Ensuring Military-logistic Capabilities through Discriminatory Public Procurement? Legal Routes to Overcome a Personnel Shortage

Nathan Meershoek, Elisabetta Manunza and Linda Senden*
Utrecht University Centre for Pubic Procurement (UUCePP) & Centre for Regulation and Enforcement in Europe (RENFORCE)

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Abstract

EU Member States are generally increasing their military expenditure to scale up military capabilities in response to Russia's invasion of Ukraine. In the Netherlands, the war in particular has put further pressure on the structural shortage of military personnel. In this article, the authors evaluate the set-up of a so-called "Ecosystem Logistics" by the Dutch Ministry of Defence to address this personnel shortage in the context of their logistical capabilities. In particular they evaluate as to whether derogation from EU public procurement law can be justified, given the requirement for economic operators and parts of their personnel to possess Dutch nationality. Many of the logistical services which will be carried out within the Ecosystem during peacetime lack a direct security objective and might therefore, at first sight, appear to be subject to the EU's public procurement directives. The authors demonstrate, however, that when considering the military purpose of the Ecosystem in light of the complete legal system of which the directives form part, as well as the division of competences between the EU and its Member States, derogation is possible based on arts 52 and 62 TFEU. A different method may thus lead to a different conclusion. Alternatively, the Ecosystem could be brought under the exceptional security-related situations of art.347 TFEU. In the conclusion, the authors reflect on the more general implications of these findings for EU public procurement regulation in the military context.

1. Introduction

War in Eastern Europe, changing global structures of power and evolving alliances are rapidly changing Europe's security structures. Although military cooperation within the EU is expanding ambitiously, national security remains the sole responsibility of each individual Member State according to art.4(2) TEU. Most of the Member States are now increasing their military expenditure to scale up military capabilities in response to Russia's military aggression against Ukraine. In the Netherlands, the war in Ukraine in particular has put further pressure on the existing challenge of how the army can still fulfil its

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constitutional tasks[1] of protecting its own and allied territory as well as maintaining and promoting peace within the international legal order now that it is faced with a structural shortage[2] of military personnel (discussed further below).

To effectively protect its own and allied territory, the Dutch Armed Forces need sufficient military-logistic capabilities, i.e. vehicles and (military) drivers.[3] A major part of these capabilities, however, will only be used during military security crises. The Dutch Ministry of Defence plans, in that context, to seek extensive cooperation with market parties to overcome the structural shortage of military personnel.[4] This cooperation mechanism should ensure the permanent availability of sufficient military-logistic capabilities to be capable of immediately scaling up logistical capabilities during a military crisis. The Defence Ministry thus aims to set up a collaboration system called the "Ecosystem Logistics" (hereinafter: the Ecosystem) in which public service contracts will be awarded to economic operators. There must be strict security conditions for participation, as the participants and some of their personnel need to be military deployable. Specifically, this means that the economic operators as well as some of their personnel should possess Dutch nationality.

These security conditions raise different types of public procurement law issues, such as whether—and under what conditions—it would be possible to exempt the Ecosystem from the application of EU public procurement law, based on one of the security exceptions in the EU Treaties. Within EU public procurement law, it is, after all, prohibited to discriminate on the basis of nationality. In 2020, we carried out contract research for the Dutch Ministry of Defence to answer such legal questions. The answers to these questions have a wider significance, as the problem of quickly scaling up logistics capabilities in wartime is inherent to military security in democratic countries with limited defence budgets and has become ever more pressing in light of the 2022 outbreak of war between Russia and Ukraine, as NATO and the EU[5] will require a higher availability of military(-logistic) capabilities from their Member States.

As the Ecosystem aims to include both military as well as non-military logistics services it cannot as a whole be based on art.346 TFEU, as measures falling under art.346 TFEU must not adversely affect competition in non-military markets such as the general market for logistical services. In any case, even the military service contracts falling within the Ecosystem are not necessarily "connected with the production of or trade in arms, munitions and war material", as they are concerned with the movement of troops by means of the non-military vehicles of the involved economic operators. Much of the legal literature on defence procurement focuses on the procurement of military equipment within the material scope of art.346 TFEU.[6] This article therefore specifically adds to this literature by exploring the possibilities under other grounds of exception which have a much broader scope of application, including beyond the defence sector. In its case law the Court of Justice of the European Union (hereinafter: the Court) has held that the different security-based exception grounds "deal with exceptional and clearly defined cases".[7] In

[1] Derived from art.97(2) Constitution of the Netherlands.

[2] Due to the war in Ukraine and the need to supply the Ukrainian armed forces with military equipment, a shortage of equipment seems to be arising as well. Even though the Government has announced an increase in the annual budget for the Ministry of Defence, these problems do not seem to be going away quickly. For the recently announced strategic investments, see: Netherlands Ministry of Defence, *Sterker Nederland, Veiliger Europa: Investeren in een Krachtige NAVO en EU - Defensienota* (The Hague, June 2022). See also: *https://ecosysteem-logistiek.nl/* .

[3] These vehicles only need to be in part specifically designed for military purposes, for instance when it comes to transporting weapons.

[4] The Ministry is pursuing the creation of an *Adaptieve Krijgsmacht* (adaptive armed forces); in English this is also known by the broader concept of "Total Force".

[5] For the EU's approach, see: Council of the EU—Outcome of Proceedings, *A Strategic Compass for Security and Defence - For a European Union that protects its citizens, values and interests and contributes to international peace and security*, (Brussels, 21 March 2022). See: *https://data.consilium.europa.eu/doc/document/ST-7371-2022-INIT/en/pdf*.

[6] See for instance: N. Pourbaix, "The Future Scope of Application of Article 346 TFEU" (2011) 1 P.P.L.R. 1–8; B. Heuninckx, "The EU Defence and Security Procurement Directive: trick or treat?" (2011) 1 P.P.L.R. 9–28 and B. Heuninckx, "346, the number of the beast? A blueprint for the protection of essential security interests in EU defence procurement" (2018) 2 P.P.L.R. 51–74. On the other security exceptions in the context of defence procurement, see for instance: M Trybus, "The EC Treaty as an Instrument of European Defence Integration: Judicial Scrutiny of Defence and Security Exceptions" (2002) 39(6) C.M.L. Rev. 1347–1372 and M. Trybus, *Buying Defence and Security in Europe* (Cambridge: Cambridge University Press, 2014), Ch.2.

[7] *Johnston v Chief Constable of the Royal Ulster Constabulary* (222/84) EU:C:1986:206; [1986] 3 C.M.L.R. 240 at [26].

Dutch procurement practice there still seems to be confusion about whether and when derogating from EU public procurement law is possible. Looking at the specific circumstances of the different judgments will show that Member States enjoy discretion when it concerns genuine and proportional security measures, particularly so in a military context.

In this article, we will set out the main aspects of the report's legal reasoning to further reflect on the extent to which the internal market regime, as enshrined in Directive 2009/81, is a suitable instrument for addressing the pressing challenges which European defence ministries are facing today, such as the shortages of military personnel and logistical equipment. First, we will examine whether the Ministry can deviate from the provisions of the EU Public Procurement Directives when awarding public contracts within the Ecosystem to protect public security (and public policy) based on arts 52 (establishment) and 62 (services) TFEU and, secondly, whether an exception could alternatively be based on art.347 TFEU to effectively respond to war and pressing security threats. Before considering these legal routes, this article will address the main characteristics of the Ecosystem, including some features of the research method that was used to answer these legal questions.

2. Legal context of the Dutch Logistics Ecosystem

In April 2019, the Deputy Commander of the Royal Netherlands Army announced that he was to start preliminary market consultation (hereinafter: the Survey) among about a dozen logistics companies with the aim of eventually creating the Ecosystem, in line with the plan to create "adaptive armed forces". This would lead to the establishment of a long-term strategic collaboration between the Ministry of Defence and undertakings in which personnel, assets and methods are reciprocally shared and exchanged. The primary purpose of the Ecosystem is strategic in nature, so as to provide the logistics capabilities necessary to safeguard national security in crisis situations, as is also required under allied obligations in the NATO and EU context.[8] By entering into durable collaboration with other undertakings, the Ministry of Defence seeks to put guarantees in place in terms of the speed and scalability of logistics capabilities during security crises.

2.1 Military alliance and the constitutional role of the Dutch armed forces

The geographical scope of the capabilities sought after by the Ecosystem underscores the fact that it is concerned in particular with allied obligations (NATO and EU) and not just with the Netherlands' own national territorial integrity. To guarantee security in Europe after WWII, the North Atlantic Treaty[9] had already been signed in 1949 by most of the countries of Western Europe, the US and Canada. The North Atlantic Treaty is based on the right of collective self-defence, as enshrined in Article 51 of the UN Charter. This principle simply means that "an armed attack against one or more of them in Europe or North America shall be considered an attack against them all", as laid down in art.5 of the North Atlantic Treaty. However, the North Atlantic Treaty does not only create responsive obligations, but also contains obligations of a preventive nature, as the parties to the treaty undertook to "by means of continuous and effective self-help and mutual aid, […] maintain and develop their individual and collective capacity to resist armed attack" (art.3). In short, NATO Member States must have the capabilities to *effectively* offer each other protection in military crisis situations.

A number of these obligations have also been formulated more explicitly. In 2014, for example, NATO countries agreed to link the above obligation to a budgetary commitment. They agreed that at least 2% of

[8] These obligations primarily consist of the collective self-defence clause enshrined in art.5 North Atlantic Treaty and mutual assistance clause enshrined in art.42(7) TEU.

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

each country's GNP was to be spent on defence, of which at least 20% was to be invested in equipment.[10] Only recently have many European NATO members been starting to comply with this commitment. The essence of the obligations still lies in the capability to offer each other effective protection. The effective utilisation of industrial and operational capabilities in crisis situations then requires the necessary logistics capabilities.

The logistics capabilities must therefore be sufficient to sustain the deployment of one brigade-sized task force at a distance of approximately 1,500 kilometres for a period of one year.[11] This would make the Ecosystem suitable for contributing to the protection of at least a section of the eastern border of allied (NATO and EU) territory for such a period. This strategic goal is expressed in specific terms in the "red button scenario" which the Ecosystem provides. This means that in various types of crisis situations, the Ministry of Defence must have the necessary logistics capabilities of participating undertakings at its disposal. The Ecosystem would thus primarily include public contracts for logistical services over land. For the participating economic operators this means that they need to be able to assure availability of their (non-military) vehicles and drivers.

As a starting point for this red button scenario, the Survey uses the situation in which art.5 of the North Atlantic Treaty is triggered following an armed attack on a NATO member.[12] This falls under the first—and constitutionally assigned—task of the armed forces, namely the protection of its own and allied territory (*Defence Main Task I*).[13] The Survey shows that the market (in this case the undertakings which participated in the Survey) is able to meet the Ministry's needs in terms of logistics capabilities. This goes beyond simply guaranteeing deployment of the capabilities of the participating market players. In order to be able to function militarily in crisis situations, periodic large-scale exercises and the associated training of (civilian) personnel are also required in peacetime.[14] In addition to providing logistics capability for the first main Defence task, the Ecosystem should also provide logistics capabilities for the carrying out of the other two Dutch main Defence tasks, namely the promotion of the international rule of law and stability (*Defence Main Task II*) and the provision of support to civilian authorities in law enforcement, disaster relief and humanitarian aid (national and international; *Defence Main Task III*).[15] The Ecosystem therefore fits the constitutional role of the Dutch Armed Forces, which extends beyond its own territorial integrity. As enshrined in art.97 of the Constitution, the armed forces also serve to "maintain and promote the international legal order". This requires international cooperation in the EU and NATO context.

2.2 Can restricting access to military-logistic contracts be permissible under EU public procurement law?

It is clear—in terms of free movement—that the Ecosystem would constitute an impediment to cross-border trade. By exclusively and directly awarding public contracts[16] to the economic operators participating in the system, other (foreign) economic operators are denied access to this specific part of the public procurement market in the Netherlands. In particular, the establishment and nationality requirements which

[10] NATO, *Wales Summit Declaration*, 5 September 2014, para.14. Similar commitments exist within the EU frameworks, though arguably of a less binding nature. See for instance: Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States. The commitments within PESCO strengthen, rather than weaken, the individual obligations of the Member States to maintain sufficient military-logistic capabilities.

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

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

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

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

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

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

would be imposed on economic operators for participation in the Ecosystem are restrictions to cross-border trade, as these requirements discriminate against foreign logistics companies.

The EU internal market can best be seen as a pillar of post-war European integration. Economic liberalisation was crucial for peace and prosperity, and still forms the basis for the EU as an economic power bloc in the world. Since the Treaty of Rome, the internal market freedoms have been enshrined in the EU Treaties in provisions in which they were given the form of prohibitions on trade barriers between Member States (known as "negative integration"). The Court has consistently held that establishment and nationality requirements fall within the scope of these prohibitions.[17] Positive integration measures, in the form of legislative harmonisation such as the EU public procurement directives, provide for specific *rules of the game* to be complied with in the internal market.

This is important because the internal market (law) is not an end in itself but only a *means* to achieve the EU's aim of promoting peace, values and the well-being of the peoples of Europe (see art.3(1) TEU) and, as such, is naturally subordinate to it. The TFEU, as well as such EU legislation, thus also provides for several exceptions to these freedoms to prevent the internal market legal system from having an absolute character. Clearly, there are thus also certain exceptions to the prohibition on trade barriers or restrictions to the free movement of goods, services and persons for situations where public policy and public security are at stake, such as provided for in the current arts 36, 52, 62, 65, 346 and 347 TFEU. Indeed, many competences in the field of public security (as well as public policy and public health) still remain almost entirely at Member State level. In the light of this division of competences, free cross-border trade can never be completely unrestricted, as that would preclude the effective carrying out of core tasks of the State. The grounds for derogation are generally mentioned in the different public procurement directives, acknowledging their potential relevance in that context.

The question to be considered then is what these exceptions may entail, also in relation to one another, and how they should be interpreted with a view to the consideration of the lawfulness of the Ecosystem as envisaged.

3. The first legal route: can the Ecosystem be justified by invoking TFEU protection of "public security"?

As noted before, the EU Treaties provide for possibilities to justify derogation in cases where a Member State wishes to take measures to pursue key objectives which may impede cross-border trade. This possibility is often no longer available as soon as the matter is regulated by secondary EU legislation. The decisive question is whether such secondary rules regulate the relevant matter *exhaustively*.[18] If it cannot be inferred from the *text* and *purpose* of a Directive that its intention is to regulate the matter exhaustively, Member States can still invoke the justification grounds as laid down in arts 36, 52 and 62 TFEU. With regard to the Defence Procurement Directive[19] adopted in 2009, art.2(d) provides that services such as those for which the Ecosystem will be created fall within the scope of this Directive because they serve a specific military purpose. But the Defence Directive did not regulate the matter exhaustively, as art.2 also explicitly states that the Directive applies "subject to Articles 30, 45, 46, 55 and 296 of the Treaty" (the current arts 36, 52, 62 and 346 TFEU).

This is not so much a legislative choice as a natural outcome of the division of competences between the EU and the Member States. The legal basis of the Directive in art.114(10) TFEU states that such

[17] On establishment requirements, see for instance: ECJ 4 December 1986, *Commission of the European Communities v Germany* (205/84) EU:C:1986:463; [1987] 2 C.M.L.R. 69 at [52] where the Court held that such an establishment requirement "has the result of depriving Article 59 of the Treaty of all effectiveness, a provision whose very purpose is to abolish restrictions on the freedom to provide services of persons who are not established in the State in which the service is to be provided".

[18] According to E. Manunza, 2001, second part; previously mentioned in footnote*.

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

harmonisation measures shall include "a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Union control procedure". This is no coincidence given that, according to the previously mentioned art.4(2) TEU, national security has remained the sole responsibility of the Member States. As acknowledged by the Defence Directive itself, contracts can thus be exempted from its application, based on the aforementioned justification grounds, when they:

> "necessitate such extremely demanding security of supply requirements or which are so confidential and/or important for national sovereignty that even the specific provisions of this Directive are not sufficient to safeguard Member States' essential security interests".[20]

3.1 The legal conditions for allowing 'public security' induced internal market restrictions

To exempt contracts from the application of the Directive on the basis of the public security ground contained in the previously mentioned Treaty provisions, several conditions need to be fulfilled. First of all, there must be an actual public security interest. The starting point of the Court in this respect is that grounds for exceptions to EU law must be interpreted "narrowly". In other words, there is no "general proviso" for measures taken on grounds of public security.[21] This would otherwise impede the functioning of EU law (its *effet utile*). In several of the cases which triggered the jurisprudence on this issue, Member States had in fact used the security argument as an excuse for sex discrimination.[22] Such a context is obviously very different from one in which foreign service providers are discriminated against in order to ensure guaranteed availability of military-logistic capabilities in times of crisis. The cases show that the successfulness of invoking a public security exception before the Court depends on its factual context and the persuasiveness of the arguments on which justification of exception is based.[23] In addition, the case law shows that Member States enjoy greater discretionary powers when restricting market access such as the access to public procurement procedures, as compared with restrictions of fundamental rights such as the right not to be discriminated against on the basis of sex.[24] The room for discretion then depends primarily on the degree of harmonisation, which is very limited in the military context.[25]

Justified exception on grounds of public security should then relate to specific circumstances with a specific security risk. According to established case law of the Court, however, these "specific circumstances" "may vary from one country to another and from one period to another".[26] Logically, this implies a certain margin of discretion for the national authorities in determining security requirements.[27] As the security risk intensifies, the margin of discretion will increase.[28] This margin of discretion is also in "the spirit" of the EU Treaties since Lisbon, given the confirmation in art.4(2) TEU that national security

[20] Directive 2009/81, Preamble 16. The Directive, for instance, does not create guarantees that in times of military crisis there will be no export restrictions between the Member States relating to military capabilities, see for instance: Heuninckx, "The EU Defence and Security Procurement Directive: Trick or Treat?" 24 and Heuninckx, "346, the number of the beast?" 63.

[21] *Johnston v Chief Constable of the Royal Ulster Constabulary* (222/84) EU:C:1986:206 at [26].

[22] Such as Ireland's prohibition on female police officers carrying firearms, see *Johnston v Chief Constable of the Royal Ulster Constabulary* (222/84) EU:C:1986:206 and Germany's exclusion of women from all military positions which involved firearms, see *Kreil v Germany* (C-285/98) EU:C:2000:2; [2002] 1 C.M.L.R. 36. In other cases in the military context, the Court considered sex discrimination to be justified, see: ECJ 26 October 1999, *Sirdar v Secretary of State for Defence* (C-273/97) EU:C:1999:523; [1999] 3 C.M.L.R. 559 and *Dory v Germany* (C-186/01) EU:C:2003:146; [2003] 2 C.M.L.R. 26.

[23] See also: N. Meershoek, "Why the EU Internal Market is not the Correct Legal Basis for Regulating Military-Strategic Procurement: On functional division of competences" (2022) 47(3) E.L. Rev. 356–359.

[24] This is illustrated by the fact that the protection of fundamental rights (unlike economic integration) is part of the EU's values (art.2 TEU) and that fundamental rights still apply when derogating from internal market law.

[25] See for instance: W. Sauter, "Proportionality in EU law: A Balancing Act?" in *Cambridge Yearbook of European Legal Studies* (Cambridge: Cambridge University Press, 2013), p.453.

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

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

[28] This is also the case for the different types of security exceptions, see for instance: Trybus, £The EC Treaty as an Instrument of European Defence Integration: Judicial Scrutiny of Defence and Security Exceptions" 1347–1372.

is a solely national responsibility and that the Common Security and Defence Policy (CSDP) gives the Member States room to participate, or not, in certain forms of cooperation.[29]

The concept of public security is not interpreted so narrowly as to relate only to the internal security of a Member State, but also concerns the external security of a Member State.[30] This external security is inextricably linked to international relations in a broad sense, in particular to membership or non-membership of a military alliance such as NATO. In this respect, the Court has recognised that "the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations may affect the security of a Member State".[31] Furthermore, it held in the *Leifer* judgment that:

> "(…) it is difficult to draw a hard and fast distinction between foreign-policy and security-policy considerations. Moreover […] it is becoming increasingly less possible to look at the security of a State in isolation, since it is closely linked to the security of the international community at large, and of its various components".[32]

As discussed before, the Dutch Government considers participation in NATO and the fulfilment of the obligations arising therefrom to be part of the main tasks of its military and therefore a crucial part of military foreign relations. Meeting these obligations is an important part of the Ecosystem's goal. This also means that CSDP obligations must be taken into account in the legal assessment of obligations ensuing from internal market law. EU law provisions relating to the internal market and the exceptions thereto must therefore be interpreted as much as possible in accordance with NATO and CSDP obligations. This is necessary in order to arrive at a coherent interpretation of EU law as a whole.[33] Compliance with the permanent obligations arising from the CSDP is also closely linked to the principle of Union loyalty enshrined in art.3(4) TEU.

According to the case law of the Court, the restrictive measure must be aimed at the attainment of an overriding requirement of public interest and must be proportionate to the objective pursued. More concretely, this means that the requirements of *suitability*, *necessity* and *proportionality* must be met.[34] This entails assessing whether the measure in question is suitable for protecting the interests it seeks to protect and whether it is the most appropriate means which does not impede trade more than is necessary to protect the relevant interest. In a military context, the degree of autonomy of the Member State depends on the intensity of the security risk. The Court ruled that the necessity of a measure lies in the existence of "*real, specific and serious risks* which could not be countered by less restrictive procedures" (emphasis added).[35] In addition, the objective pursued by a measure must be achieved in a coherent and systematic manner for that measure to satisfy the previously mentioned suitability criterion.[36] The market restrictions must also be as transparent as possible in order to minimise their negative impact on the internal market. This means that the restrictions must be clear and unambiguous, objectively foreseeable to economic operators and, as far as possible, publicly disclosed beforehand.[37]

[29] For instance, within Permanent Structured Cooperation Based on art.46 TEU and Council Decision (CFSP) 2017/2315 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States.

[30] *Ministre des Finances v Richardt* (C367/89) EU:C:1991:376; [1992] 1 C.M.L.R. 61 at [22].

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

[32] *Criminal Proceedings against Leifer* (C-83/94) EU:C:1995:329 at [27].

[33] L.A.J. Senden, E.R. Manunza, S. Meyer, "The Conceptual, Constitutional and Theoretical Foundations of Shared Regulation and Enforcement for a stronger Europe – COCOT Building Block Note", available at *https://www.uu.nl/sites/default/files/rebo-renforce-bb-COCOT%20Concept%20Note.pdf*. See also, S. Meyer & L.A.J. Senden, "Towards a Constitutional Responsibility Approach for Securing Good Regulation and Enforcement in the Shared European Legal Order, Working Paper as part of the Conceptual, Constitutional and Theoretical Foundations – CoCoT-RENFORCE Building Block", available at *https://www.uu.nl/en/research/utrecht-centre-for-regulation-and-enforcement-in-europe/building-blocks/foundations-of-shared-regulation-and-enforcement-for-a-stronger-europe*.

[34] The Court, however, often only really evaluates the suitability and necessity, see for instance: *European Commission v Austria* (C-28/09) EU:C:2011:854 at [125]. See also: W.T. Eijsbouts, J.H. Jans, A. Prechal, A.A.M. Schrauwen and L.A.J. Senden (eds) *Europees Recht. Algemeen Deel* (Europa Law Publishing, 2020).

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

[36] *European Commission v Austria* (C-28/09) EU:C:2011:854.

[37] Eijsbouts, Jans, Prechal, Schrauwen and Senden (eds) *Europees Recht. Algemeen Deel*, p.147.

In short, the Defence Procurement Directive does not constitute a uniform and exhaustive regime.[38] It follows from the Court's case law that Member States have retained the right to adopt measures to protect public policy and public security. In the upcoming sections, it will be shown that the example of the Ecosystem potentially fulfils the previously mentioned legal requirements of suitability, necessity and proportionality and can be exempted from the application of EU public procurement law.

3.2 Is the Ecosystem a suitable measure to safeguard national security?

Theoretically speaking, the highest degree of security of supply would be achieved with the highest degree of self-sufficiency (autarky) in operational and industrial terms.[39] This means that a State must have sufficient capabilities within its borders to protect itself against an attack from outside. In a certain sense, it is irrelevant whether the capabilities are entirely within the public sphere of the State or also partly with market parties, in view of the fact that in a crisis situation the government will have the authority to demand access to the capabilities of those market parties. This situation also suits a broader trend in which the lines between the traditional public and private spheres are fading due to the outsourcing of public tasks to entities established by private law and the active role of the State's entities in the market.[40] It is obvious that complete self-sufficiency is practically impossible for most countries. As a scenario, it is unworkable not only from a financial and practical point of view but also from the point of view of international relations. In today's globalised and nuclear world order, it is necessary for the Netherlands to be part of economic and military power blocs. From a military perspective, this means that it should contribute militarily to these alliances to maintain its influence therein.

In the case of logistics services, the main question is how to ensure that the availability of logistics capabilities meets the increased demand (immediately and continuously) in a crisis situation. Taking into account the current organisation of defence and security in the EU, there can be no doubt that in crisis situations the State must be able to requisition assets from market parties by means of emergency legislation. This possibility is also recognised by the EU Treaties in art.347 TFEU (see below). To ascertain its compatibility with EU law, the first question that needs to be addressed is whether the Ecosystem is suitable for protecting the public security interest as prescribed by the EU Treaties. The two most relevant features of the Ecosystem in that regard are, first, that it is primarily an instrument to fulfil international obligations arising from the North Atlantic Treaty and the EU's CSDP and secondly that, due to a lack of available military personnel, cooperation with market parties is needed to fulfil these obligations.

International obligations require national capabilities

In order to guarantee national security, military cooperation within NATO and the EU plays a crucial role. An important issue that still needs to be addressed here is how military obligations under the North Atlantic Treaty then relate to the EU's CSDP and also whether or when these can take precedence over EU internal market obligations.

The North Atlantic Treaty, in that regard, enjoys a privileged legal position within the EU Treaties.[41] This is because the Nart.orth Atlantic Treaty entered into force in 1949, almost ten years before the Treaty of Rome (1958) and Article 351 TFEU provides that "rights and obligations arising from agreements

[38] Neither is this the case for the other public procurement directives, see: Directive 2014/24, Preamble 41 and Directive 2014/25, Preamble 56. According to Manunza 2001, second part; previously mentioned in footnote[*].

[39] Domestic presence of military-industrial capabilities is, as such, a part of a State's military power, see: N. Meershoek, "The Constraints of Power Structures on EU Integration and Regulation of Military Procurement" (2021) (1) *European Papers* 831–868. But membership of a military alliance—including industrial cooperation—is part of a State's military power as well.

[40] On these "fading lines" in the context of the social market economy, see: E. Manunza and N. Meershoek, "Fostering the Social Market Economy Through Public Procurement? Legal Impediments for New Types of Economy Actors" (2020) 6 P.P.L.R. 353–354.

[41] Building on the research report, this was also discussed in: Meershoek, "The Constraints of Power Structures on EU Integration and Regulation of Military Procurement" (2021) (1) *European Papers* 831–868.

concluded before 1 January 1958 […] between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties". This is also emphasised in art.42(7) TEU, which explicitly states that "commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation".

Whether in terms of industrial, logistics or operational capabilities, Member States of both NATO and the EU then each have an individual responsibility—towards their own population and towards one another—to possess sufficient military capabilities. However, neither the NATO Alliance nor EU defence policy provides for integrated military capabilities. Article 3 of the North Atlantic Treaty provides that parties to the Treaty "separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack". The State of the Netherlands also has obligations to have military capabilities to contribute to EU defence policy. These ensue on the one hand from art.42 TEU and on the other hand from the specific commitments entered into by the Netherlands within the framework of permanent structured cooperation. So, States need to be prepared for crisis situations. In this context, the concept of *national capabilities* should be interpreted broadly, in that it covers all capabilities established in national territory.

In crisis situations, the State may adopt emergency legislation to demand assets from market parties (see also section below on art.347 TFEU). In the event of a *national crisis* in one Member State, mutual obligations and a degree of solidarity will normally prompt other Member States to provide assistance by making capabilities available (whatever may be needed). Possessing the capabilities to meet this obligation is an intrinsic goal of the setting-up of a well-functioning Ecosystem for logistics services. However, in the event of an *international crisis situation* such as war, the very same Member States will always first deploy their own capabilities to the best of their abilities for their own national security. The Covid-19 crisis has highlighted this notion in a different context as, even within the EU's integrated market, Member States first placed the necessary medical equipment at the disposal of their own hospitals and populations before again allowing cross-border trade in it. This vulnerability is inherent to the system of both NATO and the EU, as these organisations are primarily structured on the basis of mutual obligations; not on the basis of common capabilities to meet the security needs of their Member States.[42]

Absolute conflicts of internal market law obligations with NATO and/or CSDP obligations are not likely to occur in this context because fulfilling these obligations is an inherent part of national security based on which internal market obligations may proportionately be departed from in specific cases.

Collaboration with market parties required due to the military's reduced personnel size

Since the dissolution of the Soviet Union, the Dutch military has been considerably reduced in size. The military's personnel numbers halved between 1990 and 2010 and they have come to consist entirely of professional personnel (ever since the suspension of mandatory military service). The amount of military equipment in possession of the Dutch military has been reduced as well. For example, of the 913 tanks in 1990, only 91 were left in 2009. Nowadays, the Dutch military has only 18 tanks, which are all leased from Germany.[43] Over the same period, defence expenditure fell by 15 percent in real terms.[44] This decline continued until 2015 in the wake of the financial crisis, after which an upward trend began again.[45] The current trend of increasing and unpredictable changes in security threats requires an expansion of logistics

[42] Though the EU intends to introduce a European Rapid Deployment Capacity, see: Council of the EU *A Strategic Compass for Security and Defence* (2022).
[43] See: *https://www.defensie.nl/onderwerpen/materieel/voertuigen/leopard-2a6-gevechtstank*.
[44] Netherlands Ministry of Defence, Final Report: Future Policy Survey—A new foundation for the Netherlands Armed Forces 2010, pp.30–32.
[45] SIPRI Database Military Expenditure, *Data for all countries 1988-2019*, see: *https://www.sipri.org/databases/milex*.

capabilities as part of overall operational capabilities. At the time of writing of the report, the Ministry of Defence had approximately 8,300 vacancies to fill in a personnel force of just under 60,000 people, more than 40,000 of whom are military personnel. By far the largest numbers of vacancies are military positions.[46] To fulfil its constitutional tasks it appears to be necessary for the Dutch armed forces to partly rely on the personnel of other entities with the status of military *reservist*.

3.3 Is the Ecosystem "necessary" to safeguard national security?

The second question that needs to be addressed is whether the necessity requirement can be fulfilled in the case of the Ecosystem. First, this is shown by the fact that the maintenance of the logistics capabilities by the Ministry itself—if the shortage of personnel had not already prevented this—would not be financially feasible within the limited budgetary means. Secondly, the military nature of the logistics services for which the Ecosystem is to be created necessitates nationality requirements which are only allowed if the Ecosystem can be exempted from the application of EU internal market law.

Keeping national security affordable requires cooperation with market parties

The scale of the logistics capabilities sought by the Ministry of Defence would not be financially feasible if they were only constituted by its own permanent logistics capabilities, which would then remain largely unused in times of stability. Governments need to fulfil many requirements with limited resources. In addition to national security, public health, social security and education are also to a large extent financed with public resources. Logically, this requires maximum cost-effectiveness in order to achieve a sustainable balance in public spending and to guarantee a variety of public interests. Just as with the core State tasks in such other sectors, the Ministry of Defence tries to achieve these objectives by using its own resources as well as the resources of others as effectively as possible. In short, the Ecosystem seeks to achieve an efficient use of logistics capabilities as a whole. This provides the Ministry of Defence with guarantees for sufficient capabilities and their complete deployability in times of crisis. In times of stability, the market parties will enjoy commercial advantages, as certain capabilities of the Defence Ministry can then be made available to them.

The fact that a measure was chosen partly because of the financial interests of the State will not render the applicability of a justification for that measure problematic in any way. In the context of public health, the Court's established case law holds that the risk of "seriously undermining the financial balance of the social security system" may justify a restriction on free trade.[47] As regards EU public procurement law, the Court also held that, in the context of a system with a social objective, solidarity and cost-efficiency are relevant considerations which may, under certain circumstances, justify the direct award of public contracts.[48] The security objective, combined with increased cost-efficiency resulting from the exchange of logistics capabilities, leads to a similar justification for the non-application of EU procurement law.

Military deployability requires collaboration with 'Dutch' market parties with employees of "Dutch" nationality

Due to the importance of safeguarding national security and the ability to satisfy EU and NATO assistance obligations, combined with the fact that the armed forces simply do not have the (public) personnel and

[46] Numbers as at the time of writing the report in 2020. Although there has been an influx of personnel since then, the shortage of personnel is still significant; see: Ministerie van Defensie, *Personeelsrapportage* 2021 (18 May 2022).

[47] *Kohll v Union des Caisses de Maladie* (C-158/96) EU:C:1998:171; [1998] 2 C.M.L.R. 928 at [41].

[48] *Azienda sanitaria locale n 5 "Spezzino" v San Lorenzo Soc coop sociale* (C-113/13) EU:C:2014:2440; [2015] 2 C.M.L.R. 9 at [65]. The Court's reasoning behind allowing derogation from public procurement law also relied heavily on the fact that voluntary work was codified in the Italian constitution; somewhat like the tasks of the Dutch Defence Ministry being codified in the Dutch constitution (see again above). For a discussion of this case see again: Manunza & Meershoek, "Fostering the Social Market Economy Through Public Procurement?" (2020) 6 P.P.L.R. 354–357.

material resources to ensure this, it is essential that all economic operators participating in the Ecosystem fall under the jurisdiction of any Dutch emergency legislation in times of crisis. It is therefore necessary to make participation in the Ecosystem conditional on establishment on Netherlands territory. In the red button scenario, (part of) the personnel of the market parties participating in the Ecosystem will also have to be militarily deployable. This is because the logistics of military operations are directly linked to the operations themselves. For the Ecosystem, this means that it is necessary to make participation conditional on employing a specified number of reservists and "reservables".[49] These employees would have to have Dutch nationality in order to be able to function as military personnel in crisis situations.

The EU Treaties contain specific exceptions for "public service" and "official authority" (see arts 45(4) and 51 TFEU). The Court adopted a functional interpretation for these concepts, by only including activities which are "directly and specifically connected with the exercise of official authority".[50] Military personnel, including "reservables", fall within this category.

3.4 Is the Ecosystem proportionate as a military instrument of crisis preparedness?

It is inherent to the system of EU law that trade restrictions can be adopted in times of military crisis. This is reflected by the previously mentioned art.347 TFEU (more on this in below) and the more intergovernmental nature of the EU's defence and security policy. This EU policy area facilitates cooperation and pooling of national capabilities, but does not create actual shared capabilities to be used by a supranational body in times of crisis. Application of the public security justification and the considerations below should therefore be interpreted as far as possible in the light of both the previously mentioned feature of the system of EU law, namely that it is relies on the military capabilities of the Member States, and also of the Netherlands' obligations to contribute to EU and NATO defence policy.

The Ecosystem forms part of a coherent policy towards the "adaptive armed forces"

The Ministry of Defence has, for practical and financial reasons, embarked on a personnel policy of increasing flexibility. Following the evaluation of the Logistics and Personnel 2017/18 pilot project, the Royal Netherlands Army announced its intention to enter into a long-term strategic cooperation with the business community.[51] In the light of these developments, the Ecosystem endeavours to provide maximum achievable logistics capabilities. This means specifically that in crisis situations personnel from the participating market parties must be used.[52] In this sense, the Ecosystem is part of a broader development in which civilian capabilities are integrated into the armed forces in order to provide the Ministry of Defence with flexible capabilities that can be deployed at times when a greater need temporarily arises in a particular location. This only works if long-term strategic partnerships with market parties are entered into. As such, the Ecosystem coherently fits in a more general policy.

The relevance of NATO membership for the margin of discretion of the Member States

It follows from the case law of the Court that the geopolitical position of a Member State and the securing of that position can widen a Member State's margin of discretion. In the *Campus Oil* judgment of 1984 for instance, the Court accepted that measures taken by Ireland to benefit the security of oil supply were justified. Arguments for this included that these measures would in particular ensure Ireland's neutrality

[49] Persons willing to become reservists.

[50] *Commission of the European Communities v Spain* (C-114/97) EU:C:1998:519; [1999] 2 C.M.L.R. 701 at [35]. First discussed by the Court in *Reyners v Belgium* (2/74) EU:C:1974:68; [1974] 2 C.M.L.R. 305 at [45].

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

[52] Netherlands Ministry of Defence, Final Report: Future Policy Survey—A new foundation for the Netherlands Armed Forces 2010, pp.184–185.

and the independence necessary for that in times of crisis.[53] Obligations ensuing from NATO membership can also widen the margin of discretion in invoking an exception to EU internal market rules. In the *Commission v Belgium* judgment of 2003, the Court applied an extremely marginal proportionality test. The Belgian Government had directly awarded a public contract for aerial photography to a Belgian company. According to Belgium, the direct award was possible because the Public Procurement Directive (Directive 92/50) did not apply due to the special security measures necessary to ensure the security of installations on Belgian territory, including NATO installations. The Court held that Belgium was indeed responsible for this and that it was therefore for the Belgian authorities "to lay down the security measures necessary for the protection of such installations", referring in particular to NATO installations.[54] The Court did not examine whether it was in fact possible to guarantee security within the parameters of the Public Procurement Directive.

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

As emphasised in art.36 TFEU—but applying in full to all justifications—national measures must not constitute a "means of arbitrary discrimination or a disguised restriction on trade between Member States". Put simply, EU law never provides a basis for measures that are in essence protectionist. According to the Court, this means that the justifications cannot be interpreted in such a way as to allow measures serving "purely economic interests".[55] In the *Campus Oil* judgment, the Court added a degree of nuance to this. In the context of measures taken by Ireland for the supply of petroleum products, the Court held that such a measure, because of the "exceptional importance as an energy source in the modern economy, [is] of fundamental importance for a country's existence since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon [it]".[56] It is thus justified, in the interests of public security, to take measures to ensure a constant minimum supply of petroleum products. After all, such a measure by far transcends purely economic considerations.[57] The Court added that "the fact that the rules are of such a nature as to make it possible to achieve, in addition to the objectives covered by the concept of public security […] objectives of an economic nature" does not exclude application of the public security justification.[58]

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

[53] *Campus Oil Ltd v Minister for Industry and Energy* (72/83) EU:C:1984:256; [1984] 3 C.M.L.R. 544 at p.2738.
[54] *Commission of the European Communities v Belgium* (C-252/01) EU:C:2003:547 at [29]–[30].
[55] *Campus Oil Ltd v Minister for Industry and Energy* (72/83) EU:C:1984:256.
[56] *Campus Oil Ltd* (72/83) EU:C:1984:256 at [34].
[57] *Campus Oil Ltd* (72/83) EU:C:1984:256 at [35].
[58] *Campus Oil Ltd* (72/83) EU:C:1984:256 at [36].

Certainty regarding provision of logistics services in a crisis situation requires proportional "Do ut des"[59] relationships between the Ministry of Defence and market parties in times of peace and stability.

The Ecosystem is organised on the basis of reciprocity between the Ministry of Defence and the economic operators that will enjoy certain commercial benefits from participating in the Ecosystem. This reciprocity is mainly visible in times of peace and stability. As a crisis situation intensifies, so will the military requirements, and there will be a lesser degree of reciprocity. The Ecosystem's primary aim is after all to ensure that, in times of crisis, the Ministry of Defence can immediately call on the availability of the collaborating parties and that these parties respond without delay. To guarantee the permanent participation of market parties in the Ecosystem, there has to be an element of attractiveness for them.

To provide this attractiveness, the Ecosystem needs to ensure that the participants have the prospect of being able to provide (part of) the civilian services contracts in times of peace and stability to the Ministry, as became clear during the preliminary market consultation. In return, these economic operators will need to make continuous investments in peacetime in order to be able to quickly deliver what is required of them in times of crisis. For example, they and their personnel will also have to meet high standards in peacetime and participate in large-scale military exercises. Sustainment of all this operational capability can only be assured if these parties receive sufficient contracts from the Ministry of Defence in peacetime as well. In peacetime and under conditions of national stability, numerous contracts for civilian services will be assigned within the system without a public tender. Economic operators that do not participate in the Ecosystem are thus not eligible for an award of these contracts.

From a legal point of view, this does not need be problematic, as long as the civilian services contracts are proportional to the objective of the Ecosystem as a whole, which is ultimately aimed at safeguarding national security. The Ministry should, in that regard, examine how many public contracts have to be awarded within the Ecosystem to make participation commercially attractive for the economic operators. An indication that the Ministry could be able to adequately meet the requirement of proportionality in the organisation of the Ecosystem is the fact that it has stated that it will not accommodate all logistics services in the Ecosystem and reserves the right to put logistics services out to public tender.[60]

4. The second legal route: can the Ecosystem be brought under the exceptional security-related situations of art.347 TFEU?

The relative nature of the internal market in relation to the EU's general aims had already been made evident since the Treaty of Rome (1957) in the exception provision of the current art.347 TFEU.[61] This provision made it immediately clear that, from the EEC's establishment in 1957, in the four situations listed in the Article, Member States are permitted to take security measures which could adversely affect the functioning of the internal market. The four situations mentioned are: I) "in the event of serious internal disturbances affecting the maintenance of law and order", II) "in the event of war", III) in case of "serious international tension constituting a threat of war" or IV) "in order to carry out obligations it has accepted for the purpose of maintaining peace and international security".

This means that, in addition to the exceptions from arts 52 and 62 TFEU discussed in earlier in this article, the Dutch Government could also invoke art.347 TFEU for the purposes of the Ecosystem if it

[59] *Do ut des* is not just an expression. It derives from Roman law and indicates the will to do something for something (or for personal gain). For the Ecosystem to function there should thus be a transactional relationship between the State and the market parties. In Roman Law the "do ut des" fell under the contracts "*without a name*".

[60] *Survey Report Logistics Ecosystem*.

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

can be regarded as a response to one of these types of crisis situations. An important feature of art.347 TFEU is the obligation for Member States to consult each other to minimise the negative impact on the internal market.[62] As art.347 TFEU is a more exceptional provision compared with the public security provisions discussed above, and is only meant as a sort of last resort, justifying derogation based on the public security exceptions would be the most logical solution for the Ecosystem. Here below we will assess the Ecosystem from the angle of the last three of these situations.

4.1 Preventive response to war

The Ecosystem would specifically provide the Dutch Armed Forces with the logistics capabilities that would be necessary in the case of military aggression on the Eastern borders of the NATO and EU alliance. It could be argued, in that regard, that the Ecosystem is a preventive measure to prepare for a war that might arise in the future; and also to prevent the internal market from becoming more harshly affected by this in the future. A purely linguistic interpretation of the text of the Treaty would not support using art.347 TFEU for a preventive measure, seeing that it uses the expression 'in the event of'. A more systematic and teleological interpretation does, however, support it, as evidenced by the opinion of Advocate General Cosmas in the *Albore* judgment of 2000.[63]

According to Advocate General Cosmas, art.347 TFEU seems "to constitute the demarcation line between the normal circumstances in which national and Community institutions function and difficult situations of national danger which affect the more general relationship between the Community and Member States".[64] Cosmas acknowledges that this cannot be read literally in the provision, but that it is clear from its objective, which is "to confer on the Member States the greatest possible capability to deal with certain exceptional and truly dangerous eventualities". In fact, Cosmas does not consider it necessary for any of the situations mentioned to actually occur; it is sufficient if "the measures taken are directly and exclusively linked to those situations". According to Cosmas, preventive measures which "are directly and exclusively linked to the exceptional situations [the Article] (…) describes" can also fall under the scope of this ground for the exception provided in art.347 TFEU.

Of crucial importance is Cosmas's interpretation that otherwise the provision would be robbed of its "practical usefulness" and be rendered "entirely redundant".[65] Cosmas did add to his reasoning that such measures could be made conditional on being temporary, and this can be assessed by the Court.[66] In particular, regulatory measures of a more general nature would be inadmissible if adopted on a permanent basis. According to Cosmas, the permanence of measures often indicates that they "have not been taken exclusively for the purpose of resolving problems" falling within the scope of art.347 TFEU. However, to the extent that the Ecosystem has a permanent character, it can still be argued that it is aimed exclusively at the red button scenario. However, this requires a more extensive substantiation than is necessary for a temporary measure.

Advocate General Cosmas's opinion shows that the Ecosystem can be brought within the scope of art.347 TFEU; questions do arise, however, regarding the requirement that only measures aimed exclusively at enabling the Netherlands armed forces to respond adequately to a possible war or threat of war can be brought under this exception. This would require that, if such a situation actually occurs, the Netherlands

[62] To a certain extent art.347 TFEU therefore inherently includes a sort of proportionality requirement, as Member States need to consult each other. The question remains whether this is also open to judicial review. Koutrakos argues, in that regard, that some sort of proportionality test should be applied by asserting that it would be the role of the court to strike "the balance between, on the one hand, ensuring the effectiveness of Community law and, on the other hand, not encroaching upon the rights enjoyed by the Member States in the sphere of foreign policy and defence", although the extent of judicial review over the application of art.347 TFEU would be more "limited" than over other security exceptions; see: P. Koutrakos, "Is Article 297 EC a 'Reserve of Sovereignty"' (2000) C.M.L. Rev. 1354–1355.

[63] Opinion of Advocate General Cosmas in *Re, Albore* (C-423/98) EU:C:2000:401.

[64] Opinion of Advocate General Cosmas in *Re, Albore* (C-423/98) EU:C:2000:401 at [27].

[65] Opinion of Advocate General Cosmas in *Re, Albore* (C-423/98) EU:C:2000:401 at [31].

[66] Opinion of Advocate General Cosmas in *Re, Albore* (C-423/98) EU:C:2000:401 at [32].

would be able to apply emergency regulations to the participating undertakings in question so that maximum logistics capabilities become available. For the civilian logistics services to be included in the Ecosystem it would then have to be demonstrated that the actual amount of those services is necessary for the exclusively military purpose of the Ecosystem.

4.2 Responding to an existing serious international tension constituting a threat of war

The term "threat of war" has a very broad scope and is, to a certain extent, subjective. Its subjective character lies in the fact that it is not defined in EU law, which leaves a wide margin of discretion to the Member States.[67] There is no doubt that, since the annexation of Crimea by Russia in 2014, there has been 'international tension' threatening the territorial integrity of (Eastern) European States, much more so since Russia's 2022 full-scale invasion of Ukraine. The Ecosystem serves to provide logistics support to possible military missions for protecting Dutch allies (in both EU and NATO contexts) when necessary. It is conceivable that this international tension will spread to other geographical areas within NATO and/or EU territory. In addition, the Netherlands Government has a wide margin of discretion in determining that such a threat exists. The question remains whether this context of international tension is a concrete enough "threat of war" directed against the allied relations that the Ecosystem seeks to protect.

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

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

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

5. Conclusion

Russia's invasion of Ukraine harshly underscored the relevance of national security in terms of available military capabilities. Military-logistic capabilities form a substantial part of this, as the fulfilment of military operations—especially when outside a country's own borders—depends to a large extent on the logistical ability to move troops and equipment. Even though military spending is increasing rapidly in Europe in response to the ongoing war, personnel and/or equipment shortages are not easily overcome in the short term. Considering cooperation mechanisms such as the Dutch example of the Ecosystem, can then be beneficial for other Member States as well. This article has shown that such mechanisms, even when including discriminatory requirements for participation, are not necessarily in violation of EU public procurement law.

In the Dutch context, the Defence Ministry seeks to overcome the constraints on ensuring sufficient logistics capabilities that arise from staff shortages by engaging in strategic cooperation with economic

[67] See M. Trybus, *European Union Law and Defence Integration* (Oxford: Hart Publishing, 2005), p.187. See also: Opinion of Advocate General Cosmas in *Re, Albore* (C-423/98) EU:C:2000:401 at [29].

operators through the development of the Ecosystem. To be able to count on the capabilities of these actors militarily in times of crisis they need to be located in the Netherlands, employ Dutch personnel with the status of *reservist* and participate in military exercises in peacetime. These (discriminatory) requirements entail internal market restrictions and thus raise the question of their admissibility under EU public procurement law and the internal market freedoms as enshrined in the EU Treaties.

There are then two legal routes based on which the development of such a discriminatory cooperation mechanism can be justified with a view to ensuring public security. Justification of such a (discriminatory) mechanism based on arts 52 and 62 TFEU is then possible, as far as:

i) it constitutes a suitable mechanism to maintain military-logistic capabilities in a context of structural personnel shortage;
ii) the discriminatory requirements—relating to establishment and nationality of parts of the personnel—are necessary for its military purpose; and
iii) the value of the non-military contracts which are awarded within its framework is proportionate to the Ecosystem's military purpose.

It should be noted that, in the Dutch context, the proportionality requirements will usually be met if the general principles of Dutch law (such as the principles of good governance), that still apply after exception from EU law, are complied with.[68]

More generally, the case study shows that the internal market principles are not always suitable to regulate procurement in a military context. This is surprising when considering that the EU legislature specifically sought to adapt these principles according to the requirements of the military context by adopting the Defence Procurement Directive in 2009. Questions arise as to whether this Directive can be effective in regulating different types of defence procurement and as to whether it was adopted under the correct legal basis in the EU Treaties.[69] It will often not be possible to effectively set up mechanisms, such as the Ecosystem, which aim to enable a quick scaling up of capabilities in wartime, within the boundaries of the internal market principles. In times of war and worldwide increase in defence spending, it seems necessary to consider alternative instruments to strengthen European defence industries for meeting the pressing security challenges.[70]

[68] For an extensive analysis of these principles, see the last part of the original research report on which this article is based.

[69] These questions are addressed in: Meershoek, "The Constraints of Power Structures on EU Integration and Regulation of Military Procurement" (fn.39 above), 831–868 and Meershoek, "Why the EU Internal Market is not the Correct Legal Basis for Regulating Military-Strategic Procurement" (fn.23 above), 353–375.

[70] This appears to be the current approach of the European Commission as well, looking at its recent proposals which seek to foster joint procurement rather than procurement liberalisation; see Joint Communication: on the Defence Investment Gaps Analysis and the Way Forward JOIN (2022) 24 final (Brussels, 18 May 2022) and Proposal for a Regulation on establishing the European defence industry Reinforcement through common Procurement Act COM(2022) 349 final (Brussels, 19 July 2022). The forthcoming PhD dissertation of Nathan Meershoek, one of the authors of this article, aims to search for such alternative instruments; see: N. Meershoek, "Sovereignty and Interdependence in EU Military Procurement Regulation" (Dissertation) (Utrecht University, forthcoming 2023). This research forms part of the focus area on "National Security and Critical Infrastructure" of the Utrecht University Centre for Public Procurement (UUCePP), see: *https://www.uu.nl/en/research/centre-for-public-procurement-uucepp*.