Why the EU Internal Market is Not the Correct Legal Basis for Regulating Military-strategic Procurement—On Functional Division of Competences

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Why the EU Internal Market is Not the Correct Legal Basis for Regulating Military-strategic Procurement—On Functional Division of Competences

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Abstract

The EU legislature adopted the Defence Procurement Directive in 2009 based on the internal market legal basis, aiming to contribute to the development of the military capabilities required for the CSDP through procurement liberalisation. The EU's relevance as a military actor within the current division of competences, however, solely relies on national military capabilities. Member States therefore still extensively base their military procurement on the Treaty exception of art.346 TFEU and/or intergovernmental cooperation. Based on its broad legal context in the Treaties and the centre of gravity method in light of art.40 TEU, this article argues that the Directive has been adopted on the wrong legal basis and provides prospects for aligning regulation of military procurement with the EU Treaties.

Introduction

After the failed attempt to establish the European Defence Community in the 1950s, the founders of the European Economic Community sought to express their military sovereignty in the current art.346 TFEU, providing an exception to EU law for essential security interests related to the production of and trade in military equipment. While NATO became Europe's military foundation for peace and security, supranationalism remained—at the time—limited to the economic sphere.

Ever since the end of the Cold War and, seemingly, even more so in recent years, the United States' military interest in European security has been decreasing. The EU became gradually more involved in military affairs through its *intergovernmental* Common Foreign and Security Policy (CFSP), including the Common Security and Defence Policy (CSDP). At the same time, the Commission started to pursue *supranational* military ambitions through the area of the internal market. This resulted—amongst other initiatives—in the adoption of the Defence Procurement Directive ("the Directive") in 2009, aiming to strengthen the European military industries and to develop the military capabilities required for the CSDP through procurement liberalisation.[1] The recent invasion of Ukraine by the Russian Armed Forces further increases the pressure on the EU to become more of a military actor.

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[1] Directive 2009/81, Preamble 2. The Directive is part of the Commission's so-called "Defence Package", also including Directive 2009/43 on intra-community transfers of defence-related products. More recently, a budget of

The EU's relevance as a military actor within the current division of competences, however, solely relies on national military capabilities and the willingness of the Member States to participate in European projects and missions. Without its own military capabilities, the EU cannot take the ultimate responsibility for security, and thus the Lisbon Treaty emphasised that national security as well as territorial integrity are still part of the so-called "essential state functions".[2] As such, *military power* is conceptually still rooted in the ambits of state sovereignty.

A non-negligible part of a state's military power is the possession of military-industrial capabilities, whether state-owned or not. In a previous article, I argued why consequently the military procurement[3] activities of the Member States can best be understood in light of the pursuit to maintain and strengthen a Member State's military power.[4] Such military logic often contradicts the internal market logic underlying the Directive, as economic liberalisation through the principle of non-discrimination of tenderers may lead to the disappearance of military industries in some Member States. As the EU Treaties also provide a competence area which is based on military logic rather than the internal market logic, the question arises as to whether the legislature has chosen the correct legal basis for (effectively) regulating military procurement.[5]

This article will address the question by first considering the aim and origins of the Directive. Secondly, the EU legal context of military procurement will be set out, which is predominantly shaped by the understanding of the European Court of Justice ("the Court") of art.346 TFEU. Thirdly, the methodology for determining the most appropriate legal basis will be set out in light of the specific characteristics of military procurement. Fourthly, the approach of the Court to resolving legal basis disputes, particularly those between the intergovernmental legal bases of the CFSP and CSDP and the supranational legal bases of the TFEU, will be evaluated in light of art.3(6) TEU and art.40 TEU. The Directive itself will then be evaluated by considering its aim in light of its underlying logic. The analysis will conclude that the Defence Procurement Directive, as it stands, has been adopted on the wrong legal basis and will provide some prospects for aligning regulation of military procurement with the EU Treaties.

The aim of the Defence Procurement Directive to strengthen EU military capabilities through market integration

The Defence Procurement Directive was adopted in 2009 by the European Parliament and the Council on the basis of art.95 TEC (now art.114 TFEU).[6] As prescribed, it was adopted according to the ordinary legislative procedure[7] on the basis of qualified majority voting in the Council. The Directive first reiterates art.4(2) TEU by stating that "National security remains the sole responsibility of each Member State", after which it sets out its aim:

roughly eight billion euros for the European Defence Fund 2021–2027 was established by Regulation 2021/697 of the European Parliament and of the Council. The legal bases of the European Defence Fund are Industry (art.173 TFEU) and Research and Technological Development and Space (arts 182, 183 and 188 TFEU).

[2] TEU art.4(2).

[3] That is the procurement of military equipment. Within this article, military equipment is understood as equipment falling within the scope of art.346(1)(b) TFEU as defined by the Court's case law (see the third section "The Court's contextual approach to security exceptions").

[4] N. Meershoek, "The Constraints of Power Structures on EU Regulation and Integration of Military Procurement" (2021) 6 *European Papers* 831–868.

[5] This question was first raised in E. Manunza and C. Jansen, "Een interne markt voor defensieopdrachten?" (11 June 2019) *Staatscourant*.

[6] The Directive also refers to the legal bases for the freedom of establishment and services. The focus will be on art.114 TFEU because this is the legal basis as far as the Directive regulates the procurement of military goods.

[7] TEC art.251 (now art.294 TFEU).

> "The gradual establishment of a European defence equipment market is essential for strengthening the European Defence Technological and Industrial Base and developing the military capabilities required to implement the European Security and Defence Policy".[8]

In a more general sense, the aim of the Directive is to strengthen the EU's strategic autonomy within global politics by becoming less dependent on third countries for military equipment. To better understand the aim of the Directive and the choice for the internal market framework, it is helpful to consider the political process which preceded the Commission's 2007 legislative proposal.[9]

In 1996, the Commission proclaimed that European military industries were facing a crisis which could only be resolved by a European response. The end of the Cold War had made it possible for Member States to drastically cut military budgets, while market fragmentation remained an obstacle to achieving economies of scale and cross-border competition.[10] The Commission therefore considered it necessary to introduce "mechanisms based on economic efficiency, particularly in procurement policies" and expressed its preference for action based on the "existing Community instruments", which "could possibly be used in combination with the CFSP".[11] The EU's internal market-based public procurement directives (already introduced in the 1970s) are a classic example of such a "Community instrument".

More fundamentally, the Commission called for the Council to develop an "armaments policy", which is a "key factor" in defence policy. Within the context of such a policy, "Community instruments", i.e. internal market instruments, could be used to foster the competitiveness of European industries. The Commission clearly envisioned waiting before proposing internal market instruments for the adoption by the Council of a unanimously adopted common position within the framework of the CFSP.[12] The Commission noted that: "These instruments could, in particular, be adapted in the light of the security needs and of the political guidelines to be defined within the framework of the CFSP".[13] The Commission concluded by requesting the Council to give its opinion on the use of "Community instruments" in the military sector.

Even though the Council had already established a working party on European arms policy in 1995, by the end of 1997 no consensus was reached. In its 1997 strategy proposal, the Commission became more assertive and stressed that the EU internal market framework had proved its functioning for non-military products, and "can now also serve the same purpose for defence products". The Commission considered military industries to possess a dual nature, being both a "major means of production" and "essential to foreign and security policy".[14] In its draft for a common position, the Commission requested the Council to acknowledge that "European armaments policy is linked to Community policies" and to commit to adopting "binding principles, rules and mechanisms on transparency and non-discrimination in respect

[8] Directive 2009/81, Preamble 2 and 4.

[9] See also: P. Koutrakos, "The Application of EC Law to Defence Industries—Changing Interpretations of Art.296 EC" in C. Barnard and O. Odudu (eds), *The Outer Limits of European Union Law* (Oxford: Hart Publishing, 2009), pp.307–327. For an early account of the internal market as a basis for defence integration, see M. Trybus, "The EC Treaty as an Instrument of European Defence Integration: Judicial Scrutiny of Defence and Security Exceptions" (2002) 39 C.M.L. Rev. 1347–1372.

[10] Commission, "Communication from the Commission: The Challenges Facing the European Defence-related Industry, a Contribution for Action at European Level" COM(96) 10 final, p.8.

[11] Commission, "Communication from the Commission: The Challenges Facing the European Defence-related Industry, a Contribution for Action at European Level" COM(96) 10 final, pp.3–4.

[12] See also: M. Blauberger and M. Weiss, "'If You Can't Beat Me, Join Me!' How the Commission Pushed and Pulled Member States into Legislating Defence Procurement" (2013) 20 *Journal of European Public Policy* 1127.

[13] Commission, "Communication from the Commission: The Challenges Facing the European Defence-related Industry, a Contribution for Action at European Level" COM(96) 10 final, p.11.

[14] Commission, "Communication Implementing European Union Strategy on Defence-related Industries" COM(97) 583 final, p.5.

of procurement, taking current Community public procurement rules as guiding principle".[15] The Council did not adopt the common position.

The game changer came with the 1999 judgment of the Court in *Commission v Spain* where it ruled that the armaments exception of art.346 TFEU only deals with "exceptional and clearly defined cases".[16] In other words, there is a limit to exempting armaments from the application of EU law and Member States which invoke this derogation should provide evidence that derogation is justified. Even though the judgment did not concern military procurement but a—self-evidently economically motivated—tax exemption, it empowered the Commission with the threat of "politically uncontrolled integration through case law" in absence of legislation.[17] The Court clarified the meaning of art.346 TFEU for military procurement in later rulings, which will be discussed in the next section.

The Commission continued its road to legislation with its 2004 Green Paper "Defence procurement" where it observed that, regardless of the Court's jurisprudence, the derogation of art.346 TFEU is still used "quasi-systematically" and the concept of "essential interests of security" is interpreted widely in the area of public procurement.[18] To overcome the obstacles to military-industrial integration, the Commission proposed the adoption of legislation to establish a "special set of rules" for military procurement "for which use of the derogation is not justified".[19]

In September 2009, the final version of the Directive was approved by the Council, with only Portugal abstaining from the voting.[20]

The Court's contextual approach to security exceptions

Until the Court's 1999 ruling in *Commission v Spain*, it was generally assumed by the Member States that art.346 TFEU provided some sort of a categorical exception from EU law for all military procurement, as the provision reads that a Member State "may take such measures as it *considers* necessary for the protection of the essential interests of its security" (emphasis added). In its judgment, the Court clarified that for invoking art.346 TFEU, like other Treaty exceptions, it is necessary to substantiate the involved security interest.

In its long-standing line of jurisprudence, the Court has taken on a context-dependent approach to the public policy and public security derogations in the Treaties.[21] This contextual approach was put forward in *Van Duyn* where the Court established that the interests which may lead to derogation from EU law "may vary from one country to another and from one period to another".[22]

Based on this approach, the Court has, for instance, allowed Ireland in *Campus Oil* to secure its petroleum supply by protecting the viability of its state-owned oil refinery through purchasing obligations for oil importers.[23] In light of the geopolitical tensions at the time, Ireland was seeking to prevent becoming too dependent on energy supplies from the UK. The Court stressed that the mere fact that the measure also brought economic benefits for Ireland did not stand in the way of justification when these economic

[15] Commission, "Communication Implementing European Union Strategy on Defence-related Industries" COM(97) 583 final, Annex I.

[16] *Commission v Spain* (C-414/97) EU:C:1999:417 at [21].

[17] Blauberger and Weiss, "'If You Can't Beat Me, Join Me!'" (2013) 20 *Journal of European Public Policy* 1129.

[18] Commission, Green Paper: "Defence procurement" COM(2004) 608 final, p.6.

[19] Commission, Green Paper: "Defence procurement" COM(2004) 608 final, p.9.

[20] The Netherlands and Poland did express concerns about the effects of procurement liberalisation for mid-sized industries, see Council of the EU, 11806/09 ADD 1 (PV/CONS 39 ECOFIN 509), Addendum to Draft Minutes — 2954th meeting of the Council of the European Union (Economic and Financial Affairs) held in Brussels on 7 July 2009.

[21] As exceptions to the four freedoms they can currently be found in TFEU arts 36, 45, 52, 62, 65.

[22] *Van Duyn v Home Office* (41/74) EU:C:1974:133; [1975] 1 C.M.L.R. 1 at [18].

[23] *Campus Oil Ltd v Minister for Industry and Energy* (72/83) EU:C:1984:256; [1984] 3 C.M.L.R. 544.

benefits are subordinate to the security interest.[24] Later, in *Commission v Greece*, the Court rejected in a seemingly similar case the economic argument of Greece that it would excessively restrict the "fundamental right to economic freedom" if the Greek refineries were to be obliged to store petroleum which was imported, showing the (sometimes) thin line between security and economic protectionism.[25]

Besides context, the two previous examples from the Court's case law show that a good part of its decisions in these types of cases depends on the arguments put forward by the Member State and, even more so, on the absence of genuine security arguments. In *Re, Albore*, the Court, for instance, rejected Italy's authorisation scheme which prescribed that only Italian nationals could obtain an authorisation for the purchasing of immovable property located in a territory designated as of military importance. A complaint was made by the notary Albore against the Naples Registrar of Property who had refused to register the sale of properties to two German nationals, as they had not been authorised.[26] The Court addressed the public security dimension of the authorisation on its own motion because the Italian government had not invoked any security justification.[27] It considered that public security cannot be an excuse for arbitrary discrimination. To justify a restriction of free movement a "mere reference to the requirements of defence of the national territory" therefore does not suffice. It is always for the Member State to demonstrate in such cases that free movement would expose its military interests "to real, specific and serious risks which could not be countered by less restrictive procedures".[28] After all, *exceptions* are to be interpreted strictly because they are exceptions to the rule and the *effet utile* (useful effect) of EU law as a whole would otherwise be jeopardised.[29]

The more specific exception for military equipment in Article 346 TFEU

The scope of my contribution is limited to "military equipment" falling within the material scope of art.346(1)(b) TFEU. This is a more specific exception in the EU Treaties than the public policy and public security exceptions, as it is limited to essential security interests that are related to the production of and trade in military equipment. Apart from the security interest, it is more than clear from the Court's case law that Member States wishing to rely on art.346 TFEU for military procurement should first of all prove that the equipment to be procured is "intended for specifically military purposes" (subjective test) and that this intention "results from the intrinsic characteristics" of the equipment in the sense that it has been "specially designed, developed or modified significantly for those purposes" (objective test).[30] The decisions of the Court in cases where it decided that the concerned procurement was not military will therefore not be discussed.[31]

The measure at issue in the previously mentioned *Commission v Spain* was Directive 77/388, which harmonised the laws of the Member States relating to turnover taxes. This included a common system of value added tax (VAT) for domestic trade in goods and services as well as intra-community trade and imports from outside the Community, only exempting aircraft and warships from the scope of this fiscal regime. Spain had, however, adopted a law which exempted from VAT the intra-community imports of

[24] *Campus Oil* (72/83) EU:C:1984:256 at [35]–[36].

[25] *Commission of the European Communities v Greece* (C-398/98) EU:C:2001:565; [2001] 3 C.M.L.R. 62 at [21]. See also more recently the Court's rejection of Romania's electricity export restrictions: *ANRE v Hidroelectrica SA* (C-648/18) EU:C:2020:723; [2021] 1 C.M.L.R. 26 at [42]–[43].

[26] *Re, Albore* (C-423/98) EU:C:2000:401; [2002] 3 C.M.L.R. 10 at [14]–[16].

[27] *Albore* (C-423/98) EU:C:2000:401 at [19]. Instead, Italy had unsuccessfully argued that the preliminary question was inadmissible in the absence of an exercise of free movement.

[28] *Albore* (C-423/98) EU:C:2000:401 at [20]–[23].

[29] This was also established by the Court in *Van Duyn* (41/74) EU:C:1974:133 at [18].

[30] *Insinööritoimisto InsTiimi Oy (Finnish Turntables)* (C-615/10) EU:C:2012:324 at [40].

[31] Such as: *Commission v Italy (Agusta)* (C-337/05) EU:C:2008:203.

armaments, munitions and other equipment exclusively for military use.[32] Spain claimed this exemption to be necessary for ensuring "the effectiveness of the Spanish armed forces".[33] According to Spain, abolishing the exemption would have "considerable financial consequences".[34] AG Saggio rejected this argument because of its purely financial nature. As observed by Saggio, the revenue deriving from VAT would flow back into the finances of the Spanish Federal Government itself, except for only a "trifling percentage" which would go to the Community.[35] The Court agreed and thereby confirmed that the armaments exception, like all derogations from EU law involving public safety, deals with "exceptional and clearly defined cases" and does not therefore lend itself "to a wide interpretation".[36]

The Court's judgment in *Commission v Spain* eventually—as explained in the previous section—triggered the Commission to pursue supranational regulation in the area of military procurement.[37] The actual substance of the Court's judgment is, however, nothing more than a reiteration of its considerations in *Marguerite Johnston*, where it held that all security exceptions, such as those based on art.346 TFEU, "deal with exceptional and clearly defined cases".[38] Categorical exemptions are not allowed within EU law, even for military equipment. At the same time, military procurement is—to a certain degree—already quite a "clearly defined case" within the scope of the quite specific exception of art.346(1)(b) TFEU. Judicial scrutiny at the EU level is then naturally more limited.[39] The mere fact that a Member State is not allowed to categorically exempt all its military procurement from the application of EU law says very little about the extent to which it can exempt military procurement when adequately substantiated. Unlike the tax exemption in *Commission v Spain*, military procurement generally has a strong link with national security as its sole purpose is to contribute to military security.[40]

In later rulings the Court confirmed and further clarified the meaning of art.346 TFEU for military procurement. In *Finnish Turntables* the Court considered that Member States wishing to rely on art.346 TFEU in the context of military procurement should show "that it is necessary to have recourse to the derogation provided for in that provision in order to protect its essential security interests (…) and whether the need to protect those essential interests could not have been addressed within a competitive tendering procedure".[41] As AG Kokott stressed in her opinion on the case, mere reliance on national security is not sufficient for derogation.[42] Member States have a wide discretion in defining their security needs—as national security is their sole responsibility according to art.4(2) TEU—but need to prove that derogation appears necessary and is proportionate in light of the specific circumstances of each case.[43]

The idea that art.346 TFEU includes a proportionality test was explicitly confirmed by the Court in *Schiebel Aircraft* which concerned a preliminary question concerning Austrian legislation which made the trade in military goods conditional on the possession of Austrian nationality by either the natural

[32] *Commission of the European Communities v Spain* (C-414/97) EU:C:1999:417; [2001] 2 C.M.L.R. 4 at [5].
[33] *Commission v Spain* (C-414/97) EU:C:1999:417 at [17].
[34] Opinion of AG Saggio in *Commission v Spain* (C-414/97) EU:C:1999:156 at [6].
[35] Opinion of AG Saggio *Commission v Spain* (C-414/97) EU:C:1999:156 at [12].
[36] *Commission v Spain* (C-414/97) EU:C:1999:417 at [21].
[37] Blauberger and Weiss, "'If You Can't Beat Me, Join Me!'" (2013) 20 *Journal of European Public Policy* 1129.
[38] *Johnston v Chief Constable of the Royal Ulster Constabulary* (222/84) EU:C:1986:206; [1986] 3 C.M.L.R. 240 at [26].
[39] See also Trybus, "The EC Treaty as an Instrument of European Defence Integration" (2002) 39 C.M.L. Rev. 1372.
[40] For the reasoning underlying this presupposition, see again Meershoek, "The Constraints of Power Structures on EU Regulation and Integration of Military Procurement" (2021) 6 *European Papers* 831–868.
[41] *Finnish Turntables* (C-615/10) EU:C:2012:324 at [45].
[42] Opinion of AG Kokott in *Finnish Turntables* (C-615/10) EU:C:2012:26 at [61].
[43] Opinion of AG Kokott in *Finnish Turntables* (C-615/10) EU:C:2012:26 at [62]–[63].

person or the statutory representatives of an undertaking engaging in such activity.[44] As this was a preliminary ruling case, the Court did not scrutinise the applicability of the armaments exception. It did, however, indicate that even if the Austrian government could show that safeguarding the trustworthiness of arms traders can be considered to be an essential security interest, "the nationality condition would still, in accordance with the principle of proportionality, not have to go beyond what is appropriate and necessary for achieving those objectives".[45]

From the Court's jurisprudence it is clear that, in principle, military equipment falls within the scope of the internal market rules, such as those on public procurement. Derogation based on art.346 TFEU is the exception to the rule. This is a natural result of the *effet utile* of EU law, which would be severely disturbed if Member States were allowed to use exceptions categorically. Military procurement has a strong connection to the sovereign right of Member States to possess military power. This does not, however, indicate that they can derogate from EU law based on art.346 TFEU by merely referring to this sovereign right. It could consequently be argued that the EU thus has competence to regulate military procurement based on art.114 TFEU as long as Member States can still invoke art.346 TFEU when justified, as the EU legislature did with the Defence Procurement Directive.[46]

Such an argument, however, disregards the greater constitutional question underlying the choice of legal basis within EU law. According to the Court, the choice of legal basis should be based on "objective factors which are amenable to judicial review"[47] which particularly include the "aim and content of the measure".[48] In addition, the EU Treaties explicitly proclaim in art.3(6) TEU that the EU "shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties", i.e. the function of the measure must correspond with the function of the competence on which the measure is based. The mere fact that military equipment *can* be regulated based on art.114 TFEU does not indicate that it *should* be. The question as to whether it should be regulated on that basis depends on the aim and thus the function of the regulation as much (or even more; as I will argue) as on its content.

Military power and a functional division of competences

Both the Directive and the Court's case law did not bring any systemic changes to the domestic preference in the military procurement activities of the Member States.[49] In a way military procurement remained in between national sovereignty, intergovernmental cooperation and the internal market because of the

[44] *Schiebel Aircraft* (C-474/12) EU:C:2014:2139 at [4]–[7]. Trybus had already argued in 2002 that art.346 TFEU included a proportionality test. According to him, the test for the armaments exception would be characterised by a much lower degree of intensity than the regular derogations. See Trybus, "The EC Treaty as an Instrument of European Defence Integration" (2002) 39 C.M.L. Rev. 1347–1372. See more recently: M. Trybus, *Buying Defence and Security in Europe* (Cambridge: Cambridge University Press, 2014), p.111.

[45] *Schiebel Aircraft* (C-474/12) EU:C:2014:2139 at [37].

[46] For this line of thought, see Trybus, *Buying Defence and Security in Europe* (Cambridge: Cambridge University Press, 2014), pp.61–83.

[47] *Commission of the European Communities v Council of the European Communities* (45/86) EU:C:1987:163; [1988] 2 C.M.L.R. 131 at [11].

[48] *Commission of the European Communities v Council of the European Communities (Titanium Dioxide)* (C-300/89) EU:C:1991:244; [1993] 3 C.M.L.R. 359 at [10].

[49] According to the 2020 Implementation Assessment, within the time period 2016–2020 only 11.71% of the value of all military procurement was awarded based on the procedures of the Directive, thus including application of the principle of non-discrimination. Even from the contracts awarded based on the Directive, 82% was still awarded domestically. See European Parliament, *EU Defence Package: Defence Procurement and Intra-Community Transfers Directives European (October 2020) Implementation Assessment, European Parliamentary Research Service*, pp.86–98.

continuing relevance of art.346 TFEU.[50] This is a natural outcome of the Directive's lack of functionalism.[51] At their best, international norms, such as those derived from the EU Treaties, are both a reflection of political (preferably democratic) realities as well as a constraining force upon them. Law and international politics stand in a "dual functional relationship", as law is the "function of the civilisation in which it originates", while at the same time a "social mechanism" seeking to achieve certain objectives.[52] When assuming this mutually reinforcing relationship between law and politics, one can predict the "potential effectiveness" of regulation based on the extent to which the regulation reflects political reality.[53] The Court's contextual approach to legal disputes relating to security exceptions, as described in the previous section, confirms the relevance of interpreting the law within its context. For EU law such functionalism also requires legal interpretation of specific provisions—such as art.346 TFEU—to be based on a systemic understanding in light of the EU's overall purpose as described in art.3(1) TEU and its constitutional limits as described in art.4 TEU.[54]

Both economic integration within the internal market and the EU's defence policy within the CFSP should contribute to the EU's overall aim of promoting peace, the well-being of its citizens and its values. Within the internal market this is achieved through economic interdependence based on *issue linkage* and comparative advantage economics.[55] The EU's defence policy, in contrast, is based on the sum of national military power, exemplified by art.42(1) TEU which stresses that the performance of the civilian and military tasks of the CSDP "shall be undertaken using capabilities provided by the Member States". Unlike in the internal market, where *economic interdependence* is institutionalised by reciprocal market access for different sectors of the economy, military interdependence is based on collective self-defence[56] requiring states to contribute with their own military capabilities.[57] Military procurement primarily contributes to a

[50] Both the Commission and the Member States somehow appear to be comfortable with this situation. The five infringement procedures which the Commission opened in 2018, which all related to alleged incorrect application of the Directive, were all closed after negotiations, see European Commission, press release, *Defence procurement: Commission opens infringement procedures against 5 Member States* (25 January 2018), *https://ec.europa.eu /commission/presscorner/detail/en/IP_18_357*.

[51] For a more elaborate analysis of the Directive's lack of functionalism, see Meershoek, "The Constraints of Power Structures on EU Regulation and Integration of Military Procurement" (2021) 6 *European Papers* 831–868.

[52] H. Morgenthau, "Positivism, Functionalism and International Law" (1940) 34 *American Journal of International Law* 274. In this context, "social forces" can refer to all non-legal forces, e.g. political, economic as well as military forces.

[53] A. Slaughter, "International Law and International Relations Theory: a Dual Agenda" (1993) 87 *American Journal of International Law* 205.

[54] Maduro refers to this as meta-teleological understanding of legal norms as part of the overall EU legal order, see M. Maduro, "Interpreting European law: judicial adjudication in a context of constitutional pluralism" (2007) 1 *European Journal of Legal Studies* 140. For such an approach in the military context of EU law, see also: E. Manunza, N. Meershoek and L. Senden, "The Ecosystem for the Military Logistics Capabilities of the Adaptive Armed Forces: In the light of the NATO Treaty, the EU Treaties and national public procurement and competition law" (Utrecht University Centre for Public Procurement & RENFORCE, 2020), Part II (originally drafted in Dutch).

[55] On issue linkage, see Meershoek, "The Constraints of Power Structures on EU Regulation and Integration of Military Procurement" (2021) 6 *European Papers* 831–868, 853, referring to E. Haas, "Why Collaborate? Issue-linkage and International Regimes" (1980) 32 *World Politics* 357–405. On comparative advantage as a theoretical basis for economic integration through EU law, see for instance C. Barnard, *The Substantive Law of the EU: The Four Freedoms*, 6th edn (Oxford: Oxford University Press, 2019), pp.4–6. Free market theorist Adam Smith already considered protectionism feasible in all industries that contributed to a state's military power, see A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Oxford: Oxford University Press, 1976), 1st edn published in 1776, Book IV.

[56] TEU art.47(7).

[57] Eisenhut, on the contrary, has argued that based on emerging "common perception of today's threats", "enhanced cooperation" and a "common interest in an increasingly efficient defence procurement" the "essential security interests" of the art.346 TFEU exception should "be perceived as being consistent throughout the European Union", see Eisenhut, "The Special Security Exemption of Art.296 EC: Time for a New Notion of 'Essential Security Interests'?" (2008)

state's military power (i.e. its capabilities) by acquiring military equipment which is technologically superior and more effective than the equipment of (potential) adversaries. In addition, states seek to minimise dependency on foreign entities and preserve domestic industries through buy-national policies,[58] and to strengthen bilateral and multilateral alliances by strategically choosing their suppliers.[59] As an instrument of economic integration, the Directive, however, requires contracting authorities to organise their procurement procedures based on the *economic* logic of the internal market instead of the described military logic.[60]

Within this theoretical setting and the legal context of art.346 TFEU as previously discussed, the next section will explore the Court's approach to solving legal basis conflicts.

Beyond legislative discretion: how to solve legal basis conflicts between the supranational and intergovernmental Union

EU law comprises "an independent source of law".[61] Nonetheless, few would contest that the Member States ultimately are the masters of the Treaties (and thus of EU law), not least because they have effectively retained the sovereign right to withdraw in art.50 TEU.[62] This shared national ownership is arguably best reflected by the principle of conferral, i.e. that the EU can only lawfully act "within the limits of the competences conferred upon it by the Member States".[63] As a natural result of this principle, adopting measures under the wrong legal basis results in illegality. The EU's obligation to adopt legal acts based on the correct legal basis is therefore, according to the Court, of "constitutional significance".[64] Institutional consequences can be severe as well. For the Defence Procurement Directive, the choice of the internal market legal basis empowered the Commission with the role of co-legislator and law-enforcer, while choosing the CSDP as its institutional framework would have reserved most competences to the Council. According to the Court, the choice should therefore not be based on institutional preferences but instead on "objective factors which are amenable to judicial review".[65]

The Court's centre of gravity method

The objective factors which should underlie the choice of legal basis include in particular the "aim and content of the measure".[66] To objectively determine which legal basis suits a measure best, one should

38 E.L. Rev. 577–585. This perspective is also visible in the Interpretative Communication of the Commission, "Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement" COM(2006) 779 final, p.7.

[58] In fact, to minimise dependency on foreign *governments* as military exports are subject to export control.

[59] The second rationale is self-evident when considering, for instance, the recent (September 2021) annulment by Australia of a 60 billion euros submarines contract which it had awarded to the French Naval Group in order to ensure alliance with the United States and the United Kingdom within the so-called AUKUS alliance. For the alliance rationale, see E. Kapstein, "International Collaboration in Armaments Production: a Second-best Solution" (1991–92) 106 *Political Science Quarterly* 657–675.

[60] Economics should not, however, be completely neglected, as the military power objectives can only be pursued with the available budgetary means.

[61] *Costa v Ente Nazionale per l'Energia Elettrica (ENEL)* (6/64) EU:C:1964:66; [1964] C.M.L.R. 425 at [594].

[62] The Court recognised art.50 TEU to be an expression of a "sovereign choice"', see *Wightman v Secretary of State for Exiting the European Union* (C-621/18) EU:C:2018:999; [2019] 1 C.M.L.R. 29 at [50].

[63] TEU art.5(2).

[64] *Cartagena Protocol on Safety Opinion* (C-2/00) EU:C:2001:664; [2002] 1 C.M.L.R. 28 at [5].

[65] *Commission v Council* (45/86) EU:C:1987:163 at [11].

[66] *Titanium Dioxide* (C-300/89) EU:C:1991:244 at [10].

first identify the different potential legal bases in the EU Treaties.[67] For this purpose, it is crucial to realise that different legal bases bear different types of EU competence. A useful example can be found in the area of public health. Unlike the legal basis for measures which have as their object the establishment of the internal market, the legal basis for public health in the EU Treaties excludes harmonisation of laws,[68] just as the legal basis for the CFSP excludes the adoption of "legislative acts" and jurisdiction of the Court.[69]

After identifying the potential legal bases in the EU Treaties, one should ascertain the "centre of gravity" of the specific measure based on its aim and content. Van Ooik observes that the investigation of the aim and content of the measure should then lead to a conclusion on its "essence".[70] This "essence" should be seen as the ultimate function of the measure when considering its content in light of its aim. This approach is consistent with the case law of the Court. In its judgment concerning a development cooperation agreement with India, the Court ruled that the fact that the agreement "contains clauses concerning various specific matters cannot alter the characterization of the agreement". This characterisation should thus not be based on "individual clauses", but on its "essential object".[71] In *Linguistic Diversity* the Court established that the culture component in the Council Decision on the promotion of linguistic diversity in the information society was only "incidental or secondary" to the industrial component of the decision. The Decision was therefore lawfully based on the legal basis for industry, as culture was not an "essential component" of the Decision, but subordinate to the industrial component.[72]

According to AG Fennelly in *Tobacco Advertising I*, the centre of gravity method is irrelevant when examining a measure which, because of its content, could not have been adopted on the alternative legal basis.[73] In this particular case, the internal market-based Advertising Directive[74] could not have been adopted on the legal basis for public health as its *content* consisted of harmonisation of laws. Fennelly's assertion, however, cannot be upheld, as it neglects the more fundamental question as to whether the achievement of the *aim* would have been impossible with an alternative measure under an alternative legal basis. A rational legislative process will always start with a certain "need", based on which the "aim" will be ascertained, as the "content" to be chosen is subordinate to the "aim". The Treaty of Lisbon confirmed this by establishing in art.3(6) TEU that "the Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties".

With the Maastricht Treaty, the Treaty drafters had already sought to protect the Community pillar from intrusion by CFSP policies by including the first paragraph of the current art.40 TEU, proclaiming that the CFSP

[67] See R. van Ooik, *De keuze der rechtsgrondslag voor besluiten van de Europese Unie* (Deventer: Kluwer, 1999), p.59. Van Ooik calls this the "objective legal basis method". Specific reference by the Court to "centre of gravity" had already been made in 1978 in a dispute concerning the European Atomic Energy Community, see *Draft Convention on the Physical Protection of Nuclear Materials, Facilities and Transport Opinion* (1/78) EU:C:1978:202; [1979] 1 C.M.L.R. 131 at [31]. The concept was picked up again by AG Tesauro and the Court in *Titanium Dioxide* (C-300/89) EU:C:1991:244.

[68] TFEU art.168(5).

[69] TEU art.24(1).

[70] Van Ooik, *De keuze der rechtsgrondslag voor besluiten van de Europese Unie* (1999), p.83.

[71] *Portugal v Council of the European Union* (C-268/94) EU:C:1996:461 at [39].

[72] *European Parliament v Council of the European Union (Linguistic Diversity)* (C-42/97) EU:C:1999:81; [2000] 2 C.M.L.R. 73 at [40]–[43].

[73] Opinion of AG Fennelly in *Germany v European Parliament (Tobacco Advertising I)* (C-376/98) EU:C:2000:324 at [67]–[69].

[74] Directive 98/43. This Directive was annulled by the Court's judgment.

> "shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union"[75]

By removing the pillar structure, the Lisbon Treaty made[76] all of the EU's policies subordinate to their common purpose as established in art.3 TEU, i.e. to promote peace, its values and the well-being of its citizens.[77] The Lisbon Treaty therefore also reformed art.40 TEU by appending that *similarly* the implementation of TFEU policies

> "shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter".

These developments reaffirm the duty of the EU institutions to determine the legal basis of measures based on objective factors instead of institutional bias, especially when a choice needs to be made between intergovernmental (former second and third pillar) and supranational (former first pillar) bases.[78] The choice for the "Community" method cannot be made simply for the Commission's practical convenience of its supranational competence. The *raison d'être* of intergovernmental policy areas, such as the CSDP, is the need for institutional frameworks to facilitate the alignment of the exercise of national sovereign rights, without substantively limiting these sovereign rights. Choosing the most appropriate legal basis for measures which affect both the internal market and the CSDP is therefore of even greater "constitutional significance" than choosing among the supranational legal bases. The Court's centre of gravity method provides a suitable tool to make this choice.

The Court had already indicated the applicability of the centre of gravity method in legal basis disputes concerning competing CFSP and TFEU competences in its pre-Lisbon jurisprudence.

Protecting the intergovernmental competences from TFEU intrusion: "economic implications" do not always justify supranational regulation

After the 11 September terrorist attacks of 2001, the US had implemented a strict regime which required air carriers to transfer personal data of passengers to the Bureau of Customs and Border Protection (CBP). In *Passenger Name Records (PNR)*,[79] the Court addressed the legality of a Commission Decision[80] and a Council Decision[81] which both confirmed the "adequate level of protection" within the US with regard to data protection and the processing and transfer of PNR data by air carriers. These decisions were based

[75] Formerly art.47 EU Treaty.

[76] Although the former pillars are still based on different types of EU competence and decision-making procedures, they can no longer be considered in isolation, see for instance: R. Wessel, "The Dynamics of the European Union Legal Order: an Increasingly Coherent Framework of Action and Interpretation" (2009) 5 *European Constitutional Law Review* 117–142 and D. Thym, "The Intergovernmental Constitution of the EU's Foreign, Security and Defence Executive" (2011) 7 *European Constitutional Law Review* 453–480.

[77] For this approach, see also: Manunza, Meershoek and Senden, "The Ecosystem for the Military Logistics Capabilities of the Adaptive Armed Forces" (2020).

[78] See Van Ooik, *De keuze der rechtsgrondslag voor besluiten van de Europese Unie* (1999), p.377. For application of the centre of gravity method to the issue of public procurement (first pillar-internal market) and the fight against corruption (third pillar-criminal matters), see E. Manunza, *EG-aanbestedingsrechtelijke problemen bij privatiseringen en bij de bestrijding van corruptive en georganiseerde misdaad* (Deventer: Kluwer, 2001), pp.263–277.

[79] *European Parliament v Council of the European Union (PNR)* (C-317/04 and C-318/04) EU:C:2006:346; [2006] 3 C.M.L.R. 9.

[80] Decision 2004/535.

[81] Decision 2004/496.

on the Data Protection Directive,[82] which fell within the internal market competence of art.95 EC (now art.114 TFEU). The Commission Decision itself acknowledged that the CBP would use the PNR data "strictly for purposes of preventing and combating" different sorts of crimes.[83] The scope of the Data Protection Directive, however, was limited by art.3(2) which indicated that it did not apply to activities which fall "outside the scope of Community law" (former second and third pillar) and to "processing operations concerning public security, defence, State security […] and the activities of the State in areas of criminal law".[84] The European Parliament therefore brought an action for annulment of the Decisions to the Court, where it contended that the Commission's Decision was in breach of the scope of the Data Protection Directive and that art.100(a) EC Treaty did not constitute an appropriate legal basis for the Council's Decision.[85]

According to the Commission, the processing and transferring of PNR data by airline carriers merely involved the economic activity of private parties which process this data only to comply with EU law.[86] In addition, the Council contended that art.95 EC was an appropriate legal basis, as its Decision was intended to eliminate any distortion of competition between air carriers which could result from the US' legal regime. The level playing field would be distorted if only some Member States would grant US authorities access to PNR data.[87] The Commission Decision was, however, merely concerned with transfers of PNR data to the CBP which would process this data strictly for purposes relating to public security and criminal law. The fact that the air carriers initially collected this data for the fulfilment of economic activity did not change the Decision only being concerned with data processing for public security and law-enforcement purposes. So, the collection of PNR data must be distinguished from the transfer, as the latter lacks an economic purpose.[88] Consequently, the Court annulled the Commission Decision and concluded that art.95 EC did not constitute an appropriate legal basis for the agreement with the US, as both related to the data processing which was excluded from the scope of the Data Protection Directive.[89]

The Court's judgment was slightly nuanced by its 2009 judgment on the Data Retention Directive.[90] In this case it was Ireland that brought an action for annulment of this Directive on the ground that the Directive should not have been based on art.95 EC, as its centre of gravity concerned criminal law enforcement rather than the functioning of the internal market.[91] The Court rejected this argument, as "obligations relating to data retention have significant economic implications for service providers in so far as they may involve substantial investment and operating costs", and consequently "differences between the various national rules on the retention of data relating to electronic communications were liable to have a direct impact on the functioning of the internal market".[92] As put forward by Ireland, the *PNR* judgment exposed the fact that the mere circumstance that something has "significant economic implications" does not always suffice to justify recourse to art.114 TFEU. The internal market competence should not intrude into criminal law enforcement, just as it should not encroach upon foreign policy, security or defence. The provisions of the Data Retention Directive, however, were unlike the PNR

[82] Directive 95/46. The EU's data protection regime has evolved into a Regulation. The current applicable legislation can be found in Regulation 2016/679 (General Data Protection Regulation).

[83] Decision 2004/535, Recital 15. Referring to: "terrorism and related crimes; other serious crimes, including organised crime, that are transnational in nature; and flight from warrants or custody for those crimes".

[84] Directive 95/46 art.3(2). The (current) scope of application of the GDPR is similar (art.2(2) Regulation 2016/679).

[85] *PNR* (C-317/04 and C-318/04) EU:C:2006:346 at [51] and [63].

[86] *PNR* (C-317/04 and C-318/04) at [53].

[87] *PNR* (C-317/04 and C-318/04) at [64].

[88] *PNR* (C-317/04 and C-318/04) at [55]–[57].

[89] *PNR* (C-317/04 and C-318/04) at [67]–[70]. The issue is now regulated under the legal bases for judicial cooperation in criminal matters (art.82 TFEU) and police cooperation (art.87 TFEU). See Directive 2016/681.

[90] Directive 2006/24.

[91] *Ireland v European Parliament* (C-301/06) EU:C:2009:68; [2009] 2 C.M.L.R. 37 at [28] and [58].

[92] *Ireland* (C-301/06) EU:C:2009:68 at [68]–[72].

Decisions limited to data retention by the service providers and did not govern the access to that data by public authorities, which thus remained a national competence.[93] The Court therefore dismissed the action for annulment, only for it to eventually establish the invalidity of the Directive in *Digital Rights Ireland* because of infringement of fundamental rights protection.[94]

Protecting the TFEU from CFSP intrusion: the end of the TFEU preference

In *ECOWAS*, the Court considered whether the Council had acted in violation of art.40 TEU by encroaching with a CFSP Decision upon the Community competence of development cooperation.[95] The case concerned the legality of Council Decision 2004/833/CFSP on the EU's (financial) contribution to ECOWAS (Economic Community of West African States) in the framework of the Moratorium on Small Arms and Light Weapons. The Decision was based on Joint Action 2002/589/CFSP of the Council which is a more general framework on the EU's engagement in combating the destabilising accumulation and spread of small arms and light weapons.

Normally when a measure pursues various objectives, "without one being incidental to the other", it can be based on the various relevant legal bases. Article 40 TEU, however, excludes this solution, as it requires CFSP and Community measures to remain strictly separated.[96] The Court therefore evaluated whether the contested Decision, based on its aim and content, constituted a genuine CFSP policy. With regard to its aim, the Court found that the Joint Action placed the measure from the outset "within a dual perspective", that is peace and security as well as sustainable development.[97] Although the measure was considered to form part of a "general perspective of preserving peace and strengthening international security", the development perspective could not be considered merely "incidental".[98] Similarly, the content of the measure was considered to contain two components as well. Depending on the specific aim in question, both the financial contributions and technical assistance to ECOWAS could be regarded as a CFSP or a Community measure.[99] Nonetheless, the Court decided in favour of the Community legal basis by ruling that:

> "Since art.47 EU precludes the Union from adopting, on the basis of the EU Treaty, a measure which could properly be adopted on the basis of the EC Treaty, the Union cannot have recourse to a legal basis falling within the CFSP in order to adopt provisions which also fall within a competence conferred by the EC Treaty on the Community".[100]

Consequently, the Court annulled the measure, as the contested Decision did indeed partly fall within the Community's development cooperation competence. This approach relies on the idea that the original

[93] *Ireland* (C-301/06) EU:C:2009:68 at [80]–[91].

[94] See *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources* (C-293/12 and C-594/12) EU:C:2014:238; [2014] 3 C.M.L.R. 44.

[95] Article 177 EC (now art.208 TFEU).

[96] *Commission of the European Communities v Council of the European Union (ECOWAS)* (C-91/05) EU:C:2008:288; [2008] 3 C.M.L.R. 5 at [71]–[76]. In terms of substance, this separation is, however, not that strict, as a CFSP measure may rightfully pursue TFEU objectives if these are "incidental" to the CFSP objectives. See for instance *Commission of the European Communities v Council of the European Union (EU-Kazakhstan agreement)* (C-244/17) EU:C:2018:662; [2019] 1 C.M.L.R. 38 at [43]–[74]. See also: C. Hillion and R. Wessel, "Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?" (2009) 46 C.M.L. Rev. 576.

[97] *ECOWAS* (C-91/05) EU:C:2008:288 at [85].

[98] *ECOWAS* (C-91/05) at [96].

[99] *ECOWAS* (C-91/05) at [104]–[108].

[100] *ECOWAS* (C-91/05) at [77]. This was taken over from the opinion of the Advocate General in this case, see Opinion of AG Mengozzi in *ECOWAS* (C-91/05) EU:C:2007:528 at [176].

purpose of the provision was protecting Community law from intrusion by the CFSP.[101] This approach, however, cannot be sustained for two reasons.

First and foremost, the Treaty of Lisbon, which had not yet come into force at the time of *ECOWAS*, reformed the EU's overall system. The Court largely based its TFEU preference in *ECOWAS* on the former arts 2 and 3 TEU which emphasised that second and third pillar actions should "maintain and build on the *acquis communautaire*".[102] The Lisbon Treaty, however, removed these references and placed the CFSP on an equal footing with the TFEU competences by, instead, establishing in art.3(6) TEU that the EU "shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties". More specifically, the Lisbon Treaty reformed art.40 TEU by adding that TFEU competences may not encroach on CFSP competences either.[103] Consequently, the Court's TFEU preference in *ECOWAS* lost its prevalence.

Secondly, it might often be possible to separate the CFSP dimension of a measure from the TFEU dimension. Instead of a dual legal basis, there could then be two separate measures. As proposed by Hillion and Wessel, these measures could be linked to each other "by way of a mutual reference".[104] The EU's approach to export control is a straightforward example of this. While in the case of the Defence Procurement Directive both "military" equipment and "sensitive" equipment such as dual-use goods have been included within the internal market measure, export control to third countries of military equipment is regulated by a CSDP Common Position while export control of dual-use equipment is regulated in the context of the Common Commercial Policy.[105]

The lex specialis *principle as a limit on the use of Article 114 TFEU in the Court's jurisprudence*

As first pointed out by AG Tesauro in *Titanium Dioxide*, art.114 TFEU can be considered as a "functional" competence, the scope of which is not defined *ratione materiae*, but instead by whether a measure actually contributes to the establishment of the internal market.[106] This functional nature, however, is limited by art.40 TEU, as exemplified by the *PNR* and *ECOWAS* judgments. In addition to the requirements of art.40 TEU, the Court has more generally explicated that application of the *lex specialis derogat legi generali* principle serves as an instrument to determine which legal basis is the most appropriate.[107] Building on

[101] See R. van Ooik, "Cross-pillar Litigation before the ECJ: Demarcation of Community and Union Competences" (2008) 4 *European Constitutional Law Review* 418–419.

[102] *ECOWAS* (C-91/05) EU:C:2008:288 at [59].

[103] See also: M. Maresceau and A. Dashwood (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge: Cambridge University Press, 2008), M. Cremona, "Defining Competence in EU External Relations: Lessons from the Treaty Reform Process" in Maresceau and Dashwood (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (2008), pp.44–46 and A. Dashwood, "Article 47 TEU and the Relationship between First and Second Pillar Competences" in Maresceau and Dashwood (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (2008), pp.99–103.

[104] Hillion and Wessel, "Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?" (2009) 46 C.M.L. Rev. 575, 585. See also A. Engel, *The Choice of Legal Basis for Acts of the European Union: Competence Overlaps, Institutional Preferences, and Legal Basis Litigation* (Cham: Springer, 2018), p.120.

[105] See Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment and Council Regulation 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (Recast).

[106] Opinion of AG Tesauro in *Titanium Dioxide* (C-300/89) EU:C:1991:115, p.2887.

[107] Engel, *The Choice of Legal Basis for Acts of the European Union: Competence Overlaps, Institutional Preferences, and Legal Basis Litigation* (2018), p.19. So generally this means that when for a certain matter there exists a more specific legal basis in the Treaties than art.114 TFEU, it should be adopted on that legal basis.

the centre of gravity method, the legislature should generally choose the more specific legal basis when confronted with more than one option.

In *UK v Council*, the UK contested the agricultural policy legal basis[108] of Council Directive 85/649 which prohibited the use of certain substances with a hormonal action in livestock farming. According to the UK, the Directive should also have been based on the Community's competence to harmonise the laws of the Member States for the functioning of the internal market.[109] At the time internal market harmonisation directives still required unanimity in the Council (as opposed to agricultural policy), as the Directive was adopted before the Single European Act came into force. The *lex specialis* principle was, however, explicitly mentioned in art.38(2) EEC Treaty,[110] giving "precedence to specific provisions in the agricultural field over general provisions relating to the establishment of the common market".[111] Consequently, the Court ruled that the internal market competence cannot be relied on "as a ground for restricting the field of application" of the agricultural policy competence.[112] Although the Directive was annulled because of an infringement of the Council's Rules of Procedure, the Court confirmed that the Council had lawfully adopted the Directive on the legal basis of agricultural policy alone.[113]

In a subsequent legal basis dispute between the UK and the Council, the Court confirmed the *lex specialis* principle, regardless of whether the "more specific" Treaty provision in question explicitly indicates this, as was the issue in the previous case. The case concerned the legal basis of Council Directive 93/104 on certain aspects of the organisation of working time. The Directive had been based on art.118(a) EEC Treaty which was added by the Single European Act, concerning the harmonisation of conditions relating to the health and safety of workers. According to the UK, the Directive should, however, have been based on arts 100 or 235 EEC Treaty, which were both general harmonisation competences that required unanimity within the Council.[114] The Court confirmed the relevance of the *lex specialis* principle by rejecting the UK's arguments based on the fact that art.118(a) EEC Treaty "constitutes a more specific rule than Arts. 100 and 100a". In addition, the Court observed that the *lex specialis* principle is enshrined in the "actual wording of art.100(a)(1) itself"—as it still is in art.114 TFEU—by stating that its provisions are to apply "save where otherwise provided in the Treaties".[115]

In the EU's post-Lisbon legal order, it seems appropriate to apply the *lex specialis* principle also to CFSP-TFEU legal basis disputes, as the EU Treaties have placed these dimensions on an equal footing. Although many of the TFEU legal bases seem to be of a less general nature than potentially overlapping CFSP legal bases (such as development cooperation in the *ECOWAS* judgment), this is not the case for the functional competence of art.114 TFEU.[116]

[108] EEC Treaty art.43 (currently the common agricultural policy is to be found in arts 38–44 TFEU).

[109] *United Kingdom v Council of Ministers of the European Communities* (C-68/86) EU:C:1988:85; [1988] 2 C.M.L.R. 543 at [4].

[110] Which can still be found in art.38(2) TFEU.

[111] The Court had already established this precedence based on the lex specialis principle in two cases about substantive rules, see *Pigs Marketing Board (Northern Ireland) v Redmond* (C-83/70) EU:C:1978:214; [1979] 1 C.M.L.R. 177 at [37] and *Pigs and Bacon Commission v McCarren & Co Ltd* (C-177/78) EU:C:1979:164; [1979] 3 C.M.L.R. 389 at [9].

[112] *United Kingdom v Council* (C-68/86) EU:C:1988:85 at [15]–[16].

[113] *United Kingdom v Council* (C-68/86) EU:C:1988:85 at [22].

[114] *United Kingdom v Council of the European Union* (C-84/94) EU:C:1996:431; [1996] 3 C.M.L.R. 671 at [10].

[115] *United Kingdom v Council* (C-84/94) EU:C:1996:431 at [12]. Article 100(a)(1) EEC Treaty did not yet refer to "Treaties" (plural) as the constitutional architecture was rooted in the pillar structure.

[116] This is also mentioned in Engel, *The Choice of Legal Basis for Acts of the European Union: Competence Overlaps, Institutional Preferences, and Legal Basis Litigation* (2018), p.122.

The Court's general acceptance of secondary policy objectives as decisive factors for Article 114 TFEU legislation does not extend to national security

The internal market is a possible means to an end rather than an end in itself. In many cases, harmonisation measures principally aim to overcome a problem which goes beyond the mere functioning of the market, as a functioning market is a means to an end in the first place.

In *Biotechnological Inventions*, the Court confirmed that EU internal market legislation can have a different principal aim from market-functioning. Even though the aim of the Directive at issue was promoting research and development, it was rightfully adopted on the legal basis of the internal market. According to the Court, the Directive promoted research and development by removing "the legal obstacles within the single market that are brought about by differences in national legislation and case-law", and thus harmonisation of the laws of the Member States was not considered "an incidental or subsidiary objective of the Directive but its essential purpose".[117] This may sometimes mean that a measure should be based on the internal market instead of on one of the other public interest competences. The Court concluded this to be the case in *Titanium Dioxide* for a Directive which, by establishing "harmonized levels for the treatment of different kinds of waste from the titanium dioxide industry", pursued a twofold aim of protecting the environment and improving the functioning of the internal market.[118] The Court decided that the Directive should have been based on the internal market competence[119] instead of the environment competence.[120] The Court considered it important that the legislative procedure of the internal market legal base included stronger democratic control by the European Parliament and that the current art.114 TFEU requires a high level of environmental protection anyway.[121] The Court concluded that art.114 TFEU confers a certain degree of discretion on the EU legislature for choosing the method of harmonisation which is most appropriate for achieving the desired result, "depending on the general context and the specific circumstances of the matter to be harmonised".[122]

In *Tobacco Advertising I*, the Court observed that the Directive at issue was "to a large extent inspired by public health policy objectives", even though the EU Treaties prohibit any harmonisation in the area of public health.[123] The Court emphasised that other legal bases should not be used to circumvent the prohibition of harmonisation in the area of public health (now art.168(5) TFEU).[124] Likewise, the exclusion of legislative acts in the EU's CFSP should not be circumvented by internal market legislation. The Court continued by stating that a measure adopted on internal market legal basis should "genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market".[125] The question one must ask is whether a certain measure "in fact pursues the objectives" of its legal basis.[126] The mere circumstance that public health protection is a "decisive factor" in the choices to be made is not problematic. In *Imperial Tobacco*, the Court built on this reasoning by ruling that even when there already is a legal regime in force that removes all obstacles to trade, the legislature can still adapt this legislation

[117] *Netherlands v European Parliament (Biotechnological Inventions)* (C-377/98) EU:C:2001:523; [2001] 3 C.M.L.R. 49 at [27]–[28].
[118] *Titanium Dioxide* (C-300/89) EU:C:1991:244 at [2] and [11].
[119] EEC Treaty art.100(a) (now art.114 TFEU).
[120] EEC Treaty art.130(s) (now art.192 TFEU).
[121] *Titanium Dioxide* (C-300/89) EU:C:1991:244 at [18]–[20] and [24].
[122] *United Kingdom v European Parliament* (C-66/04) EU:C:2005:743; [2006] 3 C.M.L.R. 1 at [45] and *United Kingdom v European Parliament* (C-217/04) EU:C:2006:279; [2006] 3 C.M.L.R. 2 at [43].
[123] *Tobacco Advertising I* (C-376/98) EU:C:2000:544; [2000] 3 C.M.L.R. 1175 at [76]–[77].
[124] *Tobacco Advertising I* (C-376/98) at [78]–[79].
[125] *Tobacco Advertising I* (C-376/98) at [84].
[126] *Tobacco Advertising I* (C-376/98) at [85].

on the basis of health protection.[127] The legislature has a considerable amount of discretion to weigh political, economic and social aspects.[128] Although *in theory* the principle of conferral presents a strong constitutional limit to the legislature, *in practice* the legislature has discretion here too. In drafting art.114 TFEU legislation, the legislature just needs to identify the present or future obstacles to trade in its Preamble.[129]

The Court's legal reasoning in the tobacco cases heavily relies on the fact that a high level of public health protection has become an integral part of art.114 TFEU ever since the Amsterdam Treaty.[130] This is not the case for issues of national security and military security as art.4(2) TEU stresses that these are exclusively national responsibilities, while for military equipment art.346 TFEU provides a specific exception. Unlike the internal market exceptions (public policy, public health and public security), art.346 TFEU constitutes an exception from the EU Treaties as a whole, and is therefore of greater *constitutional significance*. Security issues, specifically those relating to military equipment, are consequently problematic to effectively include in the *content* of internal market legislation. Instead, these issues are more suitable to be excluded by safeguard clauses as art.114(10) TFEU prescribes. In the Defence Procurement Directive, the legislature did both.

The appropriateness of the Directive's economic content to achieve its military aim

The Directive's impact assessment identified the problem of the EU's defence equipment markets to be one of fragmentation; on the demand side and the supply side, as well as regulatory fragmentation with regard to exports, transfers and procurement. Along with the increasing costs of weapon systems and flat or stagnating budgets,[131] the national markets were considered too small to "generate adequate economies of scale".[132] The impact assessment concluded that if this situation persisted, it would lead to increasing difficulties for the Member States to "maintain a sound and viable European Defence Industrial and Technological Base and to develop the military capabilities necessary for implementing the European Security and Defence Policy".

The impact assessment links this fragmentation to the general use of art.346 TFEU by Member States for their military procurement, which is substantiated by the results of some surveys. Based on stakeholder consultations, it was established that the EU's public procurement rules were ill-suited for military (and security) procurement. As such procurement is directly related to the security of the Member States, it is often influenced by "political and strategic considerations". In addition, many of those procurement processes are considered more complex in technical and financial terms. The impact assessment concludes that contracting authorities need both flexibility and security safeguards to address these challenges.[133]

[127] *R. v Secretary of State for Health Ex p. British American Tobacco (Investments) Ltd (Imperial Tobacco)* (C-491/01) EU:C:2002:741; [2003] 1 C.M.L.R. 14 at [78].

[128] *Imperial Tobacco* (C-491/01) EU:C:2002:741 at [123].

[129] See also S. Weatherill, "The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: how the Court's Case Law has become a 'Drafting Guide"' (2011) 12 *German Law Journal* 848.

[130] For a similar judgment in the area of consumer protection, see *Vodafone Ltd* (C-58/08) EU:C:2010:321 at [32]–[36].

[131] The budget cutting has drastically changed in recent times, already since Russia's 2014 invasion of Ukraine. See *https://sipri.org/databases/milex* (Military Expenditure Database). See recently SIPRI, press release, *Business as usual? Arms sales of SIPRI Top 100 arms companies continue to grow amid pandemic* (6 December 2021).

[132] Commission, staff working document—Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of certain public works contracts, public supply contracts and public service contracts in the fields of defence and security—Impact Assessment COM(2007) 766 final at [4.1], *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52007SC1598&qid=1650976512388*.

[133] Commission, staff working document, Impact Assessment at [3.3].

The achievement of the Directive's aim to limit the use of art.346 TFEU by the Member States is, however, severely constrained by its own content. These constraints are principally found in its scope of application and the remaining relevance of art.346 TFEU for security of information and security of supply.[134]

Limited scope of application

Significant parts of military contracts are excluded from the scope of application of the Directive. This is generally the case for contracts which are awarded in the context of intergovernmental industrial projects. Article 11 stipulates, in that regard, the exclusion of contracts which are governed by "specific procedural rules" of an international agreement or international organisation. One could think here, for instance, of transatlantic collaborative projects such as the development and procurement of the F-35 fighter planes by many of the EU Member States.[135] In addition, art.13(c) excludes contracts which are "awarded in the framework of a cooperative programme based on research and development, conducted jointly by at least two Member States for the development of a new product". These intergovernmental projects are not usually organised on the basis of the free market logic of economic efficiency. Instead, these projects are characterised by "work-sharing" arrangements based on political rationales, generally excluding economic operators from non-participating states.[136] By excluding these contracts from its scope of application, the Directive will not substantively influence the strategic decisions which those intergovernmental projects involve. In this way, the achievement of the Directive's aim is already constrained by its limited scope of application.

Limited extent of security-of-information safeguards

Security of information can be ensured within the Directive's legal framework by requiring different types of commitments from the tenderers with regard to safeguarding the confidentiality of classified information and their capability to do so under art.22. However, following the Court's jurisprudence on art.346(1)(a) TFEU, this is just one of the two dimensions of security of information.

In *Commission v Belgium*, the Court accepted derogation from the public procurement rules based on Belgium's argument that the necessary military certificate to be obtained by the service provider required continuous "thorough vetting".[137] The public procurement rules were not considered by the Court to be a suitable means to facilitate these security requirements. In a similar fashion, Austria argued in *Commission v Austria* that awarding the contracts for the printing of passports to a certain domestic supplier was justified by art.346(1)(a) TFEU, as it needed to be able to exercise administrative supervision over the undertaking. The Court rejected the argument, because Austria failed to prove that such administrative supervision could not be exercised over other undertakings established in Austria or that such supervision could not be effectively exercised by a "contractual mechanism subject to the rules of private law".[138] Even foreign suppliers could, according to the Court, be required to accept "security controls, visits or

[134] Some of these issues were also discussed by the author in N. Meershoek, "Nationale veiligheid als natuurlijke begrenzing van EU aanbestedingsliberalisering" (National security as a natural constraint on EU Public procurement liberalisation) (2021) *Tijdschrift Aanbestedingsrecht & Staatssteun* 24–36.

[135] See also: L. Butler, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market* (Cambridge: Cambridge University Press, 2017), pp.129–131.

[136] See for instance K. Hartley, "The Arms Industry, Procurement and Industrial Policies" in T. Sandler and K. Hartley (eds), *Handbook of Defense Economics: Volume 2—Defense in a Globalized World* (Amsterdam: Elsevier, 2007), p.1172–1173.

[137] *Commission v Belgium* (C-252/01) EU:C:2003:547 at [32]–[34].

[138] *Commission v Austria* (C-187/16) EU:C:2018:194 at [85].

inspections".[139] The Court did not, however, reject as such that supervision over security requirements is most effectively exercised over domestic undertakings.

In her opinion on the case, AG Kokott emphasised that derogations from the public procurement rules can be justified "by the fact that a Member State does not wish simply to disclose security-related information to foreign undertakings or undertakings controlled by foreign nationals".[140] It is certainly possible within the EU to impose inspections and security controls on foreign undertakings. It cannot, however, be guaranteed that these foreign undertakings will never be required to cooperate with and disclose information to the intelligence services of their countries of residence.[141] The measures at issue in *Commission v Austria* lacked consistency, as the Austrian undertaking performing the contracts was privatised without any security restrictions, for instance measures to prevent foreign ownership.[142]

Limited extent of security-of-supply safeguards

The possibilities to ensure security of supply within the Directive are limited as well. As for security of information, one must distinguish between security in terms of a supplier's commitment and ability to guarantee supply and security in *political* terms, the latter depending on the relationships and legal obligations between the contracting authority's government and the government supervising the establishment of the supplier's production capacities.

In a general sense, the Court established in *Campus Oil* that the existence of Community measures in the field of security of energy supply cannot exclude Member States from taking complementary measures based on security exceptions as, regardless of the EU frameworks, there were no guarantees that in times of crisis (war) intra-community export licences would not be suspended.[143] With regard to "goods capable of being used for strategic purposes", the Court also explicitly recognised the export sovereignty of Member States in its 1990s export control jurisprudence, as the imports, exports, and transit of these goods may affect public security.[144] Particularly in cases where "those goods are objectively suitable for military use" Member States may—regardless of EU policies—reject export licences.[145] Such a rejection does not depend on the existence of a direct security threat, but can be based on "the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations".[146] Although the EU introduced harmonisation for the national export regimes (to third countries) on dual-use goods[147] and harmonisation of the laws and regulations on the intra-community transfers of military equipment (Transfers Directive), there is still discretionary power on the decision to grant licences based on national security. In addition, the national regimes on armaments exports to third countries have not been harmonised. Instead, the national armaments

[139] *Commission v Austria* (C-187/16) EU:C:2018:194 at [86].

[140] Opinion of AG Kokott in *Commission v Austria* (C-187/16) EU:C:2017:578 at [70].

[141] The Netherlands has in that context generally excluded companies which are not established in the Netherlands and companies without any Dutch personnel who can be assigned the role of Security Officer, from obtaining a so-called *ABDO* certification, which is necessary for military contracts which include information that is classified for reasons of national security (all classified information except for the lowest grade), see Ministerie van Defensie (Defence Ministry), *ABDO Algemene Beveiligingseisen voor Defensieopdrachten* (2019) (English translation available under: General Security requirements for Defence contracts 2019), p.12 (1.4. criteria 9–11).

[142] Opinion of AG Kokott in *Commission v Austria* (C-187/16) EU:C:2017:578 at [71].

[143] *Campus Oil Ltd v Minister for Industry and Energy* (72/83) EU:C:1984:256; [1984] 3 C.M.L.R. 544 at [30].

[144] *Ministre des Finances v Richardt* (C-367/89) EU:C:1991:376; [1992] 1 C.M.L.R. 61 at [22].

[145] *Criminal proceedings against Leifer* (C-83/94) EU:C:1995:329 at [35].

[146] *Fritz Werner Industrie Ausrustungen GmbH v Germany* (C-70/94) EU:C:1995:328 at [25]–[27].

[147] Council Regulation 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items.

export regimes stayed within the CFSP's intergovernmental sphere, where the Council established some rules and guidelines in its 2008 "Common Position".[148]

Before the adoption of the Transfers Directive in 2009, armaments exports to EU Member States were—legally speaking—treated similarly to third country exports, i.e. dependent on individual export licences. The Transfers Directive seeks to harmonise the laws and regulations on the free movement of armaments within the EU to ensure the proper functioning of the internal market.[149] It aims to replace the general practice of "individual ex-ante control by general ex-post control in the Member State of origin".[150] It does not thereby eliminate the export control competence of Member States, but instead seeks to limit the use of "individual licences" to defined circumstances, whilst imposing an obligation for "general licences" under other defined circumstances. One of the circumstances requiring the issuing of general licences is when "the recipient is part of the armed forces of a Member State or a contracting authority in the field of defence, purchasing for the exclusive use by the armed forces of a Member State".[151] The Transfers Directive also provides for an option to exempt the armed forces of other EU Member States in all circumstances from the authorisation requirement.[152]

Building on the regime of the Transfers Directive, art.23(a) of the Defence Procurement Directive decides that contracting authorities may require that tenders contain proof that the tenderer is able to honour its obligations regarding export, transfer and transit of goods related to the contract. It could be argued that EU-based tenderers in possession of general licences—covering the equipment which the contracting authority procures—can effectively guarantee security of supply by fulfilling the requirement of art.23(a), regardless of their country of residence.[153] However, such a licence only entails evidence on the ability of a tenderer to guarantee security of supply at the time of the tender, but this could drastically change in crisis situations.[154] Like the provisions of the Defence Procurement Directive, the obligation to grant general licences for transfers of armaments to armed forces within the EU is subject to security derogations. According to art.7(b) Transfers Directive, the issue of an individual licence instead of a general licence could be justified because of the "essential security interests" of the issuing Member State. The scope of the Transfers Directive is limited as well by art.1, which establishes that the Directive "does not affect the discretion of Member States as regards policy on the export of defence-related products" and is subject to the security derogations of art.36 TFEU and art.346 TFEU.[155] Although the Transfers Directive simplified the rules for intra-community transfers of military equipment, restricting these transfers—whether within the EU or to third countries—has, in the end, remained a national competence.

[148] Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment.

[149] Transfers Directive 2009/43 simplifying terms and conditions of transfers of defence-related products within the Community, Recital 6.

[150] Transfers Directive 2009/43 Recital 29.

[151] Transfers Directive 2009/43 at [1].

[152] Transfers Directive 2009/43 at [2(a)].

[153] See European Commission, Directive 2009/81 on the award of contracts in the fields of defence and security—Guidance Note—Security of Supply, *https://ec.europa.eu/docsroom/documents/15409/attachments/1/translations/*.

[154] See also B. Heuninckx, "The EU Defence and Security Procurement Directive: Trick or Treat?" (2011) *Public Procurement Law Review* 24.

[155] Differentiating export policies affect the free movement of military equipment within the EU. Hungary has, for instance, during the current war in Ukraine been prohibiting the transit of weapons for the Ukrainian Armed Forces through its territory, even though it supported the Council's decision to supply weapons to Ukraine based on the European Peace Facility. The latter includes a provision which explicitly obliges the Member States to allow such transits. See Council Decision (CFSP) 2022/338 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force, art.5.

The alternative legal basis within the context of the European Defence Agency (2004)

The European Defence Agency (EDA) was created in 2004 without a specific legal basis in the EU Treaties. At the time, such a specific legal basis was already envisaged in the draft Treaty establishing a Constitution for Europe.[156] The envisaged provisions were eventually included in the Treaty of Lisbon's amendments to the TEU. As the EDA is constitutionally rooted within the CSDP, it should contribute to its implementation.[157] The general CSDP provision of art.42 TEU was supplemented in para.3 which assigns several tasks to the EDA for the purpose of improving the military capabilities of the Member States. More specifically, art.45(1) TEU sets out the constitutional tasks of the EDA which include the promotion of "harmonisation of operational needs and adoption of effective, compatible procurement methods" and the identification and implementation of "any useful measure for strengthening the industrial and technological base of the defence sector".

Following the intergovernmental nature of the CSDP, it is chiefly concerned with the "military capabilities objectives" of the Member States, as the CSDP relies on national operational capabilities.[158] The European "industrial and technological base" should be instrumental to the national capabilities. The supranational internal market legal basis of art.114 TFEU, on the other hand, is by its nature concerned with improving the European (industrial) capabilities and the competitiveness of the internal market by ensuring EU-wide competition. It is self-evident, in this context, that the choice between a CSDP legal basis and an internal market legal basis is not only of *constitutional significance*, but has far-reaching substantive implications.[159]

Conclusion

The Treaty of Lisbon reaffirmed and clarified the significance of basing EU measures on the most appropriate legal basis by establishing in art.3(6) TEU that the EU "shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties". For the achievement of these objectives, which are the promotion of "peace, its values and the well-being of its peoples" (art.3(1) TEU), the Lisbon Treaty placed the CFSP and TFEU instruments on an equal footing. Article 40 TEU should, in that regard, be understood as an expression of the centre of gravity method for disputes between CFSP and TFEU legal bases.[160]

Regarding the legal method to be applied, there are two general observations which can be distilled from the Court's jurisprudence discussed in this contribution. First, the centre of gravity method should be conducted in the light of strict demarcation as expressed in art.40 TEU and the *lex specialis* principle. Secondly, the outcome of this test should be appreciated within its constitutional setting, which is primarily determined by art.3 TEU and art.4 TEU.

[156] Council Joint Action 2004/551/CFSP on the establishment of the European Defence Agency, Preamble 6. See Draft Treaty establishing a Constitution for Europe arts I-41 and III-311.

[157] Council Decision 2015/1835 defining the statute, seat and operational rules of the European Defence Agency (Recast), Preamble 5.

[158] TEU art.42.

[159] A striking example of the substantive implications can be found in the EDA's non-binding Code of Conduct on Defence Procurement. Although the principles emphasise the fair and equal treatment of suppliers and the use of objective standards, there is no reference to the principle of non-discrimination. Security of supply and offsets are mentioned as legitimate award criteria. See EDA, *The Code of Conduct on Defence Procurement of the EU Member States Participating in the European Defence Agency* (21 November 2005). More recently, the EDA has also been assigned a coordinating role in PESCO, see Council Decision (CFSP) 2017/2315 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States, art.7.

[160] See also: R. Wessel, "Common Foreign, Security and Defence Policy" in R. Wessel and J. Larik (eds), *EU External Relations Law: Text, Cases and Materials*, 2nd edn (Cambridge: Cambridge University Press, 2020).

When applying art.40 TEU to the legal basis of the Defence Procurement Directive, the first thing that strikes one is that the Directive pursues a *military* aim through an *economic* content. Considering the centre of gravity method in light of art.3(6) TEU, it is necessary to subordinate the content to the aim. The military aim of the Directive thus makes its internal market legal basis (art.114 TFEU) problematic. This is even more so when considering that we can actually find the military aim—more or less literally—in the legal basis of the EDA (art.45 TEU), which makes the legislature's choice for the internal market legal basis contrary to the *lex specialis* principle as applied by the Court in several legal basis disputes. Considering that Member States still most often rely on art.346 TFEU to exempt their military procurement activities from EU internal market law based on military-power rationales, the matter largely falls within the national and intergovernmental sphere.

This conclusion becomes even more obvious when one appreciates the constitutional and geopolitical context of the legislation. Article 4(2) TEU emphasises national sovereignty in military affairs, proclaiming that the Union must respect the "essential state functions" of the Member States, including territorial integrity and national security. Sovereignty in its geopolitical context is intrinsically connected with the possession of *military power* (whether or not through alliance) of which the domestic presence of military industries forms a significant part. The economic logic of the Directive aimed at achieving efficiency gains is then inherently in conflict with the military logic of national security. The winners of complete procurement liberalisation would naturally be in the Member States with large military industries (in particular France and Germany). For the other Member States, an internal market approach is not suitable, as they could still seek to maintain domestic capabilities by buying domestically or prefer industrial cooperation within NATO or the CSDP. The achievement of procurement liberalisation, as pursued by the Directive, would in any case not create a level playing field by itself, as extensive differentiation in third country export policies and state involvement in defence companies would persist. The Directive's military aim thus indicates a military centre of gravity as far as the Directive aims to liberalise the markets for military equipment.

The Directive could, in that regard, still be a lawful instrument to regulate dual-use and sensitive equipment (likewise military exports are regulated within the CSDP, while dual-use exports fall within the Common Commercial Policy). A CSDP instrument could possibly also exist alongside the Directive if the Directive would acknowledge that for contracts which involve military-strategic decisions the CSDP instrument would be the primary legal framework.[161] There would then be three layers of regulation of which application depends on the suitability to protect the security interests of the Member States: first, the internal market regime which can always be applied for military procurement (and other security procurement); secondly, the CSDP framework only for contracts with military-strategic relevance[162]; and thirdly, art.346 TFEU as a last resort for contracts which are so sensitive that even the CSDP rules cannot safeguard the involved security interests.[163] In other words: the Directive should temper its ambition rather than its content. As long as the Directive remains the only general and legally binding EU framework for military procurement, its legal basis remains problematic. It leaves too much of a legal vacuum for it to be fully effective.

How the actual effectiveness of a future CSDP instrument, including general legal obligations and its possible interaction with a reformed internal market instrument, should be ensured is something to be

[161] For the idea of two separate measures for military procurement, including a mutual reference, see again Hillion and Wessel, "Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?" (2009) 46 C.M.L. Rev. 575 and 585.

[162] Member States should then prove the strategic relevance of the contract to be allowed to use the CSDP regime.

[163] As long as art.346 TFEU remains within the Treaties this third layer cannot be excluded, as art.346 TFEU provides an exception to the whole of EU law, including the CSDP.

addressed in future research.[164] The presupposition that I have defended in this article and a previous contribution[165] is that, by basing regulation on the security logic of military power, at the least its potential effectiveness to strengthen the EU's strategic autonomy will increase significantly. By adding the CSDP layer, the room for Member States to invoke art.346 TFEU would genuinely decrease. Within the internal market frameworks there is, for instance, no room for discriminatory policies, even when they contribute to national security. Consequently, Member States base their discriminatory procurement policies[166] on art.346 TFEU—rightly or not—and find themselves—at least de facto—almost unconstrained by EU law.[167] A CSDP regime could allow these discriminatory policies, but only as far as they genuinely contribute to the security of the Member States, and prohibit them when used as a disguise for economic protectionism. Such a regime could also regulate and stimulate EU intergovernmental cooperation instead of excluding it from its scope of application as is the case for the Directive. It could therewith safeguard the military function of military procurement and its contribution to the national security of the Member States on which European security is eventually based.

As long as the EU lacks a supranational defence policy, its regulation of military procurement should thus be based on the (national) military logic of this sector of industry. Within the current constitutional frameworks it should then primarily be rooted in the intergovernmental structures of the CSDP. Creating a more supranational defence policy by reforming the EU Treaties, including complete integration of military procurement, would surely bring significant efficiency gains as it would change the nature of the military logic. The question as to whether this is a good idea is, however, not one of efficiency or legal basis, but legitimacy.

[164] I will also address this in my on-going PhD project. Particularly the question of how the legally binding nature of such obligations can be uphold is something which needs to be examined (including the question whether—and to what extent—judicial review is possible).

[165] Meershoek, "The Constraints of Power Structures on EU Regulation and Integration of Military Procurement" (2021) 6 *European Papers* 831–868. In the previous article I focused in a broad sense on the potential effectiveness of an internal market regime for military procurement, whereas in this contribution I focused on the centre of gravity of the regulation in a narrower sense as being the decisive factor for determining its correct legal basis.

[166] Such as the use of military offsets.

[167] Except for the rare cases in which the Commission starts an infringement procedure.