Sovereignty and Interdependence in EU Military Procurement Regulation

Nathan Meershoek

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Nathan Anshel Meershoek

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Promotoren:

Prof. dr. E. Manunza
Prof. dr. C.M.J. Ryngaert

Beoordelingscommissie:

Prof. dr. E. Mak
Prof. dr. E.R. Muller
Prof. dr. L.A.J. Senden
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"For by art is created that great Leviathan called a Commonwealth or State which is but an artificial man; though of greater stature and strength than the natural, for whose protection and defence it was intended; and in which, the *sovereignty* is an artificial *soul*, as giving life and motion to the whole body"

Thomas Hobbes (1651)[1]

1 T. Hobbes, *Leviathan*, Oxford University Press 1996 (first published in 1651), p. 7 (The Introduction).

Table of Contents

Abbreviations

AG	Advocate General
CCP	Common Commercial Policy
CFR	Charter of Fundamental Rights of the European Union
CFSP	Common Foreign and Security Policy
CSDP	Common Security and Defence Policy
EDTIB	European Defence Technological and Industrial Base
EU	European Union
EDA	European Defence Agency
EDF	European Defence Fund
NATO	North Atlantic Treaty Organisation
NSPA	NATO Support and Procurement Agency
PESCO	Permanent Structured Cooperation
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
The Court	Court of Justice of the European Union
The Directive	Defence Procurement Directive (2009/81/EC)
SIPRI	Stockholm International Peace Research Institute
UK	United Kingdom
UN	United Nations
US	United States

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 Article 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.

Since the end of the Cold War, the United States' military interest in European security has been decreasing. The EU gradually became more involved in military affairs through its *intergovernmental* Common Foreign and Security Policy (CFSP), including the Common Security and Defence Policy (CSDP). Amidst a worldwide increase of military spending and renewed military tensions at NATO's eastern borders, European leaders have been calling for EU *strategic autonomy* in the military domain.[1] Along with the changing structures of military power in the world, dependency on arms imports from the US is often considered to be an obstacle to such autonomy. Yet, none of the Member States appear willing to substantively limit their national competences, even though the Treaty of Maastricht (1992) already established a legal basis in the EU Treaties for a Common Security and Defence Policy (CSDP). Placed within the intergovernmental legal architecture of the Common Foreign and Security Policy (CFSP), progressing towards a far-reaching EU defence policy would first require unanimity among the Member States.

Perhaps frustrated with the lacking progress on a European capabilities and armaments policy as envisioned by Article 42(3) TEU, the European Commission started to pursue *supranational* military ambitions through the area of the internal market already from the late 1990s onwards. 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 develop the military capabilities required for the CSDP.[2] The Commission primarily bases its involvement on its internal market competence; supported by the jurisprudence of the EU Court of Justice ('the Court') on the exceptional nature of the armaments

1 French President Macron in particular has been a driving force behind the call for strategic autonomy, by even more ambitiously calling for 'European sovereignty' in his 2017 *Sorbonne speech*, see: Macron, *Sorbonne Speech* 2017. For the most recent data on global military expenditure per country, see: <www.SIPRI.org>.

2 Directive 2009/81/EC, Preamble 2. The Directive is part of the Commission's so-called "Defence Package", also including Directive 2009/43/EC on intra-community transfers of defence-related products. More recently, a budget of roughly 8 billion euros for the European Defence Fund 2021-2027 was established by Regulation (EU) 2021/697. The legal bases of the European Defence Fund are Industry (Article 173 TFEU) and Research and Technological Development and Space (Articles 182, 183 and 188 TFEU).

exception in Article 346 TFEU.[3] Europeanisation of military industries based on the free market principles is deemed to foster economies of scale and the competitiveness of European military industries. This should lead to greater European self-sufficiency in producing military equipment and in doing so greater strategic autonomy for the EU as a global (military) actor. The 2022 invasion of Ukraine by the Russian Armed Forces has further increased the pressure on the EU to become more of a military actor, while the years of budget cuts and the weapons' support to Ukraine have led to equipment and personnel shortages in its Member States.

The EU's relevance as a military actor within the current division of competences thereby 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. As emphasised in the Lisbon Treaty of 2007, national security as well as territorial integrity are still part of the so-called "essential state functions" as expressed in Article 4(2) TEU. As such, *military power* and its capabilities are constitutionally speaking still rooted in the ambits of state sovereignty, while military security depends in practice on a strategic combination of national capabilities and military interdependence within alliances such as NATO and the EU. This dissertation is, in that context, a search for sovereignty and interdependence in the EU's regulation of military procurement.

In this introduction I will first put forward the research question of this dissertation by setting out its underlying problems. Secondly, I will set out and explain the theoretical framework. Based on this framework, I will then distinguish the three specific methodological angles of the three different parts. Subsequently, I will define the most important concepts, which give shape to this theoretical framework. To conclude, I will set out the structure of the dissertation and the main issue that each separate chapter addresses.

Ineffective procurement legislation and the logic of military power

Economic interdependence within what we now know as the European Union has been a tremendous source of peace and welfare following two devastating world wars. By prohibiting governments from protecting their own industries and by regulating competition, economic operators are forced to be as efficient as possible and eliminated if not competitive enough. Citizens can then reap the benefits in terms of the increased economic welfare that accompanies cross-border specialisation. The EU's regulation of public procurement is a classic example of economic integration based on this logic, as it was created in the 1970s to force national governments to procure based on the efficiency gains of cross-border trade liberalisation rather than

3 Based on the idea of the Commission engaging in "judicial politics" after the Court's judgment in Case C-414/97, *Commission* v *Spain*, ECLI:EU:C:1999:417. See: 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', *Journal of European Public Policy* 2014, pp. 1120-1138.

domestic socio-political benefits. By refraining from discriminatory procurement policies the efficiency of public expenditure is deemed to increase.

Accepting such economic logic in the military sector would potentially eliminate national industries when being outcompeted by foreign companies, because the viability of many companies fully depends on public contracts awarded by their domestic Defence Ministry.[4] In theory, the Member States could then get better value for money in their military procurement. The Directive aims to incorporate security interests within tendering procedures for military equipment without compromising on the principle of non-discrimination. In reality, however, Member States often consider discrimination based on their domestic industrial capabilities and their geopolitical interests to be the best way to ensure their security in military procurement.

The Directive therefore brought no structural changes to the domestic preference in the military procurement of the Member States. Military industries in the EU are still fragmented along national borders. According to the 2020 *Implementation Assessment* of the Directive, within the time period 2016-2018 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.[5] This can hardly be surprising when considering that military security has remained a national responsibility in the system of the EU Treaties, as generally envisioned by Article 4(2) TEU. More specifically, the special exception to EU law for military equipment of Article 346 TFEU has survived all Treaty reforms since its establishment in the 1950s with the Treaty of Rome. Given the Directive's aim of integrating Europe's military industries based on the prescribed economic logic, the legislation, at this point, is no success story.

In such a legal context, there are no political incentives to risk the diminishing of national military industries while keeping complete military responsibility. Only for those Member States with relatively superior industrial capabilities – mainly France and Germany – and for those Member States with (almost) no industrial capabilities is there a potential military gain when applying the Directive. However, the free market approach of the Directive will even for those Member States mostly be less suitable for the advancement of their military interests than intergovernmental bargaining. These differences between, on the one hand, the Directive's legal reality and its theoretical promise of increased efficiency and, on the other hand, the political reality as well as the constitutional limits to military security integration in the EU Treaties, raise questions about the potential effectiveness of the Directive. This dissertation seeks to answer these questions and provide solutions for the resulting regulatory problems.

To better understand the Directive's lacking effectiveness we must start with appreciating the function of military procurement in reality, namely to maintain and

4 This was observed for instance in: E. Manunza and C. Jansen, 'Een interne markt voor defensieopdrachten?', *Staatscourant*, 11 June 2019.

5 See: European Parliament, *EU Defence Package: Defence Procurement and Intra-Community Transfers Directives European*, Implementation Assessment, European Parliamentary Research Service, October 2020, pp. 86-98. But also for those contracts awarded pursuant the Directive between 2016-2020, 86% was still awarded to a bidder established in the country of the contracting authority (see p. 97-98).

strengthen one's military power. A significant part of the military power of states is the possession of technologically advanced equipment, which they usually procure from private parties. The highest level of security of supply for this equipment is reached when it is produced – as much as possible – within the territory of the procuring entity (the Member State) by a domestic company because export restrictions might be imposed by other states in times of military crises – when the equipment is actually needed – even within the Union. The potential effectiveness of the Directive is further compromised by the fact that this conflicting function of military procurement to provide military security is recognised by the EU Treaties as part of the 'essential state functions' of the Member States – *i.e.* their sovereign rights – in Article 4(2) TEU. Based on the armaments exception of Article 346 TFEU it can consequently lead to exception from EU law, meaning derogation from the Directive.

The core of the industrial security strategies of most Member States is therefore aimed at reaching the highest level of security of supply possible by awarding contracts to national companies or by imposing *military offsets* on foreign suppliers, both derogating from the Directive's regime. Such offset-agreements consist of obligations for suppliers to include national industry of the procuring state in their supply-chain, instead of letting the supplier choose sub-contractors freely. Offsets are generally considered to distort the functioning of the internal market by the European Commission.[6] In addition to such 'buy-national' policies, states also seek to foster cooperation with allies through their military procurement. They tend to buy military equipment from companies which are established in a state with whom they also cooperate operationally, as such cooperation requires technological interoperability of weapon systems. Understanding the effectiveness problem of the Directive thus requires appreciation of the *military* logic that is vivid in the strategic decision-making in military procurement and determine the extent to which it conflicts with the *economic* logic underlying the Directive.[7]

Observing that the military procurement activities of the Member States are more strongly guided by military logic rather than the logic of economic integration, questions also arise as to whether the EU legislature has chosen the correct legal basis issue for its regulation. The Court, after all, requires measures adopted on the legal basis of the internal market – such as the Directive – to "genuinely" improve the "establishment and functioning of the internal market".[8] The Directive, on the contrary, explicitly aims to promote the realisation of a common defence policy.[9] The Commission has apparently thought to stimulate the EU's military-strategic autonomy through integrating military industries within its general framework for economic interdependence.

6 See further Chapter 2.

7 The mere numbers of how much the Directive is applied by the Member States and how many of their military contracts are awarded to foreign (EU) suppliers tell us, in that regard, very little about the possible achievement of the Directive's purpose.

8 Case C-376/98, *Tobacco Advertising I*, EU:C:2000:544, para. 84.

9 Directive 2009/81/EC, Preamble nr. 2.

In this dissertation, I will seek a better understanding of both the general effectiveness problem and the more specific legal basis problem that have arisen in the context of the Directive. As elaborated further in the second part of this introduction, these two problems are deeply connected. Only when understanding the roots of these problems more deeply, will it be possible to think of alternative – more effective – ways for the EU to regulate military procurement in the future.

The research question and sub-questions

The following research question can be derived from the described tension between the sovereign right to hold military power and the economic rationales of the legislation:

How does the sovereign right of states to hold military power affect the EU's potential to effectively regulate military procurement?

As I explained earlier, the research question aims to resolve an observable regulatory problem ('how to regulate military procurement with limited competences'). This problem is rooted in a broader conceptual problem ('how do we define the sovereign right to hold military power in an interdependent Union'). To contribute to resolving both the specific regulatory problem as well as the general conceptual problem, the research should go beyond a mere description of the law as it stands. It should include understanding of the political context that gave birth to it. In addition, the research should provide possible solutions to overcome the identified effectiveness problems of the Directive. Even when accepting the imperfection of the Directive, one could otherwise still argue that its existence is justified because its rules are still more effective than an absence of rules would be. Whether accurate or not – legal rules ultimately serve a greater purpose than the mere achievement of a specific objective – it appears feasible for the research to also provide prospects for more effective regulation.

The main research question should accordingly be divided into an interdisciplinary (*how-is*) question seeking to understand the function of military procurement in international politics; a legal-constitutional (legal basis) question seeking to ascertain the correctness of the legal basis of the current regulation and a legal-normative (*how-should*) question seeking the foundations for improving the regulation.

i) How is the effectiveness of EU military procurement regulation constrained and shaped by global structures of military power?

ii) Has Directive 2009/81/EC been adopted on the correct legal basis in the EU Treaties?

iii) How should the EU regulate military procurement in the future?

Answering these questions requires a methodology which combines insights from the political and legal sciences; looking at the law within the political context which

gave birth to it and ensures its persisting, while reserving a unique function for the law within this particular context. The main difference with an intrinsically doctrinal approach is that the law thus is considered to possess a unique function within society but not comprising a completely self-sustaining or autonomous system.

Theoretical framework

International norms, such as those derived from the EU Treaties, are at their best both a reflection of existing political – and ideally democratic – power structures as well as a constraining force upon it. Autonomous political authority in today's world predominantly resides within the ambits of the sovereign state while its international structures are predominantly shaped through the interaction of different sovereign states. Supranational European institutions, which act – to a certain extent – autonomously, such as the European Commission, European Parliament and the EU Court of Justice, have become increasingly influential determinants for the outcomes of international politics, especially within Europe. Yet, they are only autonomous within the boundaries set by the Member States, which remain the *Masters of the Treaties* and which have effectively retained the option of withdrawal as some sort of *ultima ratio*. These boundaries can be understood as a constitutional framework, which seeks to balance the common interest of European integration against the particular interests of retaining the effective exercise of sovereign rights.[10]

Military power in terms of direct access to military capabilities and the authority to use those, are arguably the most straightforward examples of retained sovereign rights within the EU context, as the EU possesses none and the Member States all. EU law certainly regulates the *immaterial* purpose of military power, via the obligation of sincere cooperation and the obligation to uphold the EU's values of democracy and respect of human rights.[11] It does not, however, limit the *material* attainment of military power by the Member States. Neither does EU law limit the strategic choices made in the process of attaining military power, such as obligatory military service and alliance formation. In contrast, the EU's own defence policy solely relies on Member States making their military capabilities voluntarily available to the Union and requires Member States therefore to progressively improve their military capabilities.[12]

When I speak of *military power* in this dissertation I therefore solely refer to the material assets of military power, which in the EU are only in the hands of the Member States. When I speak of *international politics* in general I refer to the actions of a broader range of actors, including supranational institutions such as the European Commission and intergovernmental institutions such as the European

10 In a general sense, this is embodied by the principle of conferral which regulates the division of competences between the EU and the Member States by proclaiming in Article 5(2) TEU that the EU "shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."

11 Article 2 TEU and Article 4(3) TEU.

12 Article 42(3) TEU.

Council and NATO. However, based on the previous considerations, it is presumed that when it comes to the politics of military power, including the subject matter of this dissertation, which is military procurement, states are the dominant actors and their military power a structural determinant.

In order to answer the research question adequately, the methodology of this dissertation then takes a broad understanding of effectiveness as a point of departure, going beyond effectiveness in terms of empirical observations or *legal effectiveness* in terms of coherence, consistency and legal certainty. Such a broad understanding of effectiveness requires an interdisciplinary approach, as I briefly concluded already in the explanation of the research questions. I will set out these structural characteristics of the methodology below.

The effectiveness of regulation beyond the empirical and legal logic

In the first part of this introduction, I established the Directive's lack of effectiveness based on the empirical assessments of Member State compliance. The continuing widespread application of the Article 346 TFEU exception captures the inability of the Directive to fundamentally change the structures of military industries within the EU. Hence, the Directive appears incapable of reaching its regulatory aim. There is, however, much more to say about the Directive's effectiveness, as there are different ways in which it can be used to evaluate regulatory efforts.

In addition to *ex post* evaluation of effectiveness based on empirical data of compliance and/or the achievement of the regulatory aim, *ex ante* evaluation of effectiveness can reveal the reasons why certain regulation is ineffective. Empirical data, by itself, does often not expose whether there is a causal relationship between a piece of legislation and the measured (lack of) effects.[13] Within legal science, *ex ante* effectiveness is often evaluated based on certain legal principles, which are presumed to positively affect the prolonged impact of legal norms, *i.e. legal effectiveness*. Most importantly these principles include coherence, consistency and legal certainty.[14]

Coherence and consistency are both intrinsic elements of the EU's legal order, strongly connected to the division of competences within its institutional framework. First, this is shown by Article 3(6) TEU proclaiming that the EU "shall pursue its objectives by appropriate means *commensurate* with the competences which are conferred upon it in the Treaties" (emphasis added). There must thus be coherence between the Union's objectives, the legal norms seeking to achieve these objectives and the competences that were conferred upon the Union by the Member States to achieve the objectives. This duty is most clearly reflected by the EU's regime governing the choice of legal basis. Following the case law of the Court of Justice, this choice

13 It needs an explanation based on theoretical assumptions.

14 See for this approach: E. Manunza, 'Vernieuwing', *Tijdschrift Aanbestedingsrecht* 2012, p. 618 and E. Manunza, 'Een beschouwing van doel en effectiviteit *ex ante* van de Aanbestedingswet 2012', *The Europa Institute Working Paper* 04/12, Utrecht University 2012. For such an effectiveness approach see also: W. Janssen, *EU Public Procurement Law & Self-Organisation*, Eleven International Publishing 2018, pp. 6-7.

should be "based on objective factors which are amenable to judicial review".[15] Based on both their aims and means the Court determines the place within the different Union competences where the centre of gravity of Union measures resides.[16] The aims and means of a regulatory action should thus coherently fit the Union's complete institutional framework.

The principle of consistency is also codified in Article 7 TFEU, which requires the Union to: "ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers". If a regulatory framework is adopted under the correct legal basis in the EU Treaties, its substance should thus also be consistent with other (related) areas of EU law, such as the protection of fundamental rights. Internal market regulation such as the Directive should then be consistent with the principles of EU public procurement law and internal market law in general, such as non-discrimination, equal treatment, proportionality and transparency. More importantly, it should contribute to the Union's overall objectives of promoting "peace, its values and the well-being of its peoples" as established in Article 3(1) TEU, as well as the secondary objectives such as the establishment of a "highly competitive social market economy" as established in Article 3(3) TEU.[17] As such, this *legal effectiveness* is strongly embedded within a constitutional approach to the law.

The relationship between legal certainty and effectiveness is obvious. If a regulation lacks clarity because of vagueness or broad discretionary powers, *e.g.* to invoke exceptions such as Article 346 TFEU, its proper functioning will naturally be compromised. In the context of military procurement, the use of the Article 346 TFEU exception potentially also hampers the legal certainty of economic operators which are not awarded the respective public contract, as the use of this exception is not always (sufficiently) explained.

This dissertation is based on an interdisciplinary approach to *ex ante* effectiveness, extending its understanding beyond the *legal effectiveness*. As observed by Slaughter, "the postulates developed by political scientists concerning patterns and regularities in state behavior must afford a foundation and framework for legal efforts to regulate that behavior" as these can predict the potential effectiveness of international regulation.[18] These patterns and regularities in state behaviour when it comes to

15 Case 45/86, *Commission* v *Council*, ECLI:EU:C:1987:163, para. 11. See also: Case C-300/89, *Commission* v *Council (Titanium dioxide)*, ECLI:EU:C:1991:244, para. 10.

16 Regard should be taken of the "essential object" of a measure, see: Case C-268/94, *Portugal* v *Council of the European Union*, ECLI:EU:C:1996:461, para. 39. See also: R. van Ooik, *De keuze der rechtsgrondslag voor besluiten van de Europese Unie*, Deventer: Kluwer 1999, p. 83.

17 See: E. Manunza, N. Meershoek & L. Senden, 'Het Ecosysteem voor de militair-logistieke capaciteiten van de adaptieve Krijgsmacht: In het licht bezien van het NAVO-Verdrag, de EU-Verdragen en het nationale aanbestedings- en mededingingsrecht', *Utrecht University Centre for Public Procurement & RENFORCE* 2020, Part 2.

18 A. Slaughter, 'International Law and International Relations Theory: A Dual Agenda', *The American Journal of International Law* 1993. p. 205. For a similar approach to explaining international law as something emerging from states seeking to "maximize their interests" and "the distribution of state power", based on rational choice theory, see: J. Goldsmith and E. Posner, *The Limits of International Law*, Oxford University Press 2005, pp. 3-17.

military procurement are theoretically most strongly embedded within international structures of military power, as military procurement is intrinsically connected to the attainment of military power. Before complying with the legal principles of coherence, consistency and legal certainty, regulation aimed at the military procurement activities of states should then, first of all, be functional with regard to its objectives in light of these structures of national military power, further referred to as its *functional effectiveness*.

Military procurement regulation should thus not only coherently fit within the legal system to which it belongs, but also within the political system to which it owes its existence. Within the law-in-context approach of this dissertation, the principle of coherence then bridges the gap between functional and legal effectiveness, which together can more thoroughly predict the potential effectiveness of regulation. The legal basis question is per definition strongly embedded within both types of effectiveness, as the EU Treaties require the EU legislature to "pursue its objectives by appropriate means", *i.e.* choosing the most appropriate legal basis for its legislative acts as different legal bases lead to different outcomes.

The law should, in such a context, both be a reflection of political (democratic) realities as well as a constraining force upon it. In other words: it should be a product of an interdisciplinary effort. *Table I* schematically shows the interrelationship between the different components of effectiveness within this interdisciplinary approach in the second- and third row from above and the related legal and non-legal benchmarks in the fourth row from above. The focus of this research is on *ex ante* effectiveness embodied within a law-in-context approach, considering the system of EU law in light of its context of international politics (this interdisciplinarity is further elaborated in the section below). When I speak of *effectiveness* in this dissertation, it should be understood based on the schematic framework in *Table 1* below.

I will sporadically complement this reasoning by referring to existing empirical research such as data on military procurement from EU institutions, national governments and the Stockholm International Peace Research Institute (SIPRI). The research questions and their answering are not, however, of an empirical nature.

<table>
<tr><td colspan="4">Effectiveness</td></tr>
<tr><td colspan="3">Ex ante
(potential effectiveness based on a law-in-context approach)</td><td>Ex post</td></tr>
<tr><td colspan="2">Functional effectiveness</td><td colspan="2">Legal effectiveness</td><td>Empirical effectiveness</td></tr>
<tr><td rowspan="2">Military power structures</td><td colspan="2">Coherence</td><td rowspan="2">Data analysis</td></tr>
<tr><td>Choice of legal basis</td><td>Consistency & legal certainty</td></tr>
</table>

Table 1

Interdisciplinarity to understand the relationship between sovereignty and European integration

A dual functional relationship between law and the politics of power – law being both a reflection of politics and a constraint on it – is the core of the described effectiveness approach. Hans Morgenthau identified such a mutually reinforcing relationship between law and the social forces of a particular time and space. Law, in his words, is the "function of the civilisation in which it originates", while at the same time a "social mechanism" seeking to achieve certain objectives by regulating the behaviour of humans and human-led organisations.[19] Like other normative orders such as those ruled by morality and mores, its main function is to "keep aspirations for power within socially tolerable bounds" instead of glorifying their "unrestrained manifestations".[20] To understand EU law in complete isolation from its political context, which in the case of military procurement is dominated by the logic of national military power, would neglect its actual purpose of constraining politics – *nationalist politics* in particular- as well as neglecting it also being a product of politics.

In the context of EU law on military procurement, neglecting politics would either result in ever-expanding supranationalism in legal interpretation, or the diminishing of the potential regulatory role for the EU in this sector whatsoever. In the latter scenario, Article 346 TFEU would be understood as providing Member States with unlimited freedom of action as a purely linguistic understanding would appear to leave it to the Member States to decide on what it *considers* necessary for their essential security interests. In the former scenario, Member States would be required to fulfil a stringent proportionality test for applying the exception to military procurement.

This dilemma is a natural result of holding on to a dogmatic type of legal positivism in EU law, instead of accepting the dynamic interaction between legal orders as well as between law and other socio-political forces as I propose. Positivist scholar Hans Kelsen, for instance, considered it to be outside the *science of law* to determine the hierarchy between national law and international law, as both systems of reference are "equally correct and equally legitimate" when based on legal science alone.[21] Both systems of reference could rightly serve as a presupposition for legal analysis. In EU law, this dilemma presents itself in the question as to whether EU law has absolute supremacy or mere primacy over national law.[22] When approaching EU

19 See: H. Morgenthau, 'Positivism, Functionalism and International Law', *The American Journal of International Law* 1940, pp. 260-284. In this context, "social forces" can refer to all non-legal forces, *e.g.* political, economic as well as military forces.

20 As opposed to Nietzsche, Mussolini and Hitler, for whom the absence of restraint was an ideal for society. See: H. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (4th edn), New York: A. Knopf 1967, Chapter 14.

21 See: H. Kelsen, 'Sovereignty and International Law', *The Georgetown Law Journal* 1960, p. 639. Kelsen would then probably have argued that the interdisciplinary approach propagated here would be outside the science of law as well.

22 See: M. Avbelj, 'Supremacy or Primacy of EU Law – (Why) Does it Matter?', *European Law Journal* 2011, pp. 744-763.

law in an interdisciplinary fashion, as a product of politics designed to constrain itself, there is, however, no need to think in terms of supremacy in the first place.[23]

When following such a pluralistic approach, the EU legal order and the national legal orders autonomously and dynamically interact within a common legal system, but remain separate legal orders with their own internal hierarchy.[24] Studying this interaction is then not outside the science of law but – on the contrary – the conceptual point of reference.[25] Legal orders have rarely – if ever – proven to be completely self-sustaining. They are thus, like all social constructs, by definition imperfect and continuously in need of interpretation.[26] As a legal scholar, one could accept certain dilemmas to be outside the *science of law* and deal with its internal imperfection by reconciling the tensions to which it gives rise through the balancing of legal principles. One could also look for more of an external understanding of the law by reconstructing it within the most appropriate context (often referred to as *law in context*). Overcoming legal problems at the boundaries of different legal orders – such as the clash between national sovereignty and EU regulation of military procurement – requires the latter.

Both EU law and national law thus comprise autonomous legal orders and independent sources of law.[27] This should not be confused with sovereignty, which conceptually goes beyond the autonomy of a legal order.[28] Sovereignty, as observed by Jean Cohen, is not just legal autonomy, but also includes political self-determination.[29] Following Hobbes, sovereignty is not just the legal manifestation of the state's authority; it is its 'artificial soul'.[30] While the EU arguably enjoys some legal self-determination within the boundaries of its competences, it clearly has no political self-determination. This is explicitly recognised by the withdrawal clause of Article 50

23 *Ibid*, pp. 744-745. As pointed out by Avbelj, the Court rarely speaks in terms of 'supremacy' and where it did, it was only in the English language version. In its famous *Costa* v *E.N.E.L.* judgment it merely decided that the EEC Treaty constituted an "independent source of law" which "could not because of it special and original nature, be overridden by domestic legal provisions", see: Case 6/64, *Costa* v *E.N.E.L.*, ECLI:EU:C:1964:66.

24 *Ibid*, pp. 750-751.

25 See: M. Maduro, 'Three Claims of Constitutional Pluralism' in: M. Avbelj and J. Komárek (eds), *Constitutional Pluralism in the European Union and Beyond*, Bloomsbury Publishing 2012, p. 70. Maduro uses this distinction between legal orders and legal system of Tuori in: K. Tuori, 'The Many Constitutions of Europe', in: K. Tuori and S. Sankari (eds), *The Many Constitutions of Europe*, Taylor & Francis Group 2010, pp. 3-29.

26 To a certain extent this was already observed by Aristotle who considered that we need principles such as equity to correct the "deficiencies of legal justice" as "all law is universal, and there are some things about which it is not possible to pronounce rightly in general terms", see: Aristotle, *The Nicomachean Ethics* (The original text *Ethica Nicomachea* originates from 384-322 BC), translation by J.A.K. Thomson 1953, Penguin Books 2004, pp. 139-141.

27 See again Case 6/64, *Costa v. E.N.E.L.*, ECLI:EU:C:1964:66.

28 Avbelj, on the contrary, in setting out this heterarchical model of European integration, equates the "autonomous legal orders" with the "two sovereign levels of European integration", see: Avbelj, 'Supremacy or Primacy of EU Law' 2011, p. 750. For a more extensive analysis of his pluralist understanding of sovereignty, under which both the EU and the Member States are sovereign, see: M. Avbelj, 'Theorizing Sovereignty and European Integration', *Ratio Juris* 2014, pp. 344-363.

29 J. Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy and Constitutionalism*, Cambridge University Press 2012, p. 68.

30 See again: Hobbes' quotation preceding this Introduction (*supra* note 1).

TEU. More fundamentally, this is at the roots of public international law, as we find both the sovereign equality of states as well as the self-determination of peoples in the 'Purposes and Principles' chapter of the UN Charter.[31] Legal research which touches the concept of sovereignty therefore requires going beyond its legal manifestation by first appreciating its political roots. In the context of military procurement, it requires first defining the role of politics and military power in constraining the potential of EU law before its legal frameworks can be evaluated and improved. The latter is the essence of this dissertation's methodology.

Specific methodological angles of the different parts

The research, as a whole, is thus based on a common understanding of the interaction between the EU and national legal orders, national sovereignty and the effectiveness of law. The three different parts of the research use different angles within this methodological framework to reach conclusions on the different research questions. These different methodological angles will be summarized below.

Part I: the political angle to understand the interaction between military power and EU law

All fundamental changes to the EU Treaties were – at least partly – guided by geopolitical developments. The Treaty of Rome was adopted in 1957 as an alternative to the European Defence Community (EDC), the adoption of which was obstructed by the French parliament in 1954. Although the idea of the EDC was to embed – and thereby constrain – the rearming of Germany within supranational European structures, the fear of a revival of a military dominant Germany within these structures restrained the French parliament from ratifying the EDC Treaty. Subsequently, Germany was rearmed within the framework of Transatlantic NATO cooperation, which became the primary source of security in Western Europe. The collapse of the Soviet Union and the reunification of Germany triggered the steps towards more political integration with the Maastricht Treaty (1992). The end of the Cold War simultaneously fostered the EU's involvement in defence and security, as it was clear that the US' military interest in Europe would gradually decrease.

While EU law in general has been built on geopolitical and military structures of power, military procurement in particular is completely based on the desire of states to gain military power.[32] By procuring superior equipment and technology, states gain military power relative to their (potential) adversaries. Through such *relative gains*, states assume to improve their national security and their political positioning in the world.[33] In addition, states gain military power through their procurement by using

31 See: UN Charter, Article 1(2) and Article 2(1).

32 Military power is of course just a means which can be used for good or for bad; for offence or defence; for security or aggression. Fact remains that all states with a significant role in global politics possess military power.

33 In international relations theories, military affairs are often portrayed as an arena of states pursuing *relative gains*, whereas in economic affairs there is a greater potential for states pursuing *absolute gains* based on reciprocal market access.

it as a strategic tool to strengthen domestic industries and foster military alliances. In other words: states seek military security by strengthening their sovereignty and fostering military interdependence.

The EU cannot hold the material assets of military power itself, as its defence policy – following Article 42 TEU – relies solely on the military capabilities of the Member States. Nonetheless, the EU seeks to regulate the ways in which Member States gain and use military power, such as through the Defence Procurement Directive, even though there is in absence of a supranational defence policy no automatic alignment of the military interests of the Member States. These regulatory efforts are consequently constrained by these national interests, which depend on their relative positioning within the global structures of military power. As an instrument for gaining military power, the military procurement activities of the Member States do not naturally suit the supranational frameworks of the internal market such as expanded on in the Directive. Instead of being an instrument for the strengthening of sovereignty or the fostering of military interdependence, the Directive is an instrument of economic integration. This becomes more problematic when considering that the Treaty drafters specifically created intergovernmental frameworks for matters of security and military defence.

The methodology in Part I of this dissertation will thus be based on the idea of a dual functional relationship between law and politics; requiring to first understand the constraints of military power structures on EU regulation of military procurement. These constraints affect the EU's potential to effectively regulate this part of public procurement and thus form a component of the *effectiveness* concept used in this dissertation (see Table 2). It is presumed that regulation is most likely to succeed when taking these constraints into consideration first. In military procurement, these political constraints are derived from the urge of states to maintain and strengthen their military power, as the latter is a decisive variable in international relations (although not the only variable). This urge strongly affects strategic decision-making in military procurement, as these decisions affect the military-industrial capabilities of states as well as their military-strategic relationships within military alliances such as the EU and NATO. In that context, Part I of the dissertation elaborates those political constraints based on conceptualisations of military power in international relations theories. In its second chapter, the feasibility of regulating military offsets, which could be seen as a policy for middle sized industries to balance the military-industrial power of the states where most of the production of military equipment takes place, is evaluated.

It should be acknowledged here that constructivist theories of international relations generally attach less value to military power in terms of material capabilities as a structural determinant in international politics than the primarily realist and institutionalist theories used in this dissertation. In a general sense, international politics are indeed shaped by different types of determinants – material and immaterial. Within the scope of this dissertation – *i.e.* military procurement – the primacy of military power in terms of material capabilities is, however, undeniable. Without the urge for military power and security there would be no need for military

procurement whatsoever.[34] More concretely, military procurement is solely based on a material need. The focus on realist international relations theories in Part I does not therefore indicate that this dissertation – or even Part I – itself is a general argument for the realist case. Realist theories are generally build on the assumption that military power and security are the primary – or even the only structural – determinants for state behavior in international relations. Addressing this general assumption is far beyond the scope of this research; neither is the research based on this assumption. Part I of the dissertation merely follows the assumption that power and security are the primary determinants in *military procurement*; a significant though only small part of state behavior.

Realism then provides the best explanation of how these determinants affect military procurement of states in light of their relative power within the system. In addition, institutionalist theories provide explanations of how military power and security can be institutionalized within the structures of the EU and NATO and how they relate to economic determinants within the EU context. As this dissertation comprises a legal study, its constructivism naturally revolves around sovereignty and the law (Part II and III), which are per definition social constructs rather than material forces. These immaterial constructs are connected to the material forces because these forces are generally needed to enforce those constructs; *i.e.* external sovereignty needs to be protected by military power in terms of material capabilities.

Realism thus explains the role of military power in military procurement. The procured capabilities then contribute to the material foundation of state sovereignty. The legal relevance of this role is most clearly expressed in the Article 346 TFEU exception. Institutionalism, in addition, provides insight into the role and limits of interdependence between states in military procurement. The legal relevance of interdependence is most clearly expressed in the provisions on collective self-defence in Article 6 North Atlantic Treaty and Article 42(7) TEU. Accordingly, the research seeks for a deeper understanding of *sovereignty* and *interdependence* in the EU's regulation of military procurement.

<table>
<tr><th colspan="4">Effectiveness (Part I)</th></tr>
<tr><th colspan="3">Ex ante
(potential effectiveness based on a law-in-context approach)</th><th>Ex post</th></tr>
<tr><td>Functional effectiveness</td><td colspan="2">Legal effectiveness</td><td>Empirical effectiveness</td></tr>
<tr><td rowspan="2">Military power structures</td><td colspan="2">Coherence</td><td rowspan="2">Data analysis</td></tr>
<tr><td>Choice of legal basis</td><td>Consistency & legal certainty</td></tr>
</table>

Table 2

34 Constructivist theories on international politics, such as Alexander Wendt's *social theory*, do therefore not generally reject the relative importance of military power in terms of material capabilities as a structural determinant of international outcomes, see: A. Wendt, *Social Theory of International Politics*, Cambridge University Press 1999, pp. 109-113.

Part II: the constitutional angle to define the law's purpose and evaluate the choice of legal basis

When understanding the constraints of military power and global structures of military power on EU regulation of military procurement, it becomes possible to evaluate the existing legal norms based on their function within the *political order* in which they were created. This is, however, only half of the function of these norms. To reach a complete understanding, it is also necessary to appreciate the legal function of these norms in light of the purpose of the *legal order* of which they form part. From the material foundation of power in Part I, we move forward in Part II to a normative order, which seeks to restrain the use of power.

As emphasised before, law is not just the product of politics but a means to regulate behaviour towards the fulfilment of a particular purpose. Within the EU context, this purpose is generally constructed as the promotion of peace, its values – including democracy, rule of law and respect for human rights – and the well-being of its peoples.[35] Although one cannot systematically prioritise these aims, it is hard to ignore that without peace there could be no well-being and hardly much of a values-based society.[36] Considering the violent first half of Western Europe's 20th century, peace also remains the EU's most significant achievement, at least within its own borders. After the horrors of the two world wars, the peace purpose of the European integration project was primarily embedded in economic interdependence as a way of constraining nationalist and protectionist politics and the military aggression fuelled by it. Both world wars had shown that national constitutions and democracy are by themselves no guarantees for the prevention of excessive nationalism and military aggression. In its attempts to constrain the exercise of political power, EU law has always been of a constitutional nature, being an – apparently – necessary addition to national constitutionalism; both designed to constrain the dark sides of popular sovereignty.

In the EU context, functionalism is traditionally associated with an expansionist understanding of EU supranational competences and institutions. This is mostly due to the early approach to European integration of neofunctionalism which explained integration as an ever expanding process of integration spill-over from one sector to another based on increase of interdependencies, the legitimacy of which was mostly

35 Article 3(1) TEU.

36 Without peace there can be no general well-being and it would be hard to maintain a values-based society, but peace alone – without values and well-being – would be meaningless, as it would be without a purpose. We must therefore distinct between the source and purpose of authority, see Section 3, *Key Concepts* under *Legitimacy*.

based on the positive effects on peace and welfare.[37] Historically, the Court has often been considered a driving force in this process. European integration is goal-driven, and its laws should therefore be interpreted as far-reaching as necessary to achieve the aims of the Treaties, as these aims have been framed as being part of continuing the "process of creating an ever closer union". This is, however, too simplistic to explain European integration, which is still based on a political community of sovereign states and functionalism which can also be used as a legal method to bridge the gap between law and socio-political realities. More problematically, such expansionism in reality rather undermines the EU's constitutional purpose of constraining political power (nationalism in particular), wherever it resides, than that it contributes to this purpose. Unconstrained expansionism in EU law would compromise its constitutional nature. The Court has at times indeed expanded the impact of EU legal norms,[38] but it has equally set out their limitations; depending on the division of competences.[39]

How should we then understand functionalism in EU law? Legal functionalism, as such, is understood in this research as a methodological instruction for lawyers to not consider the law as a self-sustaining system but to understand both legal orders and their norms in light of their purpose. This goes beyond teleological interpretation, which prescribes that rules should be interpreted in light of their aims. As pointed out by Miguel Maduro, legal interpretation of specific provisions of EU law should be based on a systemic understanding of the EU Treaties, requiring a *meta-teleological* understanding of legal norms as part of the overall EU legal order.[40] In a context of constitutional pluralism, the overall EU legal order can then not be regarded in isolation from the national legal orders (or the general international legal order) as they are parts of a shared legal system and continuously interact. In addition, the law stands in a connection with a particular time. The EU Treaties are still a relatively young source of law subject to amendments and changing political realities. They can therefore best be considered as some sort of 'living constitution', leaving a certain

37 This approach was first propagated (later abandoned) by Ernst Haas, see: E. Haas, *The Uniting of Europe: Political, Social and Economic Forces 1950-1957*, Stanford University Press 1958. Haas later on propagated a more moderate theory of integration based on 'issue-linkage'. Like neofunctionalism the idea of issue-linkage is also based on interdependence, but unlike neofunctionalism it shows the limits of economic interdependence as a basis for ever-expanding supranational competences. See: E Haas, 'Why Collaborate? Issue Linkage and International Regimes', *World Politics* (1980) p. 372. This is further discussed in Section 1.3.7. For a more recent account of neofunctionalism's ability to explain the European integration, see: P. Schmitter, 'Ernst B. Haas and the legacy of neofunctionalism', *Journal of European Public Policy* 2005, pp. 255-272.

38 Most notably the impact of the internal market rules on the discretionary power of the Member States to regulate their economies. Case 26/62, *Van Gend en Loos* v *Administratie der Belastingen*, ECLI:EU:C:1963:1 and Case 8/74, *Dassonville*, ECLI:EU:C:1974:82.

39 See for instance: K. Lenaerts and Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice', *Columbia Journal of European Law* 2014, pp. 37-44. Lenaerts and Gutiérrez-Fons refer to the latter as 'teleological reduction' of competences. This is more extensively discussed in Section 4.1.1.

40 M. Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism', *European Journal of Legal Studies* 2007, p. 140.

scope for legal interpretation to take into account social, political and historical realities changing over time that were not envisioned by its drafters.[41]

The sovereign right of the Member States to hold military power dominates the law and practice of military procurement. The constitutional pluralism approach is therefore most suitable to provide a theoretical basis for answering the research question, as it simultaneously seeks to ensure the persistence of both national sovereignty and the aims of European integration. This is not to say that Member States are completely free to act as they wish in their military affairs. In that case, a EU law dissertation on military procurement would be a waste of paper. We could immediately establish that any EU intervention in this area would be incompatible with the sovereign right of the Member States to hold military power as enshrined in the EU Treaties. It would be just as pointless to evaluate the compatibility of the Defence Procurement Directive with the EU Treaties without regard for national sovereignty.

Constitutional pluralism is based on the idea that within the EU's legal system the final legal authority question is deliberately left open; *heterarchy* instead of hierarchy. The Member States have retained their sovereignty in the sense of political self-determination, but have also deliberately limited the legal exercise of certain sovereign rights. They have done so for a noble purpose, as unconstrained political power of all the individual European states has proven to be catastrophic to peace between them and even more so to the well-being of their peoples. Hence, EU law should primarily serve a constitutional function in limiting the political power of its Member States.

According to Maduro, the legitimacy of EU constitutionalism should then be derived from the "constitutional added value with respect to national constitutionalism".[42] In a similar fashion, the legitimacy of the EU's engagement in the military domain should be derived from its added value with respect to the national security of the Member States. As legitimate EU constitutionalism cannot replace national constitutionalism, EU militarism cannot replace the national military security responsibility; it can only add to it. This approach is not merely a product of my own theoretical preference, but constitutes a reflection of existing Treaty frameworks and the purpose of their creation. Particularly the proclamation in Article 4(2) TEU that the EU shall respect the essential state functions of the Member States including territorial integrity and national security reflects the constitutional limits imposed on the EU's engagement in the military domain. At the same time, Article 4(3) TEU imposes the principle of sincere cooperation on the EU and the Member States "in carrying out tasks which flow from the Treaties". Peace and security, whether through integration or cooperation, are the most crucial of these tasks.

41 See Section 4.1.2. referring to: D. Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution*, Oxford University Press 2009. See also: Manunza, Meershoek & Senden, 'Het Ecosysteem voor de militair-logistieke capaciteiten van de adaptieve Krijgsmacht 2020, Part 2.

42 Maduro, 'Three Claims of Constitutional Pluralism' 2012, pp. 67-84.

Part II of the dissertation will address the second research question as to whether the Defence Procurement Directive was adopted under the correct legal basis in the EU Treaties in this context of military power and constitutional pluralism. Before evaluating the aims and means of the Directive in light of the legal characteristics of the security exceptions in the EU Treaties, the aim and substance of the Directive and the Court's approach to resolving legal basis disputes, it is first necessary to understand how these issues are connected with national sovereignty. The first chapter of Part II will therefore build a bridge between military power – which is intrinsically connected to national sovereignty, as it should ensure military security – and EU law, which is intrinsically connected to economic integration. By going back to the philosophical roots and development of sovereignty in Europe and the initial purpose of post-World War II European integration, this chapter will set out the legal context in which the legal basis question ought to be solved.

As this national sovereignty is embedded in the EU Treaties through Article 4(2) TEU, the legal basis question of the Directive is eventually a question of the Directive's coherence with the EU Treaties as a whole and therefore a component of its *legal effectiveness* (see Table 3).

<table>
<tr><th colspan="4">Effectiveness (Part II)</th></tr>
<tr><td colspan="3">Ex ante
(potential effectiveness based on a law-in-context approach)</td><td>Ex post</td></tr>
<tr><td colspan="2">Functional effectiveness</td><td>Legal effectiveness</td><td>Empirical effectiveness</td></tr>
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</table>

Table 3

Part III: deducting lessons for better regulation

The first two parts provide for an understanding of the political and constitutional constraints on the EU's potential for regulating the military procurement of the Member States. From a European-minded regulatory perspective, the first two parts have perhaps triggered a decent – though not necessarily unhealthy – amount of pessimism about the regulatory state of play. To turn things around, Part III of the dissertation will expose how the EU could more effectively regulate military procurement, by deducing from the political and legal defects of the current regime guidance for its improvement.

This guidance will be based on the answers to the first and second sub-research questions combined with the broad effectiveness understanding as elaborated above. That means first that the suitability of the regulation should be improved by aligning it better with the constraints of geopolitical power structures under which Member States procure military equipment and the genuine security interests they seek to protect in that context, as extensively elaborated in Part I of the research. Secondly,

the coherence of the regulation should be improved by choosing the correct legal basis within the EU Treaties.

The last part will then focus on the legal effectiveness of the improved regulation in terms of consistency and legal certainty as part of the broader coherence issue (see Table 4) in order to reach a complete understanding of what the future regulation should look like. This *legal effectiveness* is connected to the *functional effectiveness*, as Article 3(6) TEU – again – prescribes that the EU "shall pursue its objectives by appropriate means *commensurate* with the competences which are conferred upon it in the Treaties". The consistency of the regulation mostly depends on whether it complies with the legal principles of the competence area of that particular legal basis. Legal certainty can be improved by clarifying the sort of military procurement that falls within the reach of the Article 346 TFEU exception, while it depends on the possibility of judicial review as well.

<table>
<tr><th colspan="4">Effectiveness (Part III)</th></tr>
<tr><th colspan="3">Ex ante
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</table>

Table 4

Concepts

Precision is the *sine qua non* for thorough legal analysis. The main challenge of legal research based on an interdisciplinary approach is, in that regard, to avert conceptual confusion. In an area of law (that is EU law), which is often described in terms of constructive ambiguity, conceptual clarity within the science of law is already a challenge; let alone when adding concepts from other disciplines to the methodological mix one might say. However, interdisciplinarity can also be understood as the solution to the ambiguity challenge. This ambiguity is, after all, no coincidence but the deliberate outcome of political compromise rather than a product of the lawyer's uncompromised mind. As unpleasant as this might appear from the perspective of legal purity, an understanding of the power structures, which underlie the compromise, provides insights into how to currently choose between competing interpretations of the norms they created and how these norms could be improved in the future.

This section aims to tackle the conceptual-confusion challenge up front by setting out the key concepts, which are at the basis of this dissertation. These concepts will be further elaborated in the different chapters that utilise them. Certain concepts, such as power and legality, are necessarily more monodisciplinary than other concepts,

which by definition mix elements of different disciplines, such as sovereignty. As described before, sovereignty is conceptually only complete when the autonomy of the *legal* order is combined with *political* self-determination. All these concepts are, however, interdisciplinary in the sense of being embedded within the interdisciplinary theoretical framework as set out above.

Although all concepts are to be understood within this interdisciplinary setting, we must not forget that this dissertation, first and foremost, aims to resolve a legal problem by ascertaining what the state of the law is and making an argument on how it could be improved. In this Introduction I have attempted to convince you – the reader – why both the question what the law is and the question how it should be require an interdisciplinary approach. Resolving the legal problem should then surely contribute to the underlying real solutions. There are, however, rather unfortunately for the legal scholar, many non-legal variables and coincidences, which affect – for good or for bad – the *law in action*. This is not different in the ambiguous law and politics of the Union. A functional – and therefore realistic – approach to legal doctrine can only provide a solid starting point for letting it contribute to peace and security in and beyond Europe.

Military procurement

All government procurement of *military equipment*. The dissertation follows the legal definition of 'military equipment' based on the Court's interpretation of Article 346 TFEU and the list of war materials drafted by the Council in 1958.[43] The Court has adopted a functional approach to this concept in its case law, limiting it to goods "intended for specifically military purposes" (subjective test). In addition, this should result "from the intrinsic characteristics" of the goods, meaning that they have been "specially designed, developed or modified significantly for those purposes" (objective test).[44] The scope of this dissertation is limited by the concept of military procurement. This means that it does not aim to provide insights into how dual-use procurement and other types of 'sensitive' procurement that are within the scope of the Directive should be regulated. Military procurement should in that regard be distinguished from 'defence procurement' which – although not further defined in this research – usually refers to a broader category of procurement for defence purposes, including dual-use procurement as well.

Military power

The sum of a state's military industrial and operational capabilities. Operational capabilities consist of the ability to act by deploying forces outside one's territory,

43 Council of the EU, *Extract of the Council decision 255/58 of 15 April 1958*, document 14538/4/08, Brussels: 26 November 2008. For a discussion of the legal status and characteristics of the list, see: Trybus, *Buying Defence and Security in Europe*: *The EU Defence and Security Procurement Directive in Context*, Cambridge University Press 2014, Chapter 3, para. 2.

44 Case C-615/10, *Insinööritoimisto InsTiimi*, ECLI:EU:C:2012:324, para. 40.

depending on geography, recruitment of troops and the logistic capabilities to move these troops.[45] Military-industrial capabilities consist of the material assets that are necessary to operate effectively; including all procurement of military equipment and the technology by the national defence ministry. Both operational and industrial capabilities to a certain extent also depend on economic power, providing an industrial foundation for the production of arms, and wealth in general as it enables governments to afford it.[46] The focus of this dissertation is, however, on military procurement, thus only the concrete industrial and technological assets of military power.

Balance of power

Often considered to be the primary source of stability in international military politics.[47] As observed by Morgenthau, it is best understood as a "manifestation of a general social principle", making it "not only inevitable" but also an "essential stabilizing factor in a society of sovereign nations".[48] In a general sense, it is presumed to bring (some) stability in the political relations between great powers (or power blocs), such as China and the United States. Within military alliances such as NATO and the EU balance of power can play a pivotal role as well as it can limit centralisation of military power. Instead of a hegemonic role for one or several actors within an alliance, security can be based on military interdependence (see under *Interdependence*). Franco-German balance of power has historically brought peace to Western Europe within the military frameworks of NATO alliance and a hegemonic role for the United States. In today's Europe, the military role of the US is decreasing and the EU is pursuing 'strategic autonomy'. All 27 Member States are, however, still equally sovereign. In the current state of affairs 'strategic autonomy' is therefore unlikely to be achieved through centralisation of military power in a predominantly Franco-German bloc. The smaller Member States can still pursue balance-of-power policies by strategically positioning themselves in-between France, Germany and other NATO partner states (United States and United Kingdom), also when it comes to their military procurement. Presuming that balance of power is helpful for maintaining peace between nations, this is not such a bad thing.

Interdependence

Presumption that economic and political globalisation constrain the actions of states beyond the international structures of military power. International politics can no longer be perceived as a mere product of the distribution of military power, as there is

45 In practice, it is not always easy to distinguish between the two, as many operational capabilities directly depend on industrial capabilities. This is for instance the case for logistic capabilities, see: Manunza, Meershoek & Senden, 'Het Ecosysteem voor de militair-logistieke capaciteiten van de adaptieve Krijgsmacht' 2020.

46 On military power, see: Morgenthau, *Politics Among Nations* 1967, Chapter 9 and J. Mearsheimer, *The Tragedy of Great Power Politics*, W. W. Norton & Company 2001, Chapter 3. For a more elaborate discussion of military power, see Chapter 1.3.

47 Although it could also be argued that a hegemonic power creates most stability.

48 Morgenthau, *Politics Among Nations* 1967, p. 161.

a multitude of issues involved, lacking a clear hierarchy.[49] Particularly within a region as economically integrated as the EU, the *high politics* of national (military) security do not necessarily dominate the *low politics* of economic welfare.[50] As opposed to realist theories, interdependence-based theories (such as liberal-intergovernmental an neo-functional theories on European integration) provide a much greater prospect for institutions and law to regulate the relations between sovereign states. However, this does not necessarily indicate that high politics and low politics can easily be mixed within the same institutional framework. Outside an alliance or regional organisation, the *high politics* of military power are still the last resort for protecting one's own sovereignty. Alliances are, in addition, not indestructible, as they are mostly based on shared external threats, the existence of which depends on time and space.[51] 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 requiring states to contribute with their own military capabilities.[52] Interdependence can provide a powerful contribution to peace between nations and protection from external threats, but we must thus distinguish economic interdependence from military interdependence.

Sovereignty and sovereign rights

Metaphysical source of political authority, from which claims to physical power can be derived. In democratic states, only *popular* sovereignty, *i.e.* sovereignty of the people, is deemed to potentially be the source of *legitimate* political authority.[53] Sovereignty is in reality, however, always exercised by individual humans. To prevent abuse, we must consequently limit the exercise of 'sovereign rights' by defining its purpose. No purpose can be achieved without the bare minimum of internal peace and external security.[54] In the end, legitimacy depends on its purpose as well as its source.[55] In this dissertation, the focus is on the external dimension of sovereignty, *i.e.* external sovereignty, which is a guiding principle in international law.[56] External sovereignty constitutes a legal principle from which one can deduce[57] the so-called fundamental

49 R. Keohane & J. Nye, *Power and Interdependence* (3rd edn), Longman 2001 (first published in 1977), pp. 22-23.

50 *Ibid,* Chapter 2.

51 See for instance: S. Walt, *The Origins of Alliances*, Cornell University Press 1987, p. 148.

52 Article 47(3&7) TEU.

53 J. Rousseau, *Of the social contract* (*Du contrat social; ou Principes du droit politique*), translation by H.J. Tozer Wordsworth Editions 1998 (first published in 1762).

54 T. Hobbes, *Leviathan*, Oxford University Press 1996 (first published in 1651).

55 B. Constant, *Principles of Politics Applicable to all Governments* (*Principes de politiques applicables à tous les gouvernements représentatifs et particulièrement à la constitution actuelle de la France*) (first published in 1813), translation by D. O' Keeffe, Liberty Fund 2003, p. 31. See more extensively: Chapter 3.2.2.

56 Although this appears to be the consensus, it is not undisputed. Other (more idealistic) schools of thought would stress the primary role of human rights law and humanitarian law. It could at the same time be argued (if following more of a realist approach) that some states are more sovereign than others, as the UN Charter has assigned a primary role for international peace and security to those powerful states, which have permanent seats in the Security Council.

57 As observed by Morgenthau in: H. Morgenthau, 'The problem of sovereignty reconsidered', *Columbia Law Review* 1948, pp. 345-347.

rights of states (sovereign rights), including sovereign equality, independence and peaceful co-existence.[58] More specifically, one of the sovereign rights of states is the right to possess military power.[59]

Military security

Particular requirement for external sovereignty. Condition of being secure from external threats. Traditionally, military security primarily consisted of territorial integrity, *i.e.* to remain free from military interventions from other states into one's physical territory. In today's world military security is more complex as different types of non-territorial threats such as those arising from global terrorism, cyber warfare and so-called hybrid warfare have become more pressing. Both national security, of which military security is a particular component, and territorial integrity, which is a particular component of military security, are recognised by the EU Treaties as 'essential state functions', which the Union ought to respect throughout its laws and policies.[60]

Functionalism

Methodological approach for legal interpretation in which the law is understood as both a product of socio-political forces as well as a constraining force upon it. Closely relates to effectiveness (see under *Effectiveness* below).

Effectiveness

There is a variety of methods to measure the effectiveness of regulation. One can *ex post* evaluate effectiveness by collecting and analyzing empirical data on compliance and seek explanations for the causal relation between compliance and the achievement of the regulatory objective.[61] As explained earlier, the methodology of the research is based on the idea of a dual functional relationship between law and politics; *effective* law being both a reflection of politics as well as a constraint on it. In this research, the focus is therefore on potential effectiveness, which is a form of *ex ante* evaluation. This includes both potential effectiveness from an interdisciplinary perspective (Part I of the dissertation) and potential effectiveness from a legal-constitutional perspective (Part II of the dissertation). From an interdisciplinary perspective, *functional effectiveness* depends on the extent to which the aim of the regulation sufficiently

58 See for instance: M. Shaw, *International Law* (6th edition), Cambridge University Press 2011, pp. 211-216.

59 This was confirmed by the International Court of Justice in: ICJ, *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v *USA*), Judgment. I.C.J. Reports 1986, p. 135.

60 Article 4(2) TEU.

61 For the Defence Procurement Directive, such evaluations have been commissioned by the Commission and the European Parliament, see: European Commission, COM(2016) 762 final, *Commission staff working document on public procurement in the fields of defence and security*, Brussels: 16 November 2016 and European Parliament, *European Implementation Assessment* 2020. Like always, one must distinct between compliance and effectiveness, as compliance merely indicates adherence to particular rules while effectiveness indicates the achievement of a particular goal.

reflects the political interests of the actors on which its success depends and whether its legal norms are functional with regards to their particular aims and in their particular context. The relevant actors primarily consist of the Member States, whose behavior the Directive seeks to regulate. *Legal effectiveness*, in addition, depends on the coherence of the legislation within the legal system of which it forms part, the inner consistency of the aims and means of the legislation and its ability to create legal certainty.[62]

Legitimacy

Concept transcending the law and as such is not a benchmark of legal analysis. As observed by Constant, legitimacy depends both on the source and purpose of political authority.[63] Legitimacy of political authority mostly relates to democratic legitimacy, that is the extent to which the law and decision-making are based on the *general will* embodied within the institutions of government. In addition, it is based on output legitimacy, which is the extent to which decision-making and the law are contributing to the achievement of a legitimate purpose[64] and the protection of individual rights; together representing the law's effectiveness (see under *Effectiveness*). It is impossible to incorporate all legitimacy concerns into legal analysis, as for legal analysis one has to presume the outcomes of legally valid elections to represent the 'general will' and the legal system as a whole to be legitimate. If these presumptions cannot generally be sustained, the legal method will not – at least, not alone – be the solution to existing societal problems. Legitimacy within legal analysis is thus embedded within a predetermined legal-constitutional order, including assumptions about what is good. Although the legal-constitutional order as a whole is predetermined, its norms are dynamic as its purpose and presumptions about what is 'good' may change over time. Still, at a certain point in time and within a particular space, the rule of law requires that this order is – as far as possible – based on objective benchmarks, ensuring a certain extent of predictability of judicial decisions. Legitimacy transcending the legal order, including the legitimacy of the legal order as a whole,[65] is much more dependent on normative preference, thus located within a more subjective system of reference. The focus of this dissertation is, in this context, more strongly on effectiveness than on legitimacy. Nonetheless, the role of legitimacy within the framework of the EU's constitutional purpose as embedded in Article 3(1) TEU will at certain points within the research be undeniable (see under *Legality and legal basis* below)

62 In practice, effectiveness then also depends on compliance and enforcement, which can to some extent be predicted or explained based on the *interdisciplinary effectiveness*.

63 Constant, *Principles of Politics Applicable to all Governments* 1813.

64 See on the difference between input- and output legitimacy in the context of EU law: S. Weatherill, 'Competence and Legitimacy', in: C. Barnard and O. Odudu, *The Outer Limits of European Union Law*, Hart Publishing 2009, p. 27.

65 As one cannot base the legitimacy of a system on its own terms, while the legality of a thing within the system naturally depends on the terms of the system.

Legality and legal basis

Primary benchmark of legal analysis, as apparent in the first part of the research question. As stressed under 'Legitimacy', it does not include the whole of legitimacy because that naturally depends on political preference, *i.e.* the purpose of political authority. In EU law, however, legality does include the question of *constitutional legitimacy*, which is the legitimacy of decision-making in light of the EU's constitutionally determined purpose. The EU Treaties proclaim that the purpose of the EU is to "promote peace, its values and the well-being of its peoples" and that it "shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties".[66] Legality evaluations of EU actions should consequently be concerned with whether i) the action contributes to the EU's purpose, ii) whether the EU has competence to adopt the action and whether it is based on the most appropriate legal basis in the EU Treaties and iii) whether the particular means of the action are compatible with the legal principles of EU primary law.

Constitutional pluralism

Methodological approach for understanding EU law, which assumes that there is no clear hierarchy between national constitutional law and EU law. The EU legal order makes its "own independent constitutional claims" which stand in a horizontal relationship with national constitutional claims rather than a hierarchical relationship.[67] National- and EU legal orders then co-exist and interact within a shared legal system in which the question of 'final authority' is deliberately left open.[68] Sovereign states can delegate competences – including sovereign rights – to supranational institutions without losing any of their sovereignty as long as there is legal and political self-determination.[69] Thus, in the European context, separate legal orders operate within a shared legal system, but political autonomy remains only for states.[70]

Functionalism in a context of constitutional pluralism

Combining constitutional pluralism with functionalism, emphasising the constitutional function of EU law. As a response to two world wars with Europe at the centre of the battlefields, European integration has been a means to protect national sovereignty from self-destruction; establishing the groundworks for common peace and prosperity. Aggressive nationalism and totalitarianism proved to be great dangers for the peaceful co-existence of the sovereign European states. Within the Western European context, the rise of Hitler in Germany particularly showed that national

66 Article 3(1) TEU.
67 See: N. Walker, 'The Idea of Constitutional Pluralism', *The Modern Law Review* 2002, p. 337.
68 See: Maduro, 'Three Claims of Constitutional Pluralism' 2012, p. 70 and 75.
69 Cohen, *Globalization and Sovereignty* 2012, p. 68.
70 That only the Member States possess political autonomy is most clearly embedded within the legal reality that Member States can freely decide to withdraw from the EU based on their own constitutional requirements, while Member States cannot be evicted by EU institutions.

democracy and constitutionalism are by no means absolute safeguards against war, destruction and genocide. European integration should, in that context, function as an extra constitutional safeguard against excessive and aggressive nationalism. By its very nature, European integration imposes a constraint on nationalist politics, economic protectionism in particular. When applying EU law, one must, however, continuously remember its function to protect national sovereignty from itself. As such, integration cannot replace sovereignty, as that would merely shift the problem to the European level.

Structure

PART I: The Law in its Context of International Politics

Chapter 1: The Constraints of Power Structures on EU Regulation and Integration of Military Procurement

The effectiveness approach of this dissertation requires starting by appreciating the political conditions under which the EU Member States engage in military procurement to determine the *functional effectiveness* of the current regulation. The Defence Procurement Directive was adopted under the legal basis for harmonisation and regulation of the EU's internal market. After World War II, economic integration was deemed to foster peace and welfare in Europe by creating conditions of economic interdependence (between France and Germany in particular). While the economy was to be regulated within the ambits of the supranational European Economic Community, military security was outsourced to the intergovernmental NATO regime. The sole purpose of military procurement, however, is to gain military power (relative to one's potential adversaries) to protect state sovereignty and security. In addition, states seek to strengthen their sovereignty by promoting industrial independence or to foster military interdependence. It is thus questionable whether the underlying *economic* logic of the Directive sufficiently facilitates the *military* logic, inherent to the regulated activity. This chapter evaluates this apparent conflict and puts forward its implications for regulating military procurement, including the choice of legal basis. By identifying these implications, the chapter sets out the challenges for the rest of the dissertation.

Chapter 2: The Potential of Regulating Offsets as a Policy of Military Power

In legal literature as well as in Commission policymaking, there is a general hostility towards offsets. This is not so strange from the Commission's perspective, as offsets are generally discriminatory and the principle of non-discrimination constitutes the core principle of the internal market. When considering military offsets in light of the function of military procurement as elaborated in Chapter 1, the negative perception of military offsets appears unjustified. Offsets can be used by industrially small and mid-sized Member States to preserve domestic industry deemed essential for the national

security and to strengthen their position within frameworks for intergovernmental cooperation. In that context, the second chapter seeks a theoretical basis for regulating offsets in the EU context by examining its core function and comparing the offset policies of three EU Member States with mid-sized industries.

PART II: Beyond Power Politics: The Law and its Purpose

Chapter 3: The Artificial Soul of the State and the Constitutional Purpose of EU Integration

The role of sovereignty as a constraint on the EU's regulation of military procurement is undeniable. The Directive explicitly mentions that exemption on the basis of 'public security' or a Member State's 'essential security interests' can be necessary – among other things – for contracts which are "so important […] for national sovereignty" that the Directive does not sufficiently safeguard these interests. To determine the extent of the legal constraint of the security exceptions in the EU Treaties facing the internal market-based Directive, it is first necessary to understand the metaphysical concept in which military security is rooted, *i.e.* external sovereignty. This chapter evaluates the philosophical roots and development of external sovereignty in that context to lay the groundworks for a EU internal perspective on the potential effectiveness of the Directive.

Chapter 4: Military Security as an Exception to EU Public Procurement Regulation within the Internal Market

The Defence Procurement Directive aims to limit the use of security exceptions by the Member States for their military procurement. Before examining the extent to which the Directive succeeds to incorporate the security concerns of the Member States so that they would not need to rely on the exceptions as much, the fourth chapter elaborates the legal characteristics of the security exceptions in the EU Treaties. It first sets out the methodology for legal interpretation. This interpretation method is subsequently tested by looking at the significant amount of jurisprudence of the EU Court of Justice on the different security related exceptions to EU law in general and EU public procurement law in particular. From the Court's rulings in such cases some general statements can be inferred about the circumstances under which military security can justify derogation from EU public procurement law.

Chapter 5: Functional Limits to EU Public Procurement Regulation in the Military Sector

Now that we know how to interpret the security exceptions in the EU Treaties and when these are potentially applicable, this chapter examines the extent to which the flexibilities of the Directive sufficiently facilitate the security concerns of the Member States apparent in military procurement.[71] As far as this is the case, Member States cannot rely on the security exceptions in the EU Treaties, because the necessity

71 As compared to Directive 2014/24/EU (regular public procurement Directive).

requirement will not be fulfilled. For those cases, the Directive can be effective. As far as the Directive does not facilitate the actual security concerns of the Member States, it lacks potential effectiveness. If the lack of potential effectiveness is as severe that it obstructs the Directive from achieving its aim and this can be linked to the Directive's legal basis, the question of the next chapter becomes even more pressing.

Chapter 6: Why the Internal Market is not the Correct Legal Basis for Regulating Military-Strategic Procurement – On functional division of competences

The question as to whether the Directive is compatible with the EU Treaties is eventually a question of legal basis. The EU Court of Justice has according to Article 263 TFEU jurisdiction to review the legality of EU acts, such as legislative acts, including the question as to whether these were adopted on the correct legal basis. There is a plethora of jurisprudence in which the Court adjudicated on whether a certain measure had been adopted on the correct legal basis. The main principle adopted by the Court for solving such legal basis conflicts is that the choice of legal basis should not be based on institutional preferences but instead on "objective factors which are amenable to judicial review" such as the "aim and content of the measure".[72] In light of the function of military procurement (Chapter 1), the constraints of sovereignty (Chapter 3) and military security (Chapter 4), and the aim and content of the Defence Procurement Directive (Chapter 5), this chapter evaluates the choice of the legislature for the internal market instead of the Common Security and Defence Policy.

PART III: Looking Forward: Prospects for Functional Regulation

Chapter 7: The Legal Foundation for a more Effective Regulation of Military Procurement within a European Security Culture

Based on the previous conclusions about effectively regulating military procurement and military offsets, the final chapter provides guidance for a renewed regulation.

72 Case 45/86, *Commission v. Council*, ECLI:EU:C:1987:163, para. 11. Case C-300/89, *Commission* v *Council (Titanium dioxide)*, ECLI:EU:C:1991:244, para. 10.

PART I

THE LAW OF THE UNION IN ITS CONTEXT OF INTERNATIONAL POLITICS

CHAPTER 1

The Constraints of Power Structures on EU Integration and Regulation of Military Procurement

Introduction[1]

European integration has always been considered a 'peace project',[2] achieving peace by economic instead of military means. Economic interdependence – between Germany and France in particular – was thought to bring balance to the European geopolitical order and peace and welfare to its citizens. Much of liberal thinking post-World War II predicted that this type of economic globalisation would systemically change the relations between those states that opened their markets. Their diplomatic relations would no longer primarily be determined by structures of military power, but rather by those of economic power or ideology even.

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

Existing legal literature is preoccupied with the legal logic of the rules imposed by the internal market and the CSDP dimensions of EU law. This chapter, instead, considers the prospects of military-industrial integration by looking at the EU Treaties as a system regulating the military-political relations between sovereign states. By explaining the role of military power's industrial component in the relations between states based on international relations theories, this chapter provides an external perspective on the EU's legal regime on military procurement.

This interdisciplinary approach to EU law is necessary to find out whether the function of military procurement in international relations is sufficiently safeguarded

1 This chapter is an updated and revised version of a published article, see: N. Meershoek, 'The Constraints of Power Structures on EU Integration and Regulation of Military Procurement', *European Papers – A Journal on Law and Integration* 2021(1), pp. 831-868.

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

within the Commission's internal market approach to regulating it, *i.e.* an evaluation of the Defence Procurement Directive's *functional effectiveness*. The concept of *balance of power* is considered of paramount importance for this evaluation, as it is the primary source of stability in systems lacking centralised authority and it can be a source of interdependence within a military alliance. In Part II of this dissertation the outcome of this *functional effectiveness* evaluation will be used as a starting point for answering the question as to whether the Directive has been adopted under the correct legal basis in the EU Treaties.

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

1.1 Legal structures of military integration and cooperation in the EU

In the years after World War II, Cold War tensions, in particular the outbreak of the Korean War in 1950,[3] were pressuring a Western European need for West Germany to rearm itself. The political elites in Western Europe and the US considered that the aggression of North Korea could be a prelude to a Russian attack on Western Europe.[4] The prospect of German rearmament had, however, been the reason for France's reluctance to let Germany join NATO. The designer of the Schuman plan and French government official,[5] Jean Monnet, considered therefore the integration of the military forces of the two countries as the only solution to Europe's security problem. Soon after launching the Schuman plan (proposing integration of coal and steel resources), Monnet was urging the French government to come up with a similar proposal for integrating the future German military forces with the French,

3 This is also mentioned as the occasion that triggered the idea of a European army by Monnet himself, see: J. Monnet, *Memoirs* (translated: R. Mayne), Third Millennium Publishing 2016 (published in 1978), Chapter 14.

4 See to that extent, in the broader historic context of the European Defence Community: E. Fursdon, *The European Defence Community: A History*, The Macmillan Press 1980, pp. 67-68.

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

because: "a German contribution to Western defence is indispensable and German rearmament unacceptable".[6] In October 1950, the French Prime Minister René Pleven adopted Monnet's proposal and came up with a plan for a common European Defence Community (EDC), entailing a united European army based on integrating all of the Member States' military capabilities under a common political and military authority.[7] If Germany were to rearm, then it would only do so under the control of a supranational authority.

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

1.1.1 The Treaty of Rome (1957): economic Europe as an alternative to the failed European Defence Community

Even though the six potential member states reached political agreement in 1952, the EDC Treaty never came into force. In August 1954, it was the French parliament that refused to ratify it. The consequences of ratification of this Treaty would have been radical for the endurance of national military capabilities. First, it would have drastically restricted the member states in recruiting national armed forces. Only for the specific cases mentioned in Article 10 of the EDC Treaty would this still have been possible, although maintenance of these national armed forces should at no time have compromised participation in the European Defence Forces.[8] Secondly, the Treaty included a general prohibition of the development, production and procurement of war material. The procurement of military equipment at the European level would have been commissioned by the supranational institution, 'the Commissariat'.[9] This procurement would have been executed through "the most extensive possible competitive bidding"; awarding contracts exclusively on the basis of lowest price.[10] The same institution would have been exclusively in charge of granting licences to authorise member states to produce, import or export equipment for their national armed forces.[11] The EDC's member states would only have been authorised to produce, import or export military equipment to an extent which did not go "beyond their needs". Moreover, for exports of military equipment, member states would only have been authorised if the Commissariat would have *considered* it consistent with the

6 J. Monnet, Memorandum to President of the French Council of Ministers, 18 September 1950, accessible through: <https://www.cvce.eu/en>(English translation).

7 Statement by René Pleven on the establishment of a European army, 24 October 1950, accessible through: <https://www.cvce.eu/en> (English translation).

8 Treaty Constituting the European Defense Communiy (EDC Treaty) 1952 (Unofficial translation by the US Government), Articles 9 and 10 (accessible through: <https://aei.pitt.edu/5201/1/5201.pdf>).

9 Article 104 of the EDC Treaty.

10 Article 104(3) of the EDC Treaty.

11 Article 107 (1) & (4) of the EDC Treaty.

"internal security of the Community".[12] Both for industrial and operational decision-making in the military domain, power would thus have shifted from the sovereign nation states to a supranational European authority.

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

In contrast to the economic provisions of the EDC Treaty, the drafters of the Rome Treaty took the exact opposite approach towards military industries. The idea of comprehensive economic integration is simple, although its legal implications are rather complex. By merging the economies of the Member States, greater welfare is stimulated by the efficiency gains which accompany the wider competition between companies. Instead of placing production under the supervision of supranational authorities – as for coal and steel – the Treaty of Rome strictly limited the sovereignty of its signatories on their regulatory and trading capacities by the rules on the internal market and competition. Actions of governments were to be constrained by the forces of a free European market. Instead of preventing war through military integration, the Treaty of Rome sought to make the prospect of war impossible through economic interdependence.[13]

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

The Court of Justice of the EU eventually ruled in *Commission* v *Spain* (1999) that the armaments exception, like all derogations from EU law involving public safety, deals with "exceptional and clearly defined cases" and does not therefore lend itself "to a wide interpretation".[15] More recently, in *Schiebel Aircraft* (2014), the Court

12 Article 107(4) c, d & e of the EDC Treaty.

13 Moravcsik refers to this as the "liberal *national security* motivation" for governments to support European integration, see: A. Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach', *Journal of Common Market Studies* 1993, p. 484.

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

15 Case C-414/97, *Commission* v *Spain*, ECLI:EU:C:1999:417, para. 21. In fact, this was, however, already clear from the Court's judgment in *Marguerite Johnston*, see: Case 222/84, M*arguerite Johnston* v *Chief Constable of the Roual Ulster Constabulary* ECLI:EU:C:1986:206, para. 26.

indicated that the derogation based on Article 346 TFEU should also adhere to the principle of proportionality.[16] As a consequence, there is at least some degree of legal scrutiny over decisions of national governments to derogate from the internal market regime in their military procurement. Legal debate on the nature of the armaments exception is mostly concerned with the intensity of the proportionality test.[17]

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

The Treaty of Maastricht (1993) introduced a legal basis into the EU Treaties for a Common Foreign and Security Policy (CFSP), including a Common Security and Defence Policy (CSDP). According to the current Article 24(3) TEU, the EU's engagement in the fields of security and defence should be based on cooperation "in a spirit of loyalty and mutual solidarity". As in the 1950s, it was again the prospect of a strengthened (by then unified) Germany that triggered the deepening of European integration. However, the collapse of the Soviet Union at the beginning of the 1990s, also triggered a decline of the military interests of the US in Europe which pressured the EU into becoming more self-reliant. In December 2003, the European Council launched its first security strategy. At the same time, two military operations in the Balkans were initiated, after which more missions undertaken by the Member States in an EU context followed.[18] The 2003 Security Strategy stressed the importance for the EU to share in the "responsibility for global security". Mentioning the US as the dominant military actor in the world ever since the "end of the Cold War", it proclaimed that no country could tackle global security issues on its own.[19]

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

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

17 See: M. Trybus, 'The EC Treaty as an Instrument of European Defence Integration: Judicial Scrutiny of Defence and Security Exceptions', *Common Market Law Review* 2002, pp. 1347-1372.

18 For an extensive overview of the 12 EU-based military operations since 2003 (at the time of writing this chapter) and analysis on the basis of justification and policy-embeddedness, see: T. Palm and B. Crum, 'Military operations and the EU's identity as an international actor', *European Security* 2019, pp. 513-534.

19 European Council, 15895/03 PESC 787, *A secure Europe in a better world – European Security Strategy*, Brussels: 8 December 2003, p. 3.

20 EU External Action Service, *Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign and Security Policy*, June 2016.

21 *Ibid,* p. 19.

22 *Ibid,* p. 20.

base, a "fair, functioning and transparent internal market" is deemed necessary. National defence (procurement) programmes are considered insufficient to address capability shortfalls, thus collaborative procurement should be increased.[23]

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

The more binding commitments stress the need for collaboration in developing and utilising capabilities. They require commitment to the joint use of existing capabilities, commitment to help overcome European capability shortcomings and demand a European collaborative approach in addressing capability shortcomings.[28] The vague language of these commitments, however, leaves much discretionary power at the national level. When it comes to public procurement and industrial policy, the participating Member States for instance committed to "the intensive involvement of a future European Defence Fund in multinational procurement with identified EU added value" and to ensuring "that all projects with regard to capabilities led by participating Member States make the European defence industry more competitive via an appropriate industrial policy which avoids unnecessary overlap".[29] This vagueness is not as strange as it might at first have seemed, now that it has been proclaimed in the considerations of the Council decision that participation in PESCO is voluntary and that it "does not in itself affect national sovereignty or the specific character of the security and defence policy of certain Member States".[30]

The effect of these commitments on procurement liberalisation is therefore minimal and depends on the legal and political-economic structures of concrete projects. PESCO merely provides a platform for the participating Member States to take part in the joint development of military capabilities (be it industrial, technological or operational). By December 2019, there were 47 ongoing projects with a cross section of the Member States involved in each of them. Projects vary from a project of 24 Member States working together on military mobility by simplifying and standardising military transport procedures, to a project involving only France and

23 *Ibid,* pp. 45-46.
24 Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States.
25 See also Protocol No. 10 of the Lisbon Treaty.
26 Only the UK, Denmark and Malta did not join.
27 See: EEAS, *Factsheet: Permanent Structured Cooperation (PESCO) – Deepening Defence Cooperation among EU Member States* <www.eeas.europa.eu> (accessed December 2019).
28 Council Decision (CFSP) 2017/2315 cit. *more binding common commitments,* nr. 10, 15 and 16.
29 *Ibid,* nrs. 8 and 19.
30 *Ibid,* recital 4.

Italy for designing and developing a new prototype for a military ship.[31] In operational terms, it can therefore easily be argued that PESCO is effective in enhancing – and deepening – cooperation among those parties which participate. The extent to which the commitments are in effect *legally* binding is, however, more questionable. The nature of PESCO is inherently (as it is project-based) based on cooperation rather than integration (like other CFSP policies, its obligations are intergovernmental rather than supranational).

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

1.1.3 The legal roots of the NATO constraint on EU military integration

As stressed in Section 1.1.2, serious steps towards more institutionalised military cooperation were taken with the Lisbon Treaty. The legal status of these commitments becomes, however, more troublesome when simultaneously considering obligations from the North Atlantic Treaty.[34] For systemic understanding of the EU's legal regime on military procurement, it is necessary to consider these different sources of law (public international law, EU CFSP law and EU internal market law), their political origins and their hierarchy.

NATO is based on the principle and legal norm of collective self-defence. Just as importantly, the North Atlantic Treaty obliges its signatories to "maintain and develop their individual and collective capacity to resist armed attack", *i.e.* to possess sufficient military capabilities for effective collective self-defence.[35] In 2014, the NATO countries

31 The projects mentioned are *Military Mobility* (6 March 2018) and *European Patrol Corvette* (EPC – 12 November 2019); an overview can be found on the website of the Council, see: <www.consilium.europa.eu>.

32 S. Blockmans, 'The EU's Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding Pesco?', *Common Market Law Review* 2018, p. 1820.

33 *Ibid,* p. 1821.

34 The nexus between NATO obligations and the EU's internal market regime has also been extensively evaluated in a recent study by the author and others commissioned by the Dutch Ministry of Defence, see (in Dutch): E. Manunza, N. Meershoek & L. Senden, 'Het Ecosysteem voor de militair-logistieke capaciteiten van de adaptieve Krijgsmacht: In het licht bezien van het NAVO-Verdrag, de EU-Verdragen en het nationale aanbestedings- en mededingingsrecht' (English translation available), *Utrecht University Centre for Public Procurement & RENFORCE* 2020.

35 North Atlantic Treaty, Washington D.C.: 4 April 1949, Article 3.

agreed that this means that defence expenditure should entail 2% of their GNP and that 20% of this should be spent on "major equipment".[36] The EU Treaties since the Treaty of Lisbon include a collective self-defence clause as well in Article 42(7) TEU, and PESCO includes similar expenditure and investment commitments. The legal primacy of military security for those Member States which are also part of NATO lies, however, with the transatlantic organisation. The EU's collective self-defence clause itself stresses that NATO "remains the foundation of their collective defence and the forum for its implementation". Moreover, Article 42(2) TEU, requires coherence between the EU's CSDP and NATO's security and defence policies. Regardless of the political-historical logic behind these limitations on EU integration, the NATO constraint has a legal logic as well. Article 351 TFEU emphasises that "rights and obligations arising from agreements concluded before 1 January 1958 […] shall not be affected by the provisions of the Treaties".

It seems that the flexibility of the CSDP obligations and the Treaty-based primacy of NATO obligations for most Member States make legal compatibility likely, whether always politically feasible or not. However, what about the military procurement obligations arising from the EU's internal market regime? The primacy of the North Atlantic Treaty, as envisioned by Article 351 TFEU should be respected there as well. When it comes to the relationship between international obligations and EU law, the Court of Justice of the EU usually solves such tensions by consistent interpretation. The jurisprudence of the Court on the security exceptions to the internal market regime shows that such consistent interpretation is normally possible in a procurement context as well. In *Van Duyn* (1974), the Court established that, although derogations must be interpreted narrowly for the effectiveness of EU law, situations in which public policy concerns can justify such derogation vary between different countries and different time periods.[37]

These circumstances include the membership of a military alliance. In *Campus Oil* (1984), the Court implicitly accepted the fact that Ireland was not a member of any alliance and maintained a policy of neutrality as supporting Ireland's security arguments to impose trade restrictions on oil importers to maintain national energy capabilities.[38] Moreover, it is settled case law that derogation from the EU Treaties based on public security includes the foreign policies of Member States. In *Werner* (1995), the Court noted that it is difficult (and too artificial) to draw a hard distinction between security and foreign policy, as the former necessarily depends on the latter. In a globalised world, it would be dysfunctional to consider the security of a state in isolation and to neglect the overall security of the international community and the legal obligations arising from this international context. Therefore, the Court concluded that "the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations may affect the security of a Member State".[39] That considerations of foreign

36 NATO, *Wales Summit Declaration*, 5 September 2014, para. 14.

37 Case 41/74, *Yvonne van Duyn and Home Office*, ECLI:EU:C:1974:133, para. 18.

38 See: Case 72/83, *Campus Oil*, ECLI:EU:C:1984:256. For the arguments of Ireland in particular, see the AG's opinion: Opinion of AG Sir Gordon Slynn in *ibid*, p. 2759.

39 Case C-70/94, *Fritz Werner Industrie Ausrüstungen GmbH*, ECLI:EU:C:1995:328, paras 25-27.

policy, or more specifically NATO membership, may justify derogation from the EU's public procurement regime was emphasised by the Court in *Commission* v *Belgium* (2003). The Court accepted derogation by Belgium from EU public procurement law without conducting an in-depth proportionality assessment, after acknowledging that the invoked security interests related to Belgium's responsibility for the security of not only its own military installations, but also those on the premises of NATO.[40]

1.1.4 The 'return' of war and the birth of a geopolitical Europe?

War returned to the European continent in February 2022 when Ukraine was brutally invaded by the Russian armed forces. The EU responded relatively fiercely towards Russia's military aggression. Although it appeared impossible or unfeasible to immediately shut down all oil and gas imports from Russia and thereby end all economic interdependence, the Member States in cooperation with their allies have imposed heavy economic sanctions. High Representative Borrell proclaimed before the European Parliament that "this is the moment in which the geopolitical Europe is being born" and that it is now time for the EU to "become a hard power".[41] Faced with Russia's military aggression next to the EU's borders, the Council decided for the first time to directly supply a third country with military equipment by pledging to deliver for 450 million euros worth of arms to the Ukrainian Armed Forces within the framework of the European Peace Facility (EPF).[42] As peace and security within the EU have traditionally been based on internal economic interdependence and external military protection by NATO, the decision to deliver weapons to Ukraine was coined a 'watershed moment' in European integration.[43]

From an institutional perspective, the EPF is indeed a remarkable development within the context of the CSDP. This framework was adopted in 2021 to "finance the common costs of military operations and missions under the CSDP, as well as operating expenditure".[44] It was based on Article 28(1) TEU which creates the possibility for the EU to take operational action when an "international situation" so requires. The EPF replaced the previous Athena system under which CSDP operations could be funded.[45] Unlike the previous frameworks, the new mechanism can also be used for the financing of assistance measures to strengthen the military capabilities of

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

41 European Parliament, *Russian aggression against Ukraine: Speech by High Representative/Vice-President Josep Borrell at the EP plenary*, Brussels: 1 March 2022.

42 Council Decision (CFSP) 2022/338 of 28 February 2022 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.

43 European Commission, Statement/22/1441 by President von der Leyen on *further measures to respond to the Russian invasion of Ukraine*, 27 February 2022.

44 Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility, and Repealing Decision (CFSP) 2015/528, Preamble cons. 11.

45 The Athena mechanism was first adopted in 2004, see: Council Decision 2004/197/CFSP of 23 February 2004 establishing a mechanism to administer the financing of the common costs of European Union operations having military or defence implications.

third states or to support peace operations led by a third state, including the supply of military equipment designed to deliver lethal force.[46]

For the purpose of an assistance measure it seems that the EPF could, in theory, also procure military equipment itself.[47] In reality, the EPF is, however, mainly used as a vehicle under which the Member States can get their self-procured equipment reimbursed. Following Article 41(2) TEU, operating expenditure within the CFSP which has military or defence implications may not be charged to the Union budget. The EPF therefore creates a separate budget in which the contributions of the Member States are determined in accordance with the GNP scale as referred to in Article 41(2) TEU.[48] The EPF thus fits the intergovernmental structures of the CSDP under which the Member States are cooperating more closely based on the "development of mutual political solidarity among Member States" as established in Article 24(2) TEU. Rather than the integration of military capabilities, the CSDP remains based on the principle of cooperative use of national capabilities.

On the 21st of March 2022 European leaders agreed on 'A Strategic Compass for Security and Defence', including the development of an EU Rapid Deployment Capacity which should be able to swiftly deploy up to 5000 troops (possibly similar to NATO-based operational capabilities).[49] The Member States committed within the ambits of this strategy to "substantially enhance" their defence expenditure and agreed on further stimulating "collaborative investments in joint projects and joint procurement of defence capabilities that are developed win a collaborative way".[50] The EU is seemingly becoming a stronger security actor. In no way does the Strategic Compass, however, indicate EU Security and Defence becoming a replacement of national capabilities or NATO. On the contrary, the Compass emphasises that EU defence policy should "contribute positively to global and transatlantic security and is complementary to NATO, which remains the foundation of collective defence for its members".[51] It is within the transatlantic security structures that the EU Member States seem to take on greater responsibility for their own security.

1.1.5 Interim conclusion: national capability commitments vs the internal market?

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

46 Council Decision (CFSP) 2021/509, Article 1(2) and Article 5(3).
47 Council Decision (CFSP) 2021/509, Article 35.
48 Council Decision (CFSP) 2021/509, Article 26(5).
49 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, p. 14.
50 *Ibid*, pp. 30-33.
51 *Ibid*, p. 5.

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

1.2 The function of military procurement in foreign policy

The UN Charter famously proclaims that members of the UN "shall refrain in their international relations from the threat or use of force".[52] Almost 75 years after the coming into force of the UN Charter, the significance of military capabilities in global politics is still difficult to overlook. Capabilities can roughly be divided into *operational* capabilities and *industrial* capabilities. Operational capabilities consist of the ability to act by deploying forces outside one's territory, depending on geography, recruitment of troops and the logistic capabilities[53] to move these troops. Industrial capabilities consist of the material assets which are necessary to operate effectively; including all procurement of military equipment by the national defence ministry.[54] Although much of the industrial capabilities are initially developed by private parties, national governments are the key actors in shaping industries, as they cover the demand side of these markets. Governments shape these industries through their public procurement policies and industrial policies, with the primary purpose of fulfilling their operational military needs to the best extent possible. The extent to which they succeed in this then partly determines their capabilities as international actors. Analysis in this chapter is limited to the industrial component of military capabilities.

Just as legal theories deal with systems of principles and rules, theories on international relations deal with power. Power is often seen as the capability to achieve certain outcomes or, more simply put, the ability to get what you want.[55] The

52 Article 2(4) of the UN Charter (1945).

53 For an analysis of possible legal obligations arising from EU internal market law for the maintenance of military-logistic capabilities in cooperation with private sector parties, see: Manunza, Meershoek & Senden, 'Het Ecosysteem voor de militair-logistieke capaciteiten van de adaptieve Krijgsmacht' 2020.

54 More indirectly, this also includes self-sufficiency in food and raw materials such as oil (economic power), see for instance: H. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, (4th edn), New York: A. Knopf 1967 and J. Mearsheimer, *The Tragedy of Great Power Politics*, W. W. Norton & Company 2001, Chapter 3. For a distinction between power in peacetime and power in wartime, see: R. Aron, *Peace and War: A Theory of International Relations* (The original text *Paix et guerre entre les nations* originates from 1962), translation by R. Howard and A. Baker Fox, Frederick A. Praeger 1967, pp. 57-61. Here, 'industrial capabilities' refers to military equipment (including technologies).

55 See for instance: J. Nye, *The Future of Power*, New York: Public Affairs 2011, Chapter 1.

procurement regulation at issue is not, however, directly concerned with political or behavioural outcomes, which are, in any case, difficult to analyse systematically as they depend on a great multitude of variables[56] and coincidences. The regulation concerns the material base of power, so it concerns the *input* rather than the *output* (desired result) of political processes. Meaningful analysis is then based on military power in terms of material capabilities (limited in this paper to industrial capabilities).[57] Military-industrial capabilities strongly link with economic power, as this provides an industrial foundation for military forces, and wealth in general, as it enables governments to afford it.[58] When referring to "power structures", as in the title of this chapter, the function of military power and its effect on the structures of the international system is meant. It is presumed that military-industrial capabilities are a significant factor in both.[59] This study does not, however, aim to specify this role as such: the focus is on the interaction between law and these material and technological capabilities.[60]

Different theories contain different explanations about the influence of power structures on the development and procurement of military equipment and *vice versa*. An extensive overview of these theories would go beyond the purpose of this study. The focus is therefore primarily on two different approaches that are present in the legal tension in the EU Treaties between national security based on the realism of self-help and military interdependence, and European (market) integration based on economic interdependence. The convincingness of different theoretical assumptions in explaining the military-industrial policies of nations is evaluated. The analysis will start with posing the main methodological question for explaining legal regimes in light of the political forces which created them. This provides a theoretical framework for the interrelationship between law and power. In the same section, the relevance of realism for understanding EU military procurement law is elaborated on, as realism poses the methodological question. Building on this, the focus shifts

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

57 Mearsheimer argues that equating power with outcomes is problematic for studying international relations, as one of the most interesting aspects of this area is how "power, which is a means, affects political outcomes, which are ends." The focus should thus be on capabilities and the way in which they could be used. See: Mearsheimer, *The Tragedy of Great Power Politics* 2001, pp. 57-60. See on this methodological problem also: K. Waltz, *Theory of International Politics*, Addison-Wesley Publishing Company 1979, pp. 191-192.

58 *Ibid*, pp. 60-75. However, this awareness was already active in the economic theories of Adam Smith, see: A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Oxford University Press 1976 – first published in 1776), Book IV, Chapter I, part I ('Of the expence of defence').

59 In any case, the usefulness of military capabilities depends on how they are used strategically and for what purpose. As famously elaborated by Thomas Schelling, modern warfare "no longer looks like just a contest of strength. War and the brink of ware are more a context of nerve and risk-taking, of pain and endurance. […] Neither strength nor goodwill procures immunity". See: T. Schelling, *Arms and Influence*, New Haven and London: Yale University Press 1966, pp. 33-34.

60 This study does in no way reject the influence of non-material forces such as culture and ideals on international politics as a whole, but the scope of the study (*i.e.* military procurement) is limited to the constitution of the material forces. Alexander Wendt, one of the main advocates of a constructivist understanding of international politics also recognizes that material forces, such as military capabilities, at some level have independent effects within the international system, see: A. Wendt, *Social Theory of International Politics*, Cambridge University Press 1999, pp. 109-113.

to interdependence and institutionalism which provide more understanding of states creating and adhering to legal regimes without neglecting the role of power.

1.2.1 Overcoming the 'realist challenge' in EU law: from realism to functionalism

Realism has a long-lasting tradition in philosophy and legal-political theories. In its essence, realism is based on the belief that power precedes morality and law rather than *vice versa*.[61] In the international system there can be a lack of effective authority as there is no centralised authority. Morgenthau therefore considered the refusal to "identify the moral aspirations of a particular nation with the moral laws that govern the universe" to be one of the main principles of realism in international relations, as power comes first. In his theory of international relations, human nature is considered as the driving force of politics. He considered the "political" human as power-seeking and acting out of *self-interest* in a world in which one is either dominating or dominated. International politics should then be explained by power defined in terms of such interest.[62] To remain free from the domination of others one first needs a secure space, which can be found in the sovereign nation state. International politics are then principally concerned with states seeking to maintain these spaces, by pursuing strategies of *state survival*. If power precedes morality, there is no limit on the means of domination, and survival is assured by acquiring superior means to potential dominators. Hence, military power is the primary source of authority in international relations.

Lacking a world government, the international system is characterised by anarchy, in which sovereign states are continuously protecting and enhancing their own interests. As a result, conflict – ultimately turning into war – is always near, and can even be considered the *ultima ratio* of power in international relations.[63] Following that line of thought, Waltz considered war in international relations as "the analogue of the state in domestic politics".[64] The difference between the state and war lies in the existence of a monopoly of legitimate physical force in the domestic system, which the decentralised international system lacks. Possessing adequate military capabilities – including as technologically advanced equipment as those of

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

62 Morgenthau, *Politics Among Nations* 1948, pp. 4-14 ('Six Principles of Political Realism'). Morgenthau's approach, to a far extent, builds on the political philosophy of Thomas Hobbes, for whom the function of the sovereign state was "to live peaceably amongst themselves, and be protected against other men", that is (internal) peace and (external) defence, see: T. Hobbes, *Leviathan*, Oxford University Press 1996 (first published in 1651), Chapter XVII.

63 E. Carr, *The Twenty Years' Crisis 1939,* p. 109. The idea of war as the ultimate instrument of (international) politics originates from the work of Carl von Clausewitz, see: C. von Clausewitz, *On War* (The original text *Vom Kriege* was first published in 1832), Oxford University Press 2008, Book 1.

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

other sovereign states – becomes vital for national security as a source of survival. If all sovereign states are guided by self-interest, dependency on foreign actors for the development and production of armaments makes one vulnerable. Procurement of military equipment developed and produced outside one's own secure space should be kept to a minimum. Although autarky in armaments production and complete technological autonomy are unrealistic in a globalised economy, somehow it remains the ideal for the realist. Even the founder of free market economic theory, Adam Smith, considered protectionism feasible in all industries that contributed to a state's military power.[65]

How does one then identify and explain legal norms in such anarchy? Does law have any potential at all? If so, can it be a tool to shape the system or is it merely a force within boundaries set by the system? These questions reflect what Slaughter considers the "realist challenge" of international law.[66] Overcoming this challenge requires an interdisciplinary approach to the understanding of legal norms that seek to regulate the relationships of sovereign states. Such an approach only works when accepting, on the one hand, that as proclaimed by Slaughter "the postulates developed by political scientists concerning patterns and regularities in state behavior must afford a foundation and framework for legal efforts to regulate that behavior".[67] These patterns can then partly predict the potential (*ex ante*) effectiveness of these efforts. In this dissertation, this interdisciplinary part of ex ante effectiveness is referred to as *functional effectiveness*.[68] These patterns are what in the title of this chapter are referred to as "power structures". On the other hand, one needs to presume that law has the potential of altering processes and outcomes of interaction between nations, as long as these legal regimes to some extent reflect existing power structures. In other words: to be an effective force, law must be functional.

This approach can be traced back to the functional approach to international law that Morgenthau envisioned in his earlier work.[69] Vigorously opposing the fundamentals of a positivist understanding of international law as a self-sufficient system which can be "understood without the normative and social context in which it actually stands", Morgenthau constructed a basis for a functional theory of international law at a most critical moment for the viability of international law. The invasion of Poland by Nazi Germany had just revealed the failure of the League of

65 Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 1776, Book IV, Chapter II. Smith used this argument to support the British *Acts of Trade and Navigation* (1651) which completely excluded all non-British ships from shipping goods to Britain. This is obviously a much broader exception to free trade than that provided by either Article 36 TFEU or Article 346 TFEU.

66 A. Slaughter, 'International Law and International Relations Theory: A Dual Agenda', *The American Journal of International Law* 1993, pp. 207-208. This 'challenge' occurred in particular after World War II had revealed the shortcomings of the post-World War I institutionalisation of international relations in bringing peace and stability.

67 *Ibid,* p. 205.

68 The methodology of this dissertation is based on the presupposition that the potential (*ex ante*) effectiveness of regulation both depends on *functional effectiveness* in terms of socio-political forces as well as *legal effectiveness* based on doctrinal purity. See again: Introduction.

69 See: H. Morgenthau, 'Positivism, Functionalism and International Law', *The American Journal of International Law* 1940, pp. 260-284.

Nations and the previous appeasement policy of the UK towards Germany to maintain stability. According to Morgenthau, law stands in a dual functional relationship with the social forces of a particular time and space.[70] In a more normative sense, international law is the "function of the civilisation in which it originates", meaning that it represents ethical values which are current in a society. At the same time, it is a "social mechanism" seeking to achieve certain objectives, be they of an economic or even military nature. The main consequence of such a functionalist approach is that law is only valid when the rules can either achieve a common interest or a balance of power.[71] International laws, such as those derived from the EU Treaties, should in that context both be a reflection of political (democratic) realities as well as a constraining force upon it.

1.2.2 Systemic constraints on international cooperation and European integration

When it comes to cooperation, realism assumes that states pursue *relative gains* rather than absolute gains. For a state the question is not merely whether cooperation or integration improves life for its citizens, but, first, whether it strengthens the state's position in the international system. Just as power precedes morality, so security precedes welfare. The consequence of states pursuing relative gains, according to Waltz, is that integration is deterred by the fears of inequality in gains and dependency; both threatening state survival.[72] States will generally all gain from international trade liberalisation, but, as observed by Gilpin, the gains are usually not distributed equally.[73] Following a realist stream of thought, states will then generally prefer relative gains over absolute gains; more so when the issue strongly connects to their military power. They will not generally trade their military power for economic gains.[74]

Bull had already noted in 1982 that enhancing military integration in Europe would require a change of policy in Britain, shifting away from its focus on transatlantic cooperation. But even after the UK joined the European Community (EC) in 1973 this was still problematic. As Bull stressed, the UK had not become the equal of France and West Germany in European politics as the UK had presumed when joining.[75] Even after the UK had joined the EC, some sort of bipolar Franco-German power structure in the decision-making processes of the Community remained. After the collapse of the Soviet Union and the process from a *unipolar* international system (dominated by the US) towards a more *multipolar* system, the influence of the US in Europe gradually decreased, along with the relative power of one of its closest European allies, the UK.

70 *Ibid,* p. 274.
71 *Ibid,* p. 275. See also: Morgenthau, *Politics Among Nations* 1948, p. 266.
72 Waltz, *Theory of International Politics* 1979, pp. 105-106.
73 R. Gilpin, *Global Political Economy: Understanding the International Economic Order*, Princeton University Press 2001, p. 77. For the impact this has on the potential for international trade treaties, see for instance: J. Goldsmith and E. Posner, *The Limits of International Law*, Oxford University Press 2005, pp. 138-143.
74 *Ibid*, p. 80.
75 H. Bull, 'Civilian Power Europe: A Contradiction in Terms?', *Journal of Common Market Studies* 1982, pp. 160-161.

Unlike the presumptions of free market economics, there is no potential of automatic harmony[76] in a system where relative gains prevail. When a state feels threatened, it will increase military spending to gain security after which other states will follow, and so on.[77] In the view of Mearsheimer this leads to an international system in which states (particularly "great powers") must be offensive actors rather than merely defensive, as one can never be certain about the intentions of other states.[78] Increased military spending will only foster overall (global) security when it improves the balance of power. There will always be conflict between the economic advantages of integration and the expensive security guarantee of autonomy. Military procurement is illustrative of the struggle, as military spending, according to Waltz, in general is "unproductive for all and unavoidable for most".[79] It would consequently be wrong to focus on economics when contextualising the law on military procurement. Economics can provide understanding of different types of secondary considerations' but the function of military procurement originates from the constraints imposed by global structures of military power. To take away the constraints on military cooperation and integration, their legal regimes should be built on balance-of-power logic rather than the economic logic of European integration.

1.2.3 Balance of power and troubled alliance

EU law is traditionally viewed from a common interest side of things, as exemplified by Article 1 TEU which mentions "the process of creating an ever closer union". One must, however, systematically distinguish between aims and means. As Article 3(1), TEU, sets out the overarching aims of the EU are to "promote peace, its values and the well-being of its peoples". The other paragraphs of the provision, which set out the means, indeed tend to emphasise supranational "common interest" means such as the internal market. Nevertheless, when the promotion of peace in a specific case is best served by more intergovernmental balance-of-power means, it takes precedence. In the words of Morgenthau, the balance of power should not be seen as a "choice of power politics", but as a "manifestation of a general social principle" and that as such it is "not only inevitable" but also an "essential stabilizing factor in a society of sovereign nations".[80] One of the major weaknesses of balance-of-power policies, namely the uncertainty of power calculations and alliances, can be countered by law,[81] but how is the balance of power reflected and safeguarded in EU law? A distinction should first

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

77 This is usually referred to as the 'security dilemma', introduced in: J. Herz, 'Idealist Internationalism and the Security Dilemma', *World Politics* 1950, p. 157.

78 Mearsheimer, *The Tragedy of Great Power Politics* 2001, p. 31. Waltz, on the contrary, argues that great powers should be defensive actors because military force is a limited instrument, through which one can establish control over a territory but not exercise it, see: Waltz, *Theory of International Politics* 1979, pp. 189-191.

79 Waltz, *Theory of International Politics* 1979, p. 107.

80 Morgenthau, *Politics Among Nations* 1948, p. 161.

81 *Ibid*, pp. 196-215.

be drawn between balance of power in the world and among actors within NATO and the EU; the external and internal balance.

The historical overview in Section 1.1. showed that major shifts in European integration were guided by balance-of-power logic, which in 1954 obstructed military integration. The formation of NATO and the EEC were generally guided as a way to balance the external threat posed by the Soviet Union.[82] The idea of a common defence provided by the EDC and the incorporation of military policies into EU law by the Treaty of Maastricht were both internally guided by (a French) fear of a militarily dominant Germany. Paradoxically, the EDC also failed because of a French fear of the loss of military control because of the presence of a militarily dominant Germany in it. The military relations between France and Germany were institutionalised within NATO by the principle of collective self-defence. There are now, however, two major problems in the EU-NATO relationship. First, NATO's establishment and success in protecting Europe from Soviet invasion depended on US hegemony within the alliance. Now that the US has been neglecting its hegemonic role,[83] a multipolar power structure within NATO arises. After Brexit, only two out of the four dominant actors within NATO are EU Member States. Cooperation within such a multipolar structure is more complex,[84] as it hampers unity and thereby creates uncertainty in military strategy. The second problem starts with not all EU Member States being in NATO. However, even among those EU Member States which are part of NATO, priorities differ. The Baltic States and Poland, bordering the threat for which NATO was founded, are more likely than France or Italy to prioritise transatlantic cooperation over the EU.[85]

Within the EU, the identified problems make the achievement of a balance of power more complex. The uniqueness of the EU is that in many policy areas the Member States have limited their sovereign rights and transferred competence to the EU. In those areas, balance of power takes on a legal-constitutional form, almost as in democratic states, by dividing powers among different institutions (*trias politica* for instance) and ideally imposing systems of checks and balances. As Article 4(1) TEU states that national security has remained the sole responsibility of the Member States, it can be assumed that the military domain is not one of these areas. Balance of power in military affairs is consequently a more political process taking place between the

82 As alliances are generally formed to balance against external threats. As observed by Walt, such threats are not based on military power alone, but on a multiple variables, i.e. aggregate power, geographic proximity, offensive power and aggressive intentions. See: S. Walt, *The Origins of Alliances*, Cornell University Press 1987, pp. 21-26 & 148.

83 This can be illustrated by the US' recent plans to withdraw military troops from Germany, see: The Guardian, *Donald Trump orders 9,500 US troops to leave Germany*, 6 June 2020 <https://www.theguardian.com/us-news/2020/jun/05/trump-orders-9500-us-troops-to-leave-germany>.

84 See for instance: Mearsheimer, *The Tragedy of Great Power Politics* 2001, Chapter 9 on 'The Causes of Great Power War' where he explains why war or conflict is more likely in multipolar power structures, as opposed to unipolar or bipolar structures.

85 See The Guardian 2020 above on the plan of former US president Trump to withdraw troops from Germany: after his statements, Polish President Duda asked for some of these troops to be sent to Poland instead, see: <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-president-duda-republic-poland-joint-press-conference-3/>.

Member States. In Section 1.3, the limitations on the residual role of the Commission are elaborated. Although the EU now consists of almost five times as many states as after the Treaty of Rome, the balance of power is often still considered to centre round a French-German consensus. This is even more the case now that the UK has left the EU. Evaluating the balance of power in the EU by looking at France and Germany only is, however, problematic because of the identified problems at the NATO level. German-French consensus will not necessarily lead to Europeanisation of military security, as the other 25 Member States have two concrete and allied alternatives to EU cooperation. They will choose their partners for military cooperation – including military procurement – based on their individual interests, not the general European interest.[86] In other words, France and Germany as the main EU powers potentially compete with the UK and the US for the alliance of the smaller European states. European security still depends on transatlantic structures of military interdependence.

1.2.4 Balance of power and military-industrial policymaking

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

The military-industrial policy of the Netherlands (as well as other European countries with similar capabilities) post-World War II illustrates an international system in which states are constrained by systemic pressures.[87] The Netherlands did not aspire to be self-sufficient in military industries, as this would have been unrealistic. To maximise national-industrial capabilities within the boundaries of the system therefore, from the 1970s onwards the Netherlands employed offset policies. Simply put, a *direct offset* means that when importing equipment, the exporting company (the prime-contractor) agrees to involve Dutch sub-contractors in the development or production of the equipment. Often such offsets come with some sort of technology transfer from the prime-contractor to the sub-contractor, stimulating technological innovation in the national industry (often through licensed production). By involvement in the development and production processes, national industry is stimulated, contrary to what happens when the equipment is imported without an offset agreement. In the latter scenario, the equipment could be acquired for a lower price. As stated by a former Dutch Minister of Economic Affairs, the extra cost serves

86 Obviously these individual security interests overlap to a far extent. The differences, such as those based on geography can, however, alter the preferences in military procurement. Poland, for instance, greatly values cooperation with the United States, as its military protections has been perceived to be Poland's primary source of security against the Russian threat ever since the collapse of the Soviet Union, whereas France and Germany have been more reluctant to act strongly against Russia's military aggression in Georgia (since 2008) and Ukraine (since 2014). For Poland's transatlantic procurement preference, see Chapter 2.

87 With regard to this example, see: E. Dirksen 'The defence-industry interface: The Dutch approach', *Defence and Peace Economics* 1998, pp. 83-97.

an industrial policy purpose by aiming to level, however slightly, the unequal nature of the international military equipment market.[88]

The most well-known example of this policy is the participation of the Netherlands in the US-led project of the development of the F-35 fighter plane and the eventual procurement of these planes. As explained by Scott-Smith and Smeets,[89] Dutch participation and gradually expanding involvement in the F-35 project was first and foremost a geopolitical decision rather than an economic one. A "deep-rooted" preference of the Royal Netherlands Air Force (RNAF) for cooperating with the US was primarily based on the aim to secure alignment with a global "superpower".[90] This fits in with the aspect of realism as set out in this section. For a country with limited capabilities to increase its power it is better to align with a global superpower than a regional (European) one: it triggers a greater relative power increase. Only once the decision had been made to participate in the F-35 programme, did industrial reasons become increasingly important to expand the involvement and to procure the aircraft. In their study, Van de Vijver and Vos estimated a turnover value of the F-35 programme for Dutch companies of over €9.2 billion and over 23,000 man-years of employment.[91] In time, the Dutch aerospace industry became dependent on the F-35 programme and the Dutch involvement in it. So, even when Saab, in 2008, once again offered the Gripen planes to the Netherlands for a significantly lower cost price, the Netherlands was by then engaged too deeply with the F-35 project and had become too industrially dependent on it to switch.[92] Although such collaboration is complex, realists would simplify the crux of these decision-making processes by stating that the military benefits of alliance with the US superseded economic concerns, just as these type of benefits supersede morality and law. Concerns of military power constrain the achievement of economic gains by collaboration rather than vice versa, as security is – more generally – a precondition for economic welfare.

88 Letter of the Minister of Economic Affairs to the Second Chamber of Parliament, *Enforceability of offset-agreements*, Nr. 24 793, 21 June 1996, p. 4.

89 G. Scott-Smith and M. Smeets, 'Noblesse oblige: The transatlantic security dynamic and Dutch involvement in the Joint Strike Fighter programme', *International Journal* 2012-2013, conclusion.

90 Stemming from the US context, such preferences are sometimes also linked to what is referred to as the 'military-industrial complex', which was introduced by former US President Eisenhower. It refers to informal ties between the military, politicians and industry actors, influencing (and possibly corrupting) such acquisition processes, see: Transcript of President Dwight D. Eisenhower's Farewell Address (1961), <www.ourdocuments.gov>. See also: K. Hartley, 'The Arms Industry, Procurement and Industrial Policies', in: T Sandler and K Hartley, *Handbook of Defense Economics: Volume 2 – Defense in a Globalized World*, Elsevier 2007, pp. 1155-1156.

91 M. van de Vijver & B Vos, 'The F-35 Joint Strike Fighter as a Source of Innovation and Employment: Some Interim Results', *Defence and Peace Economics* 2006, pp. 155-159.

92 Moreover, the Dutch Court of Auditors concluded in a report presented to the Dutch Parliament in March 2019 that the time-planning of the programme was completely dependent on political decision-making in the US, leaving the Dutch only with the choice to 'get on the bus, or let it pass', see: Algemene Rekenkamer, *Lessen van de JSF – Grip krijgen op grote projecten voor aanschaf defensiematerieel*, The Hague: March 2019.

1.2.5 Interdependence and institutionalism: finding certainty in legal regimes

Compared with realism, institutionalism and interdependence provide more optimism for a rule-based international order, beyond merely shaping and facilitating a balance of power. Keohane and Nye's theory of *complex interdependence* offers both an additional and alternative approach to global politics. Although core realist assumptions are accepted, interdependence grants a less dominating role to states as the main actors in international politics and the use of force as their primary – and of last resort – policy instrument.[93] Deepened *transgovernmental* relations by increased international trade constrain the actions of states in different ways from the ways in which realism perceives the use or threat of military force to do. Consequently, international relations have become more like domestic politics. Next to military power, there is a multitude of issues involved, lacking a clear hierarchy.[94] Particularly in a region as economically integrated as the EU, the *high politics* of national (military) security do not necessarily dominate the *low politics* of welfare.[95]

As opposed to the previously discussed direct offsets in military procurement, indirect offsets are a straightforward example of the interaction between high politics and low politics. By means of indirect offsets, national governments oblige foreign suppliers of military equipment to place orders with domestic industrial actors which are not directly connected with the imported goods.[96] Hence, military expenditure is used to promote low-politics objectives, aiming to stimulate national industries and increase employment, but this does not indicate that military industries are interchangeable with other economic sectors. Indirect offsets are mostly used when direct offsets are impossible because of a lack of relevant industry in the procuring state. The hierarchy in which military concerns supersede general economic concerns remains.

According to Keohane and Nye, increase in non-discriminatory international trade and the development of huge multinational companies after World War II took place in a "political environment favorable to large-scale institutionalized capitalism".[97] One of the core presumptions of this "economic process model" of explaining international relations is that economic welfare is the dominant political goal for national governments. Although economic interdependence and integration lead to loss of national autonomy, once interdependence has been institutionalised withdrawal is difficult, as the welfare costs of disrupting economic (international) relations will generally outweigh the autonomy benefits. Military power is then not considered a suitable policy instrument to address issues lacking a direct security

93 R. Keohane & J Nye, *Power and Interdependence* (3rd edn), Longman 2001 (first published in 1977), Chapter 2.
94 *Ibid,* pp. 22-23. In Waltz's structural realist approach, the structure is determined by military power only and all behaviour is explained within this structure, see: Waltz, *Theory of International Politics* 1979. Interdependence theory, on the contrary, relies on *issue structure* in which "different issue areas often have different political structures that may be more or less insulated from the overall distribution of economic and military capabilities" (*Ibid,* p. 43).
95 *Ibid,* Chapter 2.
96 Dirksen 'The defence-industry interface' 1998, p. 91.
97 Keohane & Nye, *Power and Interdependence* 1977, p. 34.

concern and is thus not always the last resort option. Keohane and Nye therefore consider realism as inadequate to explain much of international relations because it relies on a presumed hierarchy of issues in which military security always takes precedence. In their alternative approach, different issues are considered to occur in different political structures. Following this approach of *issue structuralism*, these different issues should then be analysed in isolation.[98]

The example of the Dutch participation in the F-35 programme shows that one must distinct between economic- and military interdependence.[99] Although the Netherlands deliberately sacrificed much more of its autonomy than it would have done within a similar European project, the prospects of relative gains were higher, as it ensured alliance with a global superpower rather than with regional European powers. For a country like the Netherlands, often lacking the industrial capabilities to develop and produce military equipment such as fighter planes autonomously, industrial cooperation can also foster military interdependence.[100] As observed by Waltz, a high intensity of military interdependence is likely to occur within multipolar power structures.[101] By engaging in the F-35 programme the relative power of the Netherlands in the international system – more specifically in the interdependent power structures of NATO – increased and meanwhile the domestic aerospace industry could survive.

To ensure that *interdependence* does not turn into mere *dependence*, it is thus wise for middle-sized countries to diversify their collaboration partner-states. As elaborated by Mark Leonard, unrestrained interdependence and connectivity in a general sense cause international conflict when gains are distributed unequally.[102] He therefore considers it necessary to establish "healthy boundaries" based on "respect for sovereignty".[103] In the legal context of EU military procurement regulation such

98 *Ibid*, p. 43.

99 The decision of the Dutch government to participate in the F-35 project was also triggered by the disaster of Srebrenica in 1995, where the Dutch military was incapable of protecting the Bosnian population from the Serbian military because of NATO's failure to provide air support. This made it clear that the Netherlands needed to be more self-sufficient (less dependent on international cooperation) in operational terms. This is pointed out in Scott-Smith & Smeets 'Noblesse oblige' 2012-13. p. 54 and mentioned in C. Klep, *Dossier JSF*, Boom: 2014, p. 20. Interestingly, the failure of Europe to act in the Yugoslav wars is often also mentioned as triggering higher involvement by the EU in military affairs, see for instance: Palm & Crum 'Military operations and the EU's identity as an international actor' 2019. and T. Palm, *Normative Power and Military Means: The evolving character of the EU's international power*, Dissertation: Vrije Universiteit Amsterdam 2017, p. 20.

100 International collaboration can in that regard be seen as a second-best solution; domestic production being the best solution, see: E. Kapstein, 'International Collaboration in Armaments Production: A Second-Best Solution', *Political Science Quarterly* (1991-92) pp. 657-675.

101 Although Waltz does not consider this to be positive for international order, see: Waltz, *Theory of International Politics* 1979, pp. 168-169.

102 M. Leonard, *The Age of Unpeace: How Connectivity Causes Conflict*, Penguin Random House UK 2022 (first published in 2021), p. 86. Focusing on 'global economic networks', this situation has also been framed as one of *weaponized interdependence*, see: H. Farrell & A.L. Newman, 'Weaponized Interdependence: How Global Economic Networks Shape State Coercion', *International Security* 2019, pp. 42-79. For a much broader analysis of how states engage in different types of *hybrid warfare* enabled by globalization, see: M. Galeotti, *The Weaponisation of Everything: A Field Guide to the New Way of War*, Yale University Press 2022.

103 *Ibid*, p. 175.

a sovereignty boundary clearly exist within the EU Treaties, as there is a specific exception in Article 346 TFEU. EU law thus provides – at least some – room for manoeuvre for Member States to balance between *sovereignty and interdependence* in military procurement regulation.[104]

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

1.2.6 The role of international institutions

Interdependence-based theories tend to stress the equal importance and reinforcing relationship between wealth and power as the goals of states.[105] Even when accepting that nations are preoccupied with relative gains rather than absolute gains, Keohane prescribes systemic value to international institutions. These international institutions, first, allow "small and weak states" to form coalitions and align their policies.[106] Secondly, these regimes "change the calculations of advantage that governments make".[107] They facilitate cooperation by creating patterns of legal liability which reduce uncertainty of outcomes. Regimes also solve the problem of asymmetrical information which impedes cooperation in a state of anarchy.[108] They thereby reduce the fear of states about the intentions of others. By engaging in international institutions and committing themselves to shared purposes, it is then presumed that the behaviour of states is significantly influenced. In particular, the reliability of states would be affected if one state fails to fulfil its commitments. A decrease in reliability would then make states lose power as well. This approach implies that diplomacy is a dynamic process in which international institutions influence states and vice versa.

It should, however, be noted here that the EU's Directive on military procurement is more ambitious than just changing the ways in which states approach military industries. The regulation does not seek to facilitate military interdependence between the EU Member States, but instead seeks to link their military procurement to the internal market, which is organised on the basis of cross-sectoral specialisation. It is obvious that institutionalised collaboration in military affairs (mostly within the context of CFSP) has created awareness among EU Member States that they often are stronger together. The regulation, however, seeks to reduce the ability of states to choose between a domestic, European or international approach based on military-strategic considerations. In concrete cases, it is difficult to decide when national security interests necessitate a domestic approach. However, if military industries are completely Europeanised, some states will lose their industrial capabilities which they now have, and therewith the ability to produce military equipment domestically, while

104 On sovereignty, see Chapter 3 and on the security exceptions, see Chapter 4.

105 This definition is used by Keohane in: R. Keohane, *After Hegemony: Cooperation and Discord in World Political Economy*, Princeton University Press 1984. He refers to: R. Gilpin, *U.S. Power and the Multinational Corporation*, New York: Basic Books 1975, p. 43.

106 Keohane & Nye, *Power and Interdependence* 1977, p. 31.

107 R. Keohane, *After Hegemony* 1984, p. 26.

108 *Ibid*, Chapter 6.

the international and the EU-CFSP systems still pressure them to be self-sufficient in operational capabilities.

It is clear that the Directive did not succeed in linking the military industries to the rest of the internal market.[109] Looking at the theoretical construct of issue-linkage brings understanding as to why.

1.2.7 Issue linkage as a prerequisite for institutionalism

Within institutionalist theories, "issue linkage" is considered the main condition under which integration can take place. Keohane considers issue areas to be the scope of international regimes and to include different issues that are regarded as so closely linked by governments that they should be dealt with together.[110] Regimes, in that sense, facilitate the linkage of issues to one another.[111] More importantly, they provide incentives for compliance, even when this is for a specific issue not beneficial, by "retaliatory linkage". When a state chooses to disturb a certain issue in a regime this will not only affect cooperation or integration on this issue, but it will disturb the functioning of the regime as a whole. It might even disturb other regimes which exist within the same network.[112] Accepting Keohane's understanding of regimes means that the potential effectiveness of placing new rules within a regime depends on whether the new issue is regarded as so closely related that it should be dealt with together with the other issues.[113] Alternative to this "substantive linkage", Haas considered linkage to be possible through some sort of *do ut des* ("tactical linkage") or when non-linkage would create great uncertainty ("fragmented linkage").[114] For tactical linkage it is, however, still necessary that different issues have similar value for the sovereignty of the actors, meanwhile fragmented linkage relies on the impossibility to deal with something at a national level. If one of the linkage methods is not sufficiently present but linkage is institutionalised anyway, incentives for compliance are deemed to be minimal.

According to Trybus, sovereignty for EU Member States in the area of defence would imply 'defence autarky', i.e. being fully independent from any other nations through self-sufficiency.[115] It is clear that even for the European nations with the largest capabilities (UK, Germany and France) autarky will not be such a realistic option, because this would come with too high a cost. Unwillingness of governments to increase military expenditure at the cost of welfare-oriented policies, in a general

109 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, still 82% was awarded domestically. See: European, Implementation Assessment 2020, pp. 86-98.

110 *Ibid*, p. 61.

111 *Ibid*, p. 91.

112 *Ibid*, p. 104.

113 According to Moravcsik, linkages are therefore more likely to succeed "within, rather than between, sectors", see: A. Moravcsik, 'Preferences and Power in the European Community' 1993, p. 506.

114 E. Haas, 'Why Collaborate? Issue Linkage and International Regimes', *World Politics* 1980, p. 372.

115 Trybus, *Buying Defence and Security in Europe* 2014, pp. 40-41.

sense, fits interdependence theories. In particular, at the national level, in a context of budgetary constraints, the boundaries between security and socio-economic policy objectives become increasingly blurred. However, this does not indicate that *issues* of military and economic power can easily be *linked* to each other in an international regime. It only indicates that military security and wealth reinforce each other, as military power requires an industrial and technological base to produce armaments. In a similar fashion, military power requires a population from which to recruit troops. In a more general sense, wealth is simply necessary – in the last resort – to make going to war affordable.[116] The available budgetary and industrial means in a state for military procurement alter its capabilities, not its function.

Military interdependence is a vivid reality within the EU and NATO, but its industrial component is not based on the economic logic of linking different sectors within a broader regime of market integration. Instead, it should be treated separately.

1.2.8 Interim conclusion: military interdependence instead of issue-linkage

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

To fully understand the characteristics of the apparent conflict between the function of military procurement and the EU's approach to regulating it, the next section will discuss the main characteristics of this regulatory approach.

1.3 The Commission's pursuit of strategic autonomy by industrial and procurement policies

Defining and implementing the CFSP is the prerogative of the EU's *intergovernmental* institutions. The Treaty of Maastricht did, however, create political momentum for intervention by the *supranational* Commission in domestic industrial policies on

116 Mearsheimer considers that military forces are built on societal resources of which "the size of a state's population and its wealth are the two most important components for generating military might", see: Mearsheimer, *The Tragedy of Great Power Politics* 2001, pp. 60-61.

military equipment. This started with a 1996 policy document. The actions of the Commission in the field of military industries are based on the internal market competence of the EU, as the Commission lacks competence on CFSP matters. In internal market affairs, the Commission can initiate legislation and monitor compliance. In the 1990s, the end of the Cold War had led to significant cuts in military spending by the Member States. This had triggered a crisis in military industries, both in terms of employment and industrial capabilities. The Commission stressed that international competition was threatening the existence of the European military industry and that overcoming this required a "traditional"[117] European approach based on economic efficiency in procurement policies.[118] The Commission also mentioned the lack of competitiveness of European industry by mentioning that "inclusive of intra-EU trade: 75% of imported major conventional weapons came from the US in the 1988-92 period".[119] Most EU Member States appeared to be more deeply integrated with the US than with each other.

The Commission took on a rather ambiguous approach to European security in its 1996 policy paper by claiming that this depended on two factors. First, the creation of a "centre of stability" should take place through expansion, by letting in all European countries wishing to join the EU. Secondly, this stability should be reached by establishing a "fully fledged" CFSP.[120] For the latter, it was deemed essential to develop a common armaments policy; this ambition can still be found in Article 42(3) TEU. Both the establishment of the EDA and PESCO, however, reveal that this approach led to differentiated integration rather than deepened integration in the field of defence. Geographical expansion of the EU and deepening integration, even though they both aimed to foster security, do not go hand in hand, nor do they necessarily reinforce each other. The lack of binding legal commitments also raises questions about how "fully fledged" the EU's defence policy is.

The Commission furthermore contested the broad interpretation and application of the Article 346 TFEU exception by the Member States by proclaiming that the exception does not grant any general powers to the Member States. More concretely, the Commission stressed that the exception does not fully exclude armaments from the scope of EU law. Only when objectively necessary for the protection of national security interests, can the exception be invoked. This approach – which, as mentioned, departs from a literal interpretation of the text of Article 346 TFEU – gained legal strength from a judgment of the Court in 1999. In the context of Spain exempting the import of armaments from VAT contrary to an EU directive, the Court ruled that Spain had "not demonstrated that the exemptions provided for by the Spanish Law are necessary for the protection of the essential interests of its security".[121] In a

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

118 Communication COM 96 10 final from the Commission, *The challenges facing the European defence-related industry, a contribution for action at European level*, Brussels: 24 January 1996, p. 3.

119 *Ibid,* p. 7.

120 *Ibid,* p. 11.

121 Case C-414/97, *Commission v. Spain*, ECLI:EU:C:1999:417, para. 22.

more recent judgment the Court even read some sort of proportionality test into the exception.[122] This shows that there is a limit to the discretionary power of the Member States to invoke Article 346 TFEU.

To understand the difficulties of linking military security integration to the internal market regime in a more practical sense, this section evaluates the Commission's most prominent policies and legislation in this field, *i.e.* the Defence Procurement Directive and the European Defence Fund (EDF), based on the theoretical findings of Section 1.2.

1.3.1 The Defence Procurement Directive (Directive 2009/81/EC)

The jurisprudence of the Court eventually opened the way for the Commission to propose sector-specific procurement legislation for the military sector.[123] The Directive was subsequently adopted in 2009 by the EU legislature on the basis of Article 114 TFEU, the EU's competence to harmonise legislation relating to the internal market.[124] The Directive is not based on Article 42(3) TEU, thus it cannot – theoretically – be considered part of a common armaments policy as envisioned by the Commission in 1996. The fact that arms exports are still regulated within the realms of the CFSP confirms this.[125] Considering the exclusion of legislative competence in the area of the CFSP, adopting a Directive would have been impossible. This does not, however, make the Directive less ambitious. In the Preamble the legislature proclaims that:

> "the gradual establishment of a European defence equipment market is essential for strengthening the European Defence Technological and Industrial Base and developing the military capabilities required to implement the European Security and Defence Policy".[126]

There is a clear logic in these objectives. The CSDP requires industrial military capabilities to be developed in a more transnational setting. As this sector is characterised by public *monopsonists* (i.e. the demand side is exclusively covered by governments), integration is only possible when governments refrain from protectionism in their procurement. For the smaller countries to take advantage of the extended economies of scale, collaborative procurement is often needed. Even if military capabilities remain at the national level, integration of industries can strengthen the overall EU industrial capabilities by the efficiency gains. Combined with

122 Case C-474/12, *Schiebel Aircraft*, ECLI:EU:C:2014:2139, para. 37.

123 See for this line of thinking, based on the idea of the Commission engaging in "judicial politics": M. Blauberger and M. Weiss, "'If you can't beat me, join me!" How the Commission pushed and pulled member states into legislating defence procurement', *Journal of European Public Policy* 2013, pp.1120-1138.

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

125 Common Position 2008/944/CFSP of the Council of the EU of 8 December 2008, Defining common rules governing control of exports of military technology and equipment.

126 Directive 2009/81/EC, Recital 2. Interestingly, the objectives of the *supranational* Directive resemble the Treaty-based tasks of the *intergovernmental* EDA, see: Article 45(1) TEU, in particular sub (b) and sub (e).

increased spending, economies of scale should also foster technological innovation, which is crucial in an international system characterised by state competition and technological arms races.[127]

Next to the substantive legal implications for the procurement policies of the Member States, the main institutional implication of the entry into force of the Directive in 2011 is perhaps more ground-breaking. By initiating the Directive, the Commission strengthened its position in military affairs. It created a legislative basis for enforcement, as the Commission has a general competence to monitor the compliance of Member States with the EU Treaties.[128] The proper implementation and application of Directives is a part of this. As mentioned before, the Commission cannot monitor the compliance of Member States within the area of the CFSP.

The potential effectiveness of the Directive is, however, already compromised by the exclusion of different types of intergovernmental collaborative procurement from its scope of application.[129] According to the European Defence Agency's (EDA) Defence Data, European collaborative defence procurement expenditure as a percentage of total procurement expenditure ranged from about 20% to 11% in the period 2017-2020.[130] In addition, many major procurement projects including third countries, such as the US and the UK, can also be excluded from the scope of application of the Directive. For most EU Member States, the greatest share of military imports is still coming from the US rather than one of their European allies.

When it comes to offsets, the implications of the Directive are surrounded with ambiguity. It has been argued that the Commission intentionally left this issue outside[131] the Directive, as including its strict interpretation on the compatibility of it with primary EU law would not be accepted by the Council.[132] At the same time, any inclusion of regulation on certain types of offsets would undermine the Commission's position on the inherently discriminatory nature of these. Offsets can then only be justified on a case-by-case basis on grounds of public or national security. Nevertheless, with the Directive the Commission got "a foot in the door".[133] To fully shape its strict approach on offsets, the next step for the Commission was to "step through the door".[134] In January 2018, the Commission opened infringement procedures against both Denmark and the Netherlands for imposing unjustified offset requirements on foreign suppliers, thereby infringing primary EU law and incorrectly transposing the

127 See for instance: The Economist, *Mind control – Artificial intelligence and war*, 5 September 2019.
128 Article 258 TFEU.
129 Directive 2009/81/EC, Article 12 and Article 13.
130 European Defence Agency, *Defence Data 2019-2020: Key findings and analysis*, Brussels: 2021, p. 11. Still far behind on the agreed benchmark of 35%.
131 Although the Directive provides rules on sub-contracting, see: Article 21 and Title III of Directive 2009/81/EC.
132 M. Weiss & M. Blauberger, 'Judicialized Law-Making and Opportunistic Enforcement: Explaining the EU's Challenge of National Defence Offsets', *Journal of Common Market Studies* 2016, p. 453. This is also explicitly mentioned in: European Commission, Directive 2009/81/EC: Guidance Note – Offsets, 12-02-2016 (first version of 2010), para. 18.
133 See: M. Weiss & M. Blauberger, 'Judicialized Law-Making and Opportunistic Enforcement' 2016, p. 453.
134 *Ibid*.

Directive.[135] The fact that Denmark does not participate in EDA or PESCO makes these infringement procedures politically extra sensitive.

The Directive does not regulate or even mention offsets but it does offer an alternative. Contracting authorities may require a successful tenderer to sub-contract a maximum of 30% of the contract to third parties[136] and they may oblige tenderers to sub-contract based on non-discriminatory and transparent procedures.[137] There is, however, no obligation to do so. In procurement procedures in which it is likely that a domestic company will win, there is little to no incentive for a Member State to require competitive bidding for sub-contracts. According to Trybus, the sub-contracting regime of the Directive is a compromise between the Member States with the bigger industries (*prime-contracting capabilities*) and the ones with smaller industries (*sub-contracting capabilities*).[138] That the regime is an outcome of political compromise is certainly true, but the question remains whether the rules are capable of fully liberalising the major EU military supply chains. When there is no obligation to do so, the Member States with prime-contracting capabilities will have little incentive to use the options. Following realist logic of state competition, the Member States with the sub-contracting capabilities will subsequently have less incentive to use the Directive at all, and instead will invoke Article 346 TFEU to buy domestically or impose offsets on a foreign supplier. Compromise or not, the sub-contracting regime of the Directive does not genuinely reflect the balance-of-power logic put forward in Section 1.2.

The figures of the 2015 evaluation of the Directive by the Commission and the 2020 Implementation Assessment of the European Parliament do not show a complete shift towards an open and integrated military sector. From the roughly €80 billion of military procurement by the Member States, only €19.3 was procured within the regime of the Directive.[139] 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.[140] It seems that the exception of Article 346 TFEU is still extensively used by the Member States to procure military equipment outside

135 Press release COM IP/18/357 of the Commission of 25 January 2018, *Defence procurement: Commission opens infringement procedures against 5 Member States*. However, all five infringement procedures have been dropped by the Commission after negotiations. This is remarkable, as enforcement of EU public procurement rules in the defence sector is one of the key responsibilities which was assigned to the Commission's new Directorate-General for Defence Industry and Space by the Von der Leyen Commission.

136 Directive 2009/81/EC, Article 21(4).

137 Directive 2009/81/EC, Article 21(3) and Article 51.

138 Trybus, *Buying Defence and Security in Europe* 2014, pp. 452-453.

139 Commission Staff Working Document SWD(2016) 407 final of 30 November 2016 – *Evaluation of Directive 2009/81/EC on public procurement in the fields of defence and security*, pp. 10, 33, 34. See also the document which the SWD accompanied: Report from the Commission to the European Parliament and the Council COM(2016) 762 final of 30 November 2016 on the implementation of Directive 2009/81/EC on public procurement in the fields of defence and security, to comply with Article 73(2) of that Directive. Considering that more than half of the value of military procurement within the regime of the Directive measured by the Evaluation took place in the UK, future compliance with the rules of the Directive is – to put it mildly – not so certain.

140 See: European Implementation Assessment 2020, pp. 86-98.

of the Directive's regime. The substantive provisions of the Directive will be further discussed in Chapter 4.

1.3.2 The European Defence Fund (EDF 2021-2027)

The Council and the European Parliament reached political agreement in 2019 to adopt the Commission's proposal for a European Defence Fund (EDF), worth €13 billion, for the budget period 2021-2027.[141] The budget and with it the ambitions of the EDF were, however, eventually reduced to €8 billion in 2020 because of the political compromise on the general EU budget in the context of the COVID-19 crisis.[142] The objective of the fund is clear. In line with its legal basis in the EU Treaties (Article 173 TFEU), the fund aims to foster the competitiveness of the EU's industry. More particularly, the efficiency and innovation capacity of the EU's defence technological and industrial base should be strengthened for the sake of increasing the EU's "strategic autonomy and freedom of action" in the international order.[143] It is clear from both the preamble and the award criteria for funding that "technological autonomy" is considered the crucial factor in this objective.[144] Eligible projects should contribute to "the innovation and technological development of European defence industry" and thereby increase independence from third country technologies.[145] Obviously, these aims are deemed to be achievable only in a "more integrated defence market in Europe".[146] The Commission will be the institution responsible for determining eligibility and allocation of funds. Broadly speaking, this integration should happen on three different levels.

First, integration should be fostered at the level of the supply side. Projects are only eligible for funding when undertaken within a consortium consisting of at least three different entities which are established in at least three different Member States.[147] Moreover, all the infrastructure to be used as well as the executive management structures must be on EU territory during the project. None of the recipients or involved sub-contractors can be under the control of a non-associated third country or an entity based in such a country. This is intended to safeguard the "security and defence interests of the Union and its Member States" as established in the CFSP.[148]

Secondly, integration should be stimulated throughout the supply chains of military equipment. A consortium should, in that regard, contribute to cross-border cooperation, in particular by including as sub-contractors from Member States other

141 Resolution TA/2019/0430 of 18 April 2019 of the European Parliament on the proposal for a regulation of the European Parliament and of the Council establishing the European Defence Fund.

142 European Council (EUCO 10/20), *Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions*, Brussels: 21 July 2020, p. 53. This resulted in the EDF to be adopted in April 2021, see: Regulation (EU) 2021/697 of the European Parliament and of the Council of 29 April 2021 establishing the European Defence Fund and repealing Regulation (EU) 2018/1092.

143 Regulation (EU) 2021/697, Article 3(1).

144 *Ibid,* recital 5.

145 *Ibid,* Article 12 (b) and (d).

146 *Ibid,* Recital 3-4.

147 *Ibid,* Article 10(4).

148 *Ibid,* Recital 15.

than the recipients. The legislation does not, however, in itself oblige the consortia which receive such funding to select their sub-contractors on the basis of non-discriminatory and transparent procedures. As mentioned before (Section 1.3.1.), this is possible, but not obligatory when procuring within the regime of the Directive.

Thirdly, integration is sought on the demand side through the promotion of collaborative procurement. In a general sense, it is mentioned that it is important that Member States intend to jointly procure the final product of a project.[149] For certain development activities, it is required that at least two different Member States have already expressed the intention to procure the final product in a coordinated way.[150] Collaborative procurement is also stimulated by the Council's PESCO decision, under which the participating Member States are also committed to involvement in the EDF.

1.3.3 The legal fiction of "economies of scale" by cooperation

The different initiatives of the Commission in the military domain designate fragmentation as a crucial obstacle to a strong European defence industrial base.[151] Such a base is deemed to be a prerequisite for the EU's strategic autonomy. The obvious economic argument against this fragmentation is that it is inefficient because potential economies of scale are not achieved.[152] "Unnecessary overlap" (as mentioned in the PESCO commitments) resulting in duplication is the consequence of a "systematic bias" for national solutions. Particularly when it comes to Research and Development (R&D) – characterised by major investments and limited public budgets – integration is considered crucial. In its impact assessment of the EDF, the Commission essentially blames fragmentation on the demand side of the market. If only Member States would collaborate more closely and refrain from buying domestically, the supply side would follow, which would then increase economies of scale. The free-market logic of the Commission is tempting, but the political economy of military procurement is dominated by military power rather than economics.

An example of this fragmentation, according to the Commission, is the development and production of combat aircraft. By the end of the 20th century there were three different projects being undertaken in Europe: the Eurofighter Typhoon (Germany, UK, Italy and Spain among the countries involved in the development, production and procurement), Dassault Rafale (France) and the Saab Gripen (Sweden). At the same time, the UK, the Netherlands, Denmark and Norway were financially engaged in the development and production of the F-35 project which was effectively controlled by the US government. As the Commission argues, the research costs of the three European projects exceed the costs of the F-35 project, yet the

149 *Ibid,* Recital 29.

150 *Ibid,* Article 21(3)a.

151 See: COM IP/16/4088 (press release), *European Defence Action Plan: Towards a European Defence Fund, Brussels*: 30 November 2016.

152 This is exemplified in the impact assessment by the Commission of the European Defence Fund, see: COM SWD(2018) 345 final, *Impact Assessment – Proposal for a regulation of the European Parliament and the Council establishing the European Defence Fund*, Brussels: 13 June 2016, pp. 14-15.

US-led project will produce more than double the number of aircraft.[153] The figures on which the Commission bases its assessment seem, however, quite meaningless when considering the different European projects separately, as there are significant differences in cost-efficiency. The research costs of Saab Gripen (€1.48 billion) are much lower than those of the Typhoon (€19.48 billion) or the Rafale (€8.61 billion) relative to its expected output.

Looking at the politics of these projects brings more systemic understanding. As pointed out by Hartley, the savings in development and production costs are often only theoretical. In practice there is a departure from the economies of scale of "perfect collaboration", as work-sharing is often based on political equity and offsets rather than efficiency.[154] France was initially part of the Typhoon programme, but withdrew from it in 1985 and eventually started its own programme. As mentioned by Heinrich, there is *ingrained resistance* in a *state-centric world* to hand over control of weapon systems to foreign nations, thus France apparently insisted on getting 50% of the work share.[155] If one follows a realist understanding of European politics it cannot come as a surprise that including the three major European military powers in such a cooperative programme might result in failure of cooperation. Achieving a balance of power is much more complex in a multipolar power structure – as opposed to a unipolar or bipolar structure.

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

This reality is also visible in the 2018 Defence Industry Strategy of the Dutch government. In the maritime sector, it envisions a dominant position for domestic industry, as there are prime-contracting capabilities domestically. The lower level of industrial capabilities in the aviation industry and industries providing equipment

153 According to a study conducted by the Centre for Studies on Federalism (CSF) and the Istituto Affari Internazionali, see: V Briani, *The Costs of Non-Europe in the Defence Field* (CSF 2013) p. 16. This is referred to in the EDF's impact assessment by the Commission, see: COM SWD(2018) 345 final, *Impact Assessment EDF,* p.15.

154 Hartley 'The Arms Industry, Procurement and Industrial Policies' 2007, pp. 1172-1173. Hartley also specifically evaluated the collaboration inefficiencies of the Typhoon programme, which led to cost increases, delays and reduced quantities, see: K Hartley, 'The Political Economy of Arms Collaboration', in: R. Matthews, *The Political Economy of Defence*, Cambridge University Press 2019, pp. 244-250.

155 M. Heinrich, 'The Eurofighter Typhoon programme: economic and industrial implications of collaborative defence manufacturing', *Defence Studies* 2015, p. 353.

for the land forces does not trigger a more economic approach, as the Commission foresees. Instead, the strategy seeks to compensate this by international cooperation rather than through a European market-based approach.[156] In practice such a cooperative approach indicates the use of offsets as in the F-35 programme. Offsets can, in that light, be considered a balance-of-power policy. Based on the proposed functional approach to EU law, it triggers the question whether effective regulation should include a legal framework for these offset agreements.

1.3.4 From fragmentation to "European champions"?

At the same time, France and Germany are promoting a so-called "European champions" approach, seemingly suiting the Commission's urge for greater economies of scale.[157] The Franco-German proposal for this renewed European industrial policy approach was paradoxically a reaction to the Commission's blocking of the *Siemens-Alstom* merger in the rail infrastructure sector on the basis of EU competition law. Fragmentation in the military sector is, however, more complex than a lack of large companies. According to the Commission, trans-border consolidation in the military sector has often led to "multi-domestic" companies rather than multinational ones. The use of offsets in particular stands in the way of deep integration, since it obliges these multi-domestic companies to include domestic industry in the supply chain.[158] Considering this, it is not so strange that Competition Commissioner Vestager responded to the blocking of the merger by stressing the need for a *level playing field* for European companies, for instance by using the public procurement rules.[159] The Commission pursues economic integration through a system of free competition, not through mergers.

However, also within the ambit of EU public procurement law, the proposed liberalisation of the European military industry brings with it the fear of the smaller EU Member States of an internal market dominated by "European champions" located in the major industrial countries (after Brexit: France and Germany; also, to

156 The Netherlands Ministry of Defence and the Netherlands Ministry of Economic Affairs and Climate Policy, *Memo: Defence Industry Strategy*, The Hague: November 2018, see the charts on p. 23.

157 See: Bundesministerium für Wirtschaft und Energie and Ministère de l'Èconomie et des Finances, *A Franco-German Manifesto for a European industrial policy fit for the 21st Century,* Paris: 19 February 2019. More recently, however, the German government also published a strategy proposing to keep certain parts of 'strategic industry' within their own borders, see: Die Bundesregierung, *Strategiepapier der Bundesregierung zur Stärkung der Sicherheits- und Verteidigungsindustrie*, February 2020.

158 COM SWD(2018) 345 final, *Impact Assessment EDF*, p. 15. Contrary to the findings in: M. Kluth, 'European defence industry consolidation and domestic procurement bias', *Defense & Security Analysis* 2017, pp. 158-173. Kluth compared the amount of domestic procurement (of Germany, France, UK and Italy) in the period before and after several consolidations that led to European cross-border companies (Airbus, MBDA Missile Systems, Thales and SELEX) in the areas of missiles, airborne radar and shipborne radar. Across the different segments, he found a decline of domestic procurement bias from 65% to 43% after several mergers in the military sector.

159 COM Statement/19/889, *Statement by Commissioner Vestager on the proposed acquisition of Alstom by Siemens and the proposed acquisition of Aurubis Rolled Products and Schwermetall by Wieland*, Brussels: 6 February 2019.

a lesser extent, Italy, Spain and Sweden[160]). The larger industrial Member States then have a much greater potential for relative gains than the smaller ones. Consequently, complete liberalisation would disrupt the balance of power between the stronger and weaker states in the EU. As mentioned before (in Section 1.2.3), most of these "weaker" states are not powerless, as they can choose to prioritise NATO cooperation over an EU-based approach.

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

1.3.5 Interim conclusion: the problem of linking military security with the internal market

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

1.4 A theoretical basis for EU military procurement law

Economic and political integration in post-war Europe brought improved welfare conditions and brought stability to the continent. At the same time, there is profound ambiguity between the aims and means of integration. The EU's most important *aim* has always been peace, thus European integration has always come with significant

160 See for instance the SIPRI Arms Industries Database 2018, which included only EU-based companies from France, Germany and Sweden in its global top 50 of arms producing companies <https://www.sipri.org/databases/armsindustry> (accessed: 28 February 2020).

geopolitical implications. However, only since the Maastricht Treaty have the EU's *means* intruded into the military domain. In the context of CSDP, the EU has been engaged in military missions outside its own territory and several initiatives for closer cooperation have been launched. But the EU's military capabilities are rather limited, as they are severely constrained by the military sovereignty of its Member States when compared with actors with similar or smaller economic capabilities (US and China, but also regional powers such as Russia, Turkey, Iran and Saudi Arabia).

These constraints are first on the operational capabilities and secondly on the industrial capabilities. First, although PESCO has increased and structured military cooperation, the EU itself cannot deploy military forces. This results in severe political constraints on the EU's operational capabilities, as collaboration depends on political compromise between Member States with diverging geopolitical interests. The EU's 2022 decision to develop an EU Rapid Deployment Capacity seems to indicate that some of these operational constraints could be overcome by establishing minimum capabilities for crisis responsiveness.[161] Secondly, the military prerogative of the Member States constrains the EU's industrial capabilities because of the inefficiencies that accompany both fragmentation and intergovernmental collaboration. According to the Commission, these inefficiencies severely constrain the competitiveness of European military industries in the world, leading to dependence on imports from third countries.

1.4.1 The primary role of capabilities and military interdependence

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

161 Council of the EU, *A Strategic Compass for Security and Defence* 2022, p. 14.

offsets and the presupposed illegality of offsets often make the Directive an ineffective instrument for these states' military policies.

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

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

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

1.4.2 The need for a dynamic armaments exception to the military procurement regime

It might appear paradoxical to argue for both a more *dynamic* and more *systemic* approach to EU law on military procurement, but this is inherent to the way in which interdependence and realist presumptions interact and conflict in the legal system imposed by the EU Treaties. Interdependence is traditionally framed as

the norm (internal market), and realism (national security) as the exception. Legal interpretation by the Court of Justice of the EU has played a stimulating role in the integration of the EU's internal market. The Court has done this through *teleological* (wide) interpretation of the norms and *restrictive* (narrow) interpretation of the exceptions. The latter sometimes goes against the literal meaning of legal provisions. This approach makes sense when considering the purpose of the EU Treaties. If Member States were to use the exception excessively so as to circumvent their duty to contribute to the establishment of an internal market – especially by adopting protectionist measures – it would undermine the achievement of the EU's objectives. In the military domain this is fundamentally different, because the norms themselves were adopted as alternatives to integration of military capabilities (operational and industrial). This is both apparent in the security derogations to the internal market regime and in the intergovernmental frameworks for military cooperation.

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

When interpreting the public security and national security exceptions to the internal market rules (hence, to public procurement obligations) this context should first be understood. This does not mean that a more integrated approach towards military procurement in the EU is impossible or infeasible. In an international order in which the interests of the US and the EU increasingly diverge, most Member States can only be effective actors through the EU.[162] However, the legal and political security prerogative of the Member States does indicate that the security *exception* needs a systemic understanding just as much as the interdependence *norm* does. First, this means that security needs an interpretation that suits the different security interests of Member States (along with their differences in capabilities). Secondly, the free market norm can only be effectively imposed on the Member States as far as markets are genuinely *free*. This requires enhanced consistency between the enforcement of the EU's public procurement rules and competition and state aid rules. Punishing a Member State for directly awarding a contract to a national company could be rather meaningless when the "legal" alternative is to open its procurement procedures to different types of subsidised foreign companies. Thirdly, the security exceptions should enable the use of offsets when these are necessary for effective national security strategies pursuing the maintenance of capabilities. For any regime on military procurement to be effective and consistent, it should regulate offsets.

In short, for military procurement regulation to contribute to the EU's aim of European strategic autonomy, it should be based on the function of military procurement.

162 See for instance the Churchill lecture given by the Prime Minister of the Netherlands in 2019 in which he stresses the need for the EU to become a stronger actor in the global order: M. Rutte, *The EU: From the power of principles towards principles and power*, Zurich: 13 February 2019.

Conclusion: the potential of basing EU military procurement regulation on its military function

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

Establishing an integrated market for military equipment based on *economic* logic appears unachievable and contradictory to the military-*power* logic which guides national decision-making and European legal structures for military cooperation (for instance within PESCO). More importantly, the military-power logic defines the function of military procurement; *i.e.* gaining military power. Without a demand for military power, there would be no supply. Through their military procurement, states thus primarily seek to acquire technologically superior equipment that is more effective than the equipment of (potential) adversaries. Two additional objectives of military procurement which potentially contribute to the military power of states can be distilled of the theoretical analysis in this chapter. Although these additional objectives are less straightforward, within the globalised geopolitical context of military industries they cannot be overlooked. These additional objectives are:

i) preserving domestic military industries through subsidies, buy-national policies and military offsets to maintain some level of industrial independence as a basis for national sovereignty;
ii) when some dependency on foreign entities is inevitable, state's seek to foster military interdependence within alliances through their procurement by choosing suppliers based on military-strategic preferences related to their country of origin.

Most EU Member States can then strategically choose between procurement from domestic companies or companies residing in EU- or NATO partner states to strengthen the military ties with those states. Even when a Member State explicitly chooses to strengthen EU interdependence through procuring from another Member State, for instance within the context of collaborative procurement based on PESCO or the EDF, it will not be guided by the Directive's logic of economic interdependence. 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 requiring states to contribute with their own military

capabilities.[163] Rather than regulating collaborative procurement, the Directive has therefore mostly excluded it from its scope of application.

States gain most military power and influence within military cooperation initiatives when combining the two additional objectives with the primary objective by imposing discriminatory offset requirements on the foreign supplier. Rather than the supranationalism of the internal market, regulation then more naturally suits the intergovernmentalism of the CSDP which requires Member States to contribute with their own military capabilities instead of attempting to integrate its industrial base. The means used by the Directive are perhaps reconcilable with the system of the EU Treaties, as the Directive leaves open the option of derogation based on Article 346 TFEU. However, the Directive's aim of liberalisation conflicts with the structures of the EU Treaties which rather reflect national sovereignty in this area.[164] The Directive thus lacks *functional effectiveness*. The next part of this dissertation will further examine the potential effectiveness of the Directive by considering its choice of legal basis and its general compatibility with the EU's legal system.

In addition to the legal basis problem, the question arises as to whether EU military procurement regulation should conditionally allow for military offsets. Balance-of-power policies in military procurement are often pursued by means of offset agreements. The facts that the legislature refused to regulate these agreements and that the Commission still considers those agreements to be almost always illegal reveal the great legal uncertainty that surrounds them. It did not, however, cause the Member States to stop using them. Balance-of-power policies *in abstracto* are legitimate tools by which smaller Member States can curb the power of the dominant actors in European (military) politics. However, when there are *in concreto* no clear legal constraints on them, the functioning of military equipment markets is hampered more than necessary. The next chapter will therefore further elaborate on the issue of military offsets against the background of EU law.

As argued in this chapter, the role of power structures in military procurement fundamentally differs from other public procurement, as military industries fundamentally differ from other economic sectors. It cannot be expected therefore that the military domain is simply integrated on the basis of trade liberalisation. Limiting the liberalising effect of the rules by legalising the use of offsets based on objective criteria would not stand in the way of a more integrated approach towards military procurement. It would only indicate a regulatory approach based on *military* logic instead of *economic* logic. Regulation should, in other words, be embedded within the existing structures of military interdependence between sovereign states rather than economic interdependence. To achieve greater military-*strategic autonomy*, the EU and its Member States should accept that it is a matter of military power with economic implications rather than the other way around. As suggested by this dissertation's title, effective regulation of military procurement should be based on state sovereignty and military interdependence.

163 Article 47(3&7) TEU.

164 Especially since the EDA (which was established in 2004) has been assigned with the same objectives as those pursued by the Directive. Article 45(1) TEU thus provides an alternative legal basis (which is more specific than Article 114 TFEU) for the fulfillment of the Directive's objectives.

CHAPTER 2

The Potential of Regulating Offsets as a Policy of Military Power

Introduction

Offsets in military procurement are often portrayed as a product of evil economic protectionism, resulting in major inefficiencies in the European military sector. Military offsets generally consist of obligations for suppliers of military equipment to include national industry of the procuring state in their supply-chain, instead of letting the supplier choose sub-contractors freely. Unsurprisingly, the Commission considered it unfeasible to regulate them within the Defence Procurement Directive. As offsets are generally discriminatory, they can only be compatible with the EU Treaties when objectively justified based on Article 346 TFEU, then falling outside the internal market. According to the Commission – as well as the majority of EU legal literature on the topic – justification is generally problematic because offsets are generally "economically motivated" and therefore lack a security objective.

However, as concluded in the previous chapter, military industries fundamentally differ from other sectors of industry because they form a significant contribution to *military power*. Within the interdependent structures of military power – amongst NATO- and EU Member States – domestic access to military industries and technologies has remained a key asset to a state's military capabilities. As discussed previously, EU Member States therefore continued their 'buy national'- and offsets policies after adoption of the Directive to ensure the viability of domestic industries. As economic liberalisation would lead to the disappearance of military industries in some Member States, the military function of military procurement and offsets naturally conflicts with the internal market function underlying the Directive. The question arises as to whether effective regulation of military procurement – in terms of *functional effectiveness* – should include rules for the legal use of military offsets instead of merely prohibiting those. And what would such regulation look like?

To answer these questions, I will first briefly introduce what offsets in military procurement consist of. Secondly, I will uncover the political-economic context of offsets by examining the offsets laws and policies of several EU Member States (the Netherlands, Sweden and Poland) in light of (publicly available) data on military expenditure and military exports and imports as well as academic literature on military industry. Thirdly, I will explain, in that context, why the legal and economic critiques on offsets do not necessarily stand in the way of regulating them. On the contrary, regulation could potentially take away some of the perceived negative effects of offsets. Fourthly, I will consider to what extent military offsets can be justified by

Article 346 TFEU in light of the political-economic context and its criticisms. In the final part of this chapter, I will propose some direction for what future regulation of offsets could possibly look like, which I will elaborate further in the final chapter.

2.1 What are offsets in military procurement?

Military offsets can grossly be divided into three categories.

First, there are *direct military offsets*, which include countertrade obligations that are directly connected to the military purchase. Such offsets oblige contractors to include domestic subcontractors into the supply-chain of the purchased good. From the perspective of the buying state, it would be particularly beneficial if some technology transfers can be included (for instance through licensed production), as this may boost technological innovation within its domestic military industries. From a military-operational perspective, it is often feasible to ensure that maintenance and reparations of imported military equipment can be performed by a domestically established economic operator. Work-sharing arrangements – also referred to as *juste retour* – which are made within intergovernmental collaboration projects for research and development (such as the US led F-35 project) are in this contribution also considered as direct military offsets, as they are generally based on the same logic.

Secondly, there are *indirect military offsets,* which include countertrade obligations that are not within the supply-chain of the purchased good but are just as well intended to maintain or strengthen domestic military industries. Even though this type of offsets lacks a direct link with the subject-matter of the contract, they can potentially be justified by Article 346 TFEU when they not adversely affect competition on the internal market for civilian goods.

Finally, there are *indirect civil offsets*, which include countertrade obligations that are non-military, *i.e.* a more general obligations to invest in the economy of the buying state. As this type of offsets appear to primarily fulfil an economic purpose, they will not be discussed further in this contribution. Indirect civil offsets cannot be justified by Article 346 TFEU as they inherently adversely affect competition on the internal market for civilian goods

2.2 Country-specific offset policies: uncovering the political-economic context and the true function of military offsets

The different evaluations of the Defence Procurement Directive have shown that EU Member States still predominantly award contracts to domestically established companies.[1] When considering that France and Germany together represent almost half of the total military expenditure of the 26 EU Member States, it becomes clear that arms producing companies in these states have a major competitive advantage

1 In particular the 2020 European Parliament *Implementation Assessment*.

over companies resided in other Member States.[2] Based on this advantage, these companies can achieve greater economies of scale, potentially resulting in lower cost prices.[3] Full application of the non-discrimination principle in military procurement procedures would consequently open the way for French and German companies to generally outcompete domestic companies for the military contracts in other Member States. Still, France and Germany also tend to award contracts extensively outside the frameworks of the Directive.[4] As the incentives for France and Germany in shaping and regulating European military industries are clear, the focus in this section is on a small selection of EU Member States with middle-sized and small military industries to find out if and how they use offsets as a means to balance the Franco-German power.

This conception perhaps reflects a simplistic presentation of the potential effects of trade liberalisation. There are other significant actors elsewhere and different types of specialised companies in different countries which influence the procurement decisions of the Member States. The conception does, however, confirm the crux of the Directive's effectiveness problem as identified throughout this research. This 'problem' is of course no product of the Directive as such. We do not live in a world of self-reliant military powers anymore – if ever. The concept of sovereignty refers to the ultimate source of legitimate authority in a decentralised world order. It does not refer to a world in which the sovereign can effectively act alone. Globalisation of military industries has fostered military interdependence and created a world in which absolute independence has become too expensive for almost all military actors. Structures of military power are determined by national capabilities and military interdependence within alliances. The actors within the interdependent structures of military power, such as the EU Member States, are equally sovereign but in no way equally powerful. Depending on geography, population and industrial resources the differences in military power are immense. Sovereignty offers the freedom of action to position oneself most strategically within the boundaries of these power structures. Sovereignty and interdependence, in other words, go hand in hand.

2 In a 2007 study it was observed in that regard that France and Germany were the only two EU Member States which did not accept offsets as a matter of policy. See: E. Anders Eriksson et al., *Study on the effects of offsets on the Development of a European Defence Industry and Market*, Final Report of 12 July 2007, pp. 20-22. This policy, however, relates to the limited value of their imports. In addition, the policy does not appear to be of a very absolute nature. Recently, Germany awarded a contract for navy ships to the Dutch Damen, while ensuring that most of the production would take place in Germany. See for instance, Reuters, *Dutch and German shipyards to build warships for Germany worth 6 billion*, 14 January 2020: <https://www.reuters.com/article/us-germany-warship-idUSKBN1ZD1J8>. Offsets have – at least in the past – also played a pivotal role in French arms exports, see: J. Hébert, 'Offsets and French Arms Exports' in: S. Martin (ed.), *The Economics of Offsets: Defence Procurement and Countertrade*, Routledge 1996, pp. 139-162.

3 To a much lesser extent this is also the case for the 3rd (Italy) and the 4th (Spain) military spenders within the EU.

4 After announcing a 100 billion euro investment in its military in response to Russia's 2022 invasion of Ukraine, the German legislature quickly adopted a law to 'accelerate' procurement procedures in the defence sector. See: Gesetz zur Beschleunigung von Beschaffungsmaßnahmen für die Bundeswehr * (*Bundeswehrbeschaffungsbeschleunigungsgesetz* – BwBBG), 19 July 2022. As the law significantly limits judicial review for certain procurement procedures, it is likely to disadvantage foreign suppliers.

The selection of countries with middle sized industries consists of the Netherlands, Sweden and Poland. Within the time period 2000-2020 these countries were listed by SIPRI as nr 10 (Netherlands), nr 12 (Sweden) and nr 22 (Poland) of the top arms exporting countries globally. The accumulated value of the total sum of arms exports of these three countries is, however, just above the half of the individual value of either Germany's or France's exports.[5] In terms of military expenditure there are significant differences between these countries,[6] but compared to the major spenders (France and Germany; to a lesser extent also Spain and Italy) and the small spenders they appear to be in the middle.

The potential negative effects of trade liberalisation for middle-sized countries is also shown by the fact that the Netherlands and Poland expressed their doubts about the new legislation during the meeting in which the Council adopted the Defence Procurement Directive. They observed that the Directive could potentially have negative consequences for market access of small and medium sized enterprises which are located outside the countries of the prime contractors. Poland even explicitly expressed "that the current proposal would neither lead to the creation of a level playing field and the increase of efficiency of national defence industries nor to the enhanced competitiveness of the European defence market" and that national rules on offset arrangements should not be limited by the Directive.[7]

To better understand the roots of offsets, I will briefly set out the main characteristics of the military industries in Sweden, Poland and the Netherlands below.

2.2.1 Sweden: from a market-liberalism towards renewed focus on territorial integrity

After World War II, Sweden continued its previous policy of 'armed neutrality', including a high level of military self-reliance and a restrictive export policy.[8] From the 1970s onwards, this policy gradually changed in light of the decreasing domestic demand[9] because of the high costs. Between 1960 and 1970, Sweden's military expenditure fluctuated between 3,4% and 4% of its GDP. From 1970 to 1990, expenditure gradually decreased to 2,6% of GDP, further decreasing to around 1% in the last decades. Along with the changing policy, Swedish military industrial policies became more market-liberal. State ownership decreased drastically from 1999 onwards, without severe restrictions on foreign ownership. In its 2007 and 2009 material acquisition strategies, the Swedish government emphasized this market-liberal approach by expressing

5 See SIPRI Arms Transfers Database, *TIV of arms exports from the top 50 largest exporters, 2000-2020*. Italy: 12 147; Netherlands: 10 994; Sweden: 8038. Numbers are the total sum of export value in this time period based on SIPRI Trend Indicator Values (TIVs) expressed in millions.

6 For instance in 2019: Italy: 28 370; Netherlands: 12 211; Sweden: 6234. See SIPRI Military Expenditure Database.

7 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.

8 For an overview of the historical context, see: B. Hagelin, 'From certainty to uncertainty: Sweden's armament policy in transition, in: S. Markowski et al. (eds.), *Defence Procurement and Industry Policy: A Small Country Perspective*, Taylor & Francis Group 2009, pp. 286-288.

9 See: SIPRI Military Expenditure Database.

its preference for acquiring equipment off-the-shelf or develop new equipment by international cooperation, domestic development being the least preferable option.[10]

The development of this market-liberal approach thus runs parallel to a period of budget-cutting, which had reached its low point by 2009.[11] Russia's military aggression in Georgia (2008) and its annexation of the Crimea (2014) drastically changed the Swedish military attitude. From 2014 onwards, Sweden started to structurally increase its military expenditure and used these financial resources to revalue its domestic military industries. As mentioned above, military expenditure did not, however, increase as a percentage of the Sweden's GDP. In 2020, the Swedish Parliament adopted the *Totalförsvaret (Total Defence) 2021-2025* strategy, including a budget increase of 40% for this period. Sweden had already identified all combat aircraft, all underwater capability and integrity-critical parts of the command domain (*e.g.* sensors, cybersecurity and crypto) as essential interests of national security, and therefore generally exempted from EU law by Article 346 TFEU.[12] In a more general sense, Sweden stressed the importance of domestic defence companies for the operational capabilities of its armed forces, its military partnerships with other countries and access to technology from those countries.[13]

For a country of its size, Sweden has significant and technologically advanced military industry, although increasingly with foreign shareholders. Its military market is dominated by Saab which was listed as nr 30 in SIPRI's 2018 Top 100 of Arms-producing and military services companies in the world, as the only EU-based company outside of Germany, France or Italy.[14] With the production of the Saab JAS39 Gripen fighter planes, Sweden is next to France the only EU Member State in which a modern fighter plane was developed and produced.[15] As a country with limited military capabilities, its military industries have become highly dependent on exports. In fact, only Saab's annual turnover is almost three times as much as Sweden's annual military equipment expenditure.[16] As a small country, Sweden imports a significant part of its military equipment. Even though Sweden has been outside NATO, by far the largest portion of its imports during the last twenty years have been from the US.[17]

10 See: M. Lundmark, 'The Swedish defence industry: Drawn between globalization and the domestic pendulum of doctrine and governance' in: K. Hartley & J. Belin, *The Economics of the Global Defence Industry*, Routledge 2020, p. 296.

11 See SIPRI Military Expenditure Database.

12 Government Offices of Sweden, Ministry of Defence, *Totalförsvaret 2021-2025* (translation carried out by the Ministry of Defence of the main elements of the Government bill "Totalförsvaret 2021–2025" (Total Defence 2021-2025), on 15 December 2020 the *Riksdag* voted in favour of this bill, p. 128.

13 *Ibid*, p. 129.

14 According to Lundmark, Saab's production of military material accounted for some 75% of the total Swedish production, see: Lundmark, 2020, p. 292. For SIPRI's Top 100, see: SIPRI Arms Industry Database.

15 The Eurofighter Typhoon fighter planes were developed and produced by a consortium of German, Italian, British and Spanish companies.

16 Based on Saab's 2019 turnover of 35,4 billion SEK and Sweden's 2019 military equipment expenditure of 1,3 billion euro. Saab's turnover is based on its annual report 2019 (see: <https://www.saab.com/investors/reports-and-presentations#2049_year_2019>). Sweden's equipment expenditure is based on the data of the European Defence Agency (see: <https://eda.europa.eu/publications-and-data/defence-data>).

17 See SIPRI Arms Transfers Database and SIPRI Military Expenditure Database.

Even though Sweden is relatively self-reliant in military procurement, it was also pressured into the implementation of offset policies by economic globalization from the 1980s onwards. The first offset policy was constructed with regards to the production of the Saab Gripen project, as many sub-components and systems of this fighter plane needed to be imported. After a period in which Sweden's offsets pursued a multitude of military and economic objectives, it started focusing its offset policies on military objectives from 1999 onwards.[18] Sweden abandoned civil indirect offsets. As rightly observed by Sköns, Sweden's military direct offsets are aimed at effective domestic maintenance and modification of imported equipment, while military indirect offsets aim to secure domestic military-industrial capabilities more generally.[19] Both type of offsets thereby potentially strengthen the military capabilities of a country, depending on their effectiveness and the significance of technology transfers. Indirect military offsets should best be focused on those technologies of which the domestic presence is identified by a country as essential for its security.

According to SIPRI data, around half of the total sum of military imports in the period 2000-2021 were coming from the US.[20] This shows a strong preference for transatlantic alliance in military affairs, which will only increase if its planned NATO accession will be implemented.[21]

2.2.2 Poland: offsets legislation and transatlantic preference

As a former member of the Warsaw Pact, Poland's military industries for a long time had been under the control of centralised Soviet military planning. After the collapse of the Soviet Union, Poland's military spending initially decreased drastically, while its military production (mostly Soviet equipment) was no longer suitable for own use, particularly not for use in NATO context.[22] Consequently, liberalisation and privatisation of military industry, by opening it up to competition within EU and NATO context, would have eliminated most of Poland's industry. After just having regained its sovereignty, this was no appealing option. When Poland acceded to NATO in 1999, it was forced to restructure its military industry to effectively integrate into the alliance without losing all domestic industry. Military offsets have proven to be a tool for Poland to pursue this two-fold strategy.[23]

Although Poland regained its military sovereignty after the end of the Warsaw Pact, it has not become even close to being self-reliant. In contrast to the Soviet

18 Elisabeth Sköns, 'Evaluating defense offsets: the experience in Finland and Sweden' in in: J. Brauer and P. Dunne, *Arms Trade and Economic Development: Theory, Policy and Cases in Arms Trade Offsets*, Taylor & Francis Group 2004, p. 155.

19 *Ibid*, p. 155.

20 See SIPRI Arms Transfers Database. Considering that Sweden does not import fighter planes from the US, this is quite a high figure.

21 See: NATO Press Release, *NATO Allies sign Accession Protocols for Finland and Sweden*, 5 July 2022.

22 S. Markowski & A. Pienkos, 'Polish defence industry: Learning to walk again' in: K. Hartley & J. Belin, *The Economics of the Global Defence Industry*, Routledge 2020, p. 256.

23 This prospect was already observed in: S. Markowski & P. Hall, 'The defense industry in Poland: an offsets-based revival?' in: *Arms Trade and Economic Development: Theory, Policy and Cases in Arms Trade Offsets*, Taylor & Francis Group 2004, p. 175.

period, within NATO and EU structures Poland can independently produce military equipment as well as choose its preferred countries for imports. To maintain an military-industrial base the Polish government eventually decided to consolidate its industries within a state-owned holding company, the *Polska Grupa Zbrojeniowa* (PGZ – Polish Armaments Group) which was formally established in 2013 (in 2018 it was listed nr 74 on SIPRI's top 100 of arms producing companies).Looking at Poland's imports shows that it has chosen to root its military-industrial security most strongly within transatlantic NATO structures, as more than half of the value of its imports in the period 2000-2021 were spent on US equipment.[24] In addition, the Polish government decided in January 2020 to purchase 32 F-35 fighter planes from the US, thereby aligning their air force with the US and other EU Member States (the Netherlands, Denmark and Italy) which preferred the American fighter plane over the European alternatives.[25] Considering the extensive and structural presence of US troops on Polish territory, this preference can hardly come as a surprise.

The function of offsets in Poland's military procurement primarily consists of strengthening these strategic alliances without giving up domestic industry. Poland seeks a balance between supplying its armed forces with superior equipment that is interoperable with the equipment of NATO allies and maintaining domestic industry; both considered indispensable to guarantee its national sovereignty. Although the preservation of mostly state-owned domestic industry is costly, in light of increasing Russian aggression it is considered a *sine qua non* for achieving the highest level of security of supply. Offsets safeguard security of supply for imported equipment in a broad sense when technologies are transferred to PGZ, enabling a maximum level of state control over servicing, maintenance and upgrades.[26]

In this context, Poland adopted its first *Offsets Act* in 1999 which included mandatory offsets for all military equipment imports with a value above 5 million euros, possibly also including civilian offsets.[27] This act was amended in 2014, seemingly to reconcile it with the Commission's Guidance Note, as the latter explicitly mentioned the illegality of laws which include mandatory offsets.[28] In the current 2014 Offsets Act, only direct military offsets are allowed and it should be individually determined for each offset agreement whether its use is necessary for essential security interests.[29] By abandoning civilian offsets and shifting the responsibility for offsets from the Ministry of Economy to the Ministry of Defence, Poland emphasized the military-strategic purpose of its offset policy.

24 SIPRI Arms Transfers Database.

25 Although Italy also uses the Eurofighter Typhoon. The ratio of US imports as a share of total imports will therefore significantly increase in the coming years.

26 See: M. Terlikowski, *Defence and Industrial Policy in Poland: Drivers and Influence*, Armament Industry European Research Goup: Policy Paper July 2017.

27 Markowski & Hall, 'The defense industry in Poland: an offsets-based revival?' 2004, p. 178.

28 Even when only mandatory for contracts which were already exempted from EU law based on Article 346 TFEU.

29 Republic of Poland, 15 July 2014, Poz. 932, *o niektórych umowach zawieranych w związku z realizacją zamówień o podstawowym znaczeniu dla bezpieczeństwa państwa* (English translation: *on Certain Agreements Concluded in Connection with Contracts Essential for National Security*).

2.2.3 The Netherlands: in-between specialisation and military autonomy

Although there is no Dutch company listed in SIPRI's top 100 of arms producing companies, the Netherlands has significant military industry established in its territories. In the period 2000-2020 the Netherlands is the world's 10th arms exporter.[30] Dominant actors in the Dutch military sector include the naval company Damen and the Dutch establishment of the French military conglomerate Thales. Large parts of the Dutch military sector, however, consist of smaller companies which are primarily involved through subcontracts awarded by large (foreign) companies. In that context, the Netherlands' concern with the Defence Procurement Directive is also visible in its 2018 *Defensie Industrie Strategie* (Defence Industry Strategy), where it stressed that the regulation only opens up the market for prime contracts, while the awarding of sub-contracts remains domestically oriented.[31] As mentioned in Chapter 1, the function of military offsets for the Netherlands primarily consists of levelling the unequal nature of the international market for military equipment.[32] The *unequalness* of this market should be understood as the natural advantage of military companies which are established in a country with a larger military, *i.e.* companies with easier access to more military contracts.

The Dutch Ministry of Economic Affairs and Climate, which is responsible for the offsets policy refers to military offsets as "industrial participation". In its 2017-2018 report on industrial participation, the Ministry emphasised that ensuring 'direct relations' with the major defence companies is necessary for the preservation of the industrial capabilities which are considered necessary for the national security. For its own sovereignty it is considered necessary to maintain a certain amount of autonomous operational capabilities.[33] Some of these technological and industrial assets are considered globally innovative and competitive. As such, their preservation is deemed to greatly contribute to European security and to the attractiveness of the Netherlands as a partner in international collaboration programmes.[34]

When it comes to international collaboration, the Dutch military-industrial policy can generally be characterised by refraining from strongly prioritising EU cooperation over Transatlantic cooperation or *vice versa*, thereby making its strategic choices on a case-by-case basis. In its 2018 Strategy, the Netherlands envisioned a predominantly domestic approach for the maritime sector and an international collaboration approach for land and aviation.[35] This domestic approach in the maritime sector is obviously related to the presence of Damen. The Netherlands and Belgium decided in 2016 to jointly procure new frigates for their navy's. The leading

30 SIPRI Arms Transfers Database.
31 Ministry of Defence and Ministry of Economic affairs, *Nota: Defensie Industrie Strategie* (English translation available), November 2018, p. 11.
32 Letter of the Minister of Economic Affairs to the *Tweede Kamer* (Second Chamber of Parliament), *Enforceability of offset-agreements*, Nr. 24 793, 21 June 1996, p. 4. More recently, see: Letter of the Minister of Economic Affairs to the *Tweede Kamer*, *Rapportage Industrieel Participatiebeleid* 2017-2018, 20 June 2019.
33 *Rapportage Industrieel Participatiebeleid* 2017-2018 (attachment), p. 1.
34 *Ibid*, p. 2.
35 *Defensie Industrie Strategie* 2018, p. 23.

role in the procurement process was reserved to the Netherlands, which decided to directly award the contract for building the ships to Damen and the contract for the integrated radar- and fire-control systems to the Dutch establishment of Thales, both based on Article 346 TFEU.[36] In 2020, Germany also awarded a 6 billion euros contract to Damen for the building of new frigates, including an extensive set of offsets.[37]

In reality, a fully domestic approach is not possible even in the maritime sector. For the contract of replacing its submarines, different tenderers are still competing within a procurement procedure which has been excluded from the application of EU law based on Article 346 TFEU. Both the French Naval and the Swedish Saab choose to collaborate for this tender with Dutch operators (Naval with the Royal IHC and Saab with Damen) to increase their chances of winning the contract, while the German company ThyssenKrupp Marine Systems chose to compete by itself. But also if the contract would be awarded to ThyssenKrupp there will be great involvement of Dutch economic operators through offsets. ThyssenKrupp markets its bid to the Dutch government by promising to create 500 direct jobs and 1500 indirect jobs in the Netherlands and making the Dutch naval city of Den Helder a 'submarine valley'.[38] In September 2022 the Dutch Ministry of Defence officially announced that the award criteria will include the awarding of points based on essential interests of national security – following the wording of Article 346 TFEU – for the involvement of Dutch companies in the development, engineering, production and maintenance of so-called 'critical systems'.[39] The winning tenderer, in addition, has to sign a so-called 'industrial collaboration agreement', aimed to include Dutch companies as well..[40]

In the aviation sector, the Netherlands traditionally has close ties to the US Air Force. The most well-known example of the Dutch offsets policy is the participation of the Netherlands in the US-led project of the development of the F-35 fighter plane and the eventual procurement of these planes. In 1997, the Dutch government decided to participate in the development of the F-35 fighter plane, later triggering their procurement. Although there is a multitude of reasons that lay behind the Dutch involvement in the project, it seems clear that access to US military technology – which was deemed superior to European alternatives – and the traditionally close relations between the Netherlands (the Royal Netherlands Air Force in particular) and the US were decisive.[41] The choice to participate in this project was thus first and foremost a geopolitical choice.[42] As opposed to the European alternatives such as the Tornado, Eurofighter Typhoon and Saab JAS39 Gripen programmes, the development

36 See: Letter of the State Secretary of Defence to the *Tweede Kamer* (Second Chamber of Parliament), *B-brief project 'Vervanging M-fregatten'*, 24 June 2020, p. 2-3.

37 See again: Reuters, *Dutch and German shipyards to build warships for Germany worth 6 billion* 2020.

38 See: <https://www.thyssenkrupp-marinesystems.nl/en/> (accessed 8 July 2021).

39 Letter of the State Secretary of Defence to the *Tweede Kamer* (Second Chamber of Parliament), *Offerteaanvraag vervanging onderzeebootcapaciteit*, 30 September 2022, p. 6.

40 *Ibid*.

41 See: G. Scott-Smith and M. Smeets, 'Noblesse oblige: The transatlantic security dynamic and Dutch involvement in the Joint Strike Fighter programme', *International Journal* 2012-2013, pp. 49-69 and S. Vucetic and K. Richard Nossal, 'The international politics of the F-35 Joint Strike Fighter', *International Journal* 2012-2013, pp. 3-12 and (in Dutch) C. Klep, *Dossier-JSF*, Amsterdam: Boom 2014, Chapter 1.

42 Scott-Smith & Smeets, 'Noblesse oblige' 2012-13, conclusion.

phase of the F-35 programme was fully controlled by the US, which aimed to retain monopolies in high technology industries.[43] The involvement of companies from the non-US partners in the programme has been mainly in the production phase. Moreover, the lead contractors (Lockheed Martin and Boeing) had already been selected before other countries joined the programme, and were located in the US. To a large extent based on the close ties with the US in the aviation sector, around 64% of the total value of its imports in the period 2000-2021 were imports from the US.[44]

2.3 Military offsets as a product of military power structures

Legal critiques on offsets in the EU law context are primarily based on the economic assumption that offsets distort free market functioning, which is deemed to ensure the most efficient allocation of resources. Several economists and legal scholars have also argued that offsets hamper economic development and increase corruption risks in military procurement. In this section, I will first attempt to identify the essence of the different critiques, after which I will put forward the hypothesis that military offsets can best be considered as a product of structures of military power while taking these critiques into account. Against that background, military offsets will afterwards be evaluated in light of Article 346 TFEU.

2.3.1 The legal-economic hostility towards offsets

As offset requirements are generally discriminatory, and thereby restricting free cross-border trade, the legal debate in EU law centers around the question whether they can be justified based on one of the security exceptions in the EU Treaties. It is often asserted that offsets are generally "economically motivated" and therefore "in principle illegal".[45] Indirect civil offsets are the clearest example of this. They do not fall within the scope of the armaments exception of Article 346 TFEU because they generally do "adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes". Military offsets, on the contrary, generally fall within the material scope of Article 346 TFEU (further elaborated in Chapter 4) and can therefore be justified if they can be deemed necessary for the protection of a state's essential security interests. Nonetheless, the Commission adopted a strict approach towards offsets in its military procurement

43 This comparison was made in: K Hartley, 'Collaboration and European Defence Industrial Policy', *Defence and Peace Economics* 2008, p. 308.

44 SIPRI Arms Transfers Database.

45 See: D. Eisenhut, 'Offsets in defence procurement: a strange animal – at the brink of extinction?', *European Law Review* 2013, pp. 393-403, 393. See also: M. Trybus, *Buying Defence and Security in Europe*, Cambridge University Press 2014, pp. 413-417. Trybus argues (at 417) that "even direct military offsets are almost never legal under Article 346 TFEU".

policies, while intentionally leaving it outside of the Defence Procurement Directive because they "stand in direct contrast to the [EC] Treaty".[46]

The legal hostility towards justifying offsets – including military offsets – is thus primarily based on the assumption that offsets are economically motivated and consequently detrimental to the European single market as protectionism results in economic inefficiencies compared to a free market scenario.[47] There is, however, no proof that offsets are generally motivated by political-economic incentives.[48] Even if offsets would partly be 'economically motivated', that would not by itself stand in the way of justification based on Article 346 TFEU. Offset policies are often pursued in an institutional setting that allows for a variety of military and economic motivations, often making it difficult to precisely distinguish between the two.[49] One cannot simply assume that if on the political level the economic motivations are emphasised, this tells the whole story. Economic benefits of military procurement, such as increased national employment, might just be a way to gain democratic support for unpopular military spending. In addition, the Court ruled in *Campus Oil* (1983) that if a Member State benefits economically from a trade restriction, this does not by itself excludes justification as long as the economic benefits are subordinate to the security interest.[50] It would therefore be wrong to automatically consider all offset arrangements that include economic motivations as illegal.

2.3.2 Corruption and economic development related critiques

Apart from the internal market and efficiency critiques on offsets, which are primarily based on comparative advantage economics, concerns about corruption, economic development and proliferation have been voiced as well in academic literature. Although it is far beyond the scope of this dissertation to systematically analyse these arguments, some nuances need to be made.

Transparency International addressed the corruption risks which are specific to offset arrangements in the military sector in a 2010 report. As a sector in which public and private interests are deeply connected and transparency is limited for security reasons, military industries appear to be more prone to corruption than other

46 Commission Staff Working Document, Impact Assessment COM (2007) 766 final. See on this issue also: M. Weiss and M. Blauberger, 'Judicialized Law-Making and Opportunistic Enforcement: Explaining the EU's Challenge of National Defence Offsets', *Journal of Common Market Studies* 2015, pp. 444-462, at 453.

47 So, when going beyond an economic efficiency approach, the legal hostility towards offsets becomes too simplistic, see for instance: D. Schoeni, 'Second-Best Markets: On the Hidden Efficiency of Defense Offsets', *Public Contract Law Journal* 2015, pp. 369-416 and D. Schoeni, 'Defense Offsets and Public Policy: Beyond Economic Efficiency', *Air Force Law Review* 2016, pp. 95-162.

48 On the contrary, the empirical model of Taylor points in the direction that military- and rent-seeking incentives (unfortunately he did not distinct between different non-economic incentives) tend to exert more influence on offset policies than economic incentives, see: T. Taylor, 'Modeling offset policy in government procurement', *Journal of Policy Modeling* 2003, pp. 985-998.

49 For instance in the Netherlands, where the *Defensie Industrie Strategie* 2018 has been a collaborate effort of both the Defence Ministry and the Ministry of Economic Affairs and Climate, while specific offset policies.

50 Case C-72/83, *Campus Oil*, ECLI:EU:C:1984:256, para. 36.

sectors.[51] According to the report, offsets are more prone to corruption than military procurement in general for several reasons.[52] What stands out is the general lack of transparency, lack of financial scrutiny and the broad discretionary powers of public officials in dividing and distributing the offsets packages.[53] These issues are, however, as acknowledged in the report's conclusion itself, not unavoidable, and could thus be addressed in regulation.[54]

More fundamental is the observation that the attractiveness of an offsets package could be used as an inducement to governments to "improperly influence the need for an arms purchase".[55] But when is such influence in fact 'improper'? This problem relates to a more general critique voiced at offsets in economic development literature. It is often asserted that countries tend to spend more on military equipment if there is a possibility to impose offsets on imports.[56] Military offsets are in fact hidden subsidies to domestic military industry in the absence of the possibility to directly purchase from a domestic operator. According to Dumas, the proclaimed economic benefits of offsets could then be used by government officials to gain public and political support for expensive and unpopular procurement of military equipment.[57] The fact that offsets might be used to gain support for expensive equipment does not, however, by itself indicate that the equipment is not needed.[58] Dumas actually considers military procurement in general to be detrimental to economic development, as it burdens the financing of other public services and diverts scarce economic resources away from sectors which actually contribute to material well-being.[59]

When taking these economic arguments against military offsets a step further, one could even argue that offsets are detrimental to international security as they promote the proliferation of armaments. This is not, however, how security functions in a system of sovereign states. Security depends more strongly on balance of power than on preventing proliferation of armaments as an isolated policy. Military offsets

51 Transparency International refers to a 2006 Survey in which "one third of international defence companies felt they had lost out on a contract in the preceding year because of perceived corruption by a competitor". See: Transparency International, *Defence Offsets: Addressing the Risks of Corruption & Raising Transparency*, April 2010, p. 14. Such numbers are not, however, as outstanding as presented when comparing them with general perceptions of corruption in government procurement and realising that what one 'actually' perceives as corruption differs from one country to another, see: E. Manunza and N. Meershoek, 'Fostering the social market economy through public procurement? Legal impediments for new types of economy actors', *Public Procurement Law Review* 2020, p. 350.

52 The first mentioned reason, that industrial policy tools are more prone to corruption, is not specific to offsets, as military procurement in general is also generally used as an industrial policy tool.

53 Transparency International, *Defence Offsets* 2010, pp. 15-17.

54 *Ibid*, p. 43.

55 *Ibid*, p. 18.

56 See for instance: A. Markusen, 'Arms trade as illiberal trade', in: J. Brauer and P. Dunne, *Arms Trade and Economic Development: Theory, Policy and Cases in Arms Trade Offsets*, Taylor & Francis Group 2004, p. 83.

57 L. Dumas, 'Do offsets mitigate or magnify the military burden', in: J. Brauer and P. Dunne, *Arms Trade and Economic Development: Theory, Policy and Cases in Arms Trade Offsets*, Taylor & Francis Group 2004, p. 21.

58 In fact, it implies that even indirect civilian offsets have a military purpose rather than an economic purpose. Regardless, as stressed before, they fall outside the scope of Article 346 TFEU.

59 Dumas, 'Do offsets mitigate or magnify the military burden' 2004, p. 24 For Dumas "there are no good *economic* reasons to engage in military procurement at all" (p. 29). For that reason, he prefers indirect civilian offsets over military offsets.

potentially contribute to security within an alliance because they strengthen military interdependence. For states with small and middle-sized military industries, it is often the only way to play a role within this interdependence and thereby strengthen their external security. As a constraint on unilateralism in foreign policy, interdependence potentially fosters peace and security.[60]

2.3.3 Military offsets and collaboration as a (balance-of-) power instrument

The largest flaw of the legal-economic paradigm is that it distracts from the systemic causes of military offsets. Military industries are a significant part of the military power of states. Military procurement is therefore intrinsically connected to the desire to preserve and strengthen a state's military power. Legal interpretation of the norms which regulate military procurement should therefore be appreciated according to *military* logic rather than *economic* logic. The same goes for military offsets, as these are intrinsically connected to military procurement. In a general sense, military offsets – where feasible within a collaborative program – can best be considered as a "second-best" policy after buying domestically, which has remained the ideal in terms of military power.[61] Buying domestically developed and produced equipment is for most states often not realistic; depending on a state's industrial/technological and financial resources. As put forward by Kapstein, pursuing the domestic preference requires technological and financial resources.[62] If a state possesses the technological resources (or some of it) but lacks the financial resources, it will prefer co-development, while it will prefer co-production if it is the other way around. There are then, grossly speaking, three different ways in which offsets promote the military interests of a state.

First, offsets can fulfill a concrete military-operational need when they ensure that maintenance and reparations of the purchased equipment can be performed by a domestically established economic operator. This often requires a minimum level of technology transfers, as far as necessary for maintenance and reparations. As such offsets are intrinsically linked to the purchased equipment as well as military-operational needs, they can most easily be justified.

Second, offsets can be a tool for industrial development and innovation beyond preservation of existing industries when they come with technology transfers and co-production. An example of this can be found in the early 1960s arms transfers from the US to its European allies. After the "early postwar boom", European industries had rebuild themselves, causing the US government to look for ways to keep its

60 R. Keohane and J. Nye, *Power and Interdependence* (4th edn.), Longman 2012 (first published in 1977), p. 19. Keohane and Nye argue that within economically integrated structures, such as the EU and NATO, complex interdependence limits the primacy of security as the main concern of states in their foreign policies.

61 From SIPRI's extensive sets of empirical data, it is clear that the European states with large domestic industries, especially France (0,2%) and Germany (0,1%), have a much lower import-expenditure ratio than middle-sized industries, such as Italy, the Netherlands and Poland (± 1,5%), and small industries such as Lithuania (2,8%), Croatia and Portugal. Figures are calculated based on the time frame 2015-2019. See SIPRI Arms Transfers Database and SIPRI Military Expenditure Database.

62 E. Kapstein, 'International Collaboration in Armaments Production: A Second-Best Solution, *Political Science Quarterly* 1991-92, pp. 657-675, at 659.

dominance in NATO armaments markets by providing some prospect for industrial development.[63] In that context, Germany for instance decided (as well as Belgium, the Netherlands and Italy) to purchase the US Starfighter instead of a French Dassault alternative, including a significant boost for German aviation industries through extensive use of co-production.[64] Likewise, Belgium, Denmark, Norway and the Netherlands announced participation in the production of F-16 fighter planes in 1975, including many offset arrangements.[65]

Third, military offsets promote cross-border military-industrial cooperation and thereby strengthen military alliances, whether within NATO or EU frameworks. Although the prospects of cooperation are constrained by states pursuing relative gains rather than absolute gains, technological development in arms' industries, globalization and limited financial resources have forced states to cooperate.[66] Strengthening military alignment with the US Air Force has been the main incentive for many EU Member States to participate in the US-led F-35 project and eventually buy the fighter planes.[67] For the states with middle-sized industries, like the Netherlands, participation in US-led projects and the military offsets that came with it have – be it indirectly – been a means to balance the industrial power of Germany and France.

Military offsets are thus not the illness of the European military market-place, but rather a side-effect of how this sector of industry is rooted within the military power ambitions of the sovereign Member States. These ambitions, first and foremost, originate in the global structures of military power; rather than the structures of economic power which are regulated by the internal market. From a purely economic perspective, military expenditure is, in the words of Waltz, "unproductive for all and unavoidable for most".[68] Likewise, military offsets are economically unproductive for all, but a necessary tool for those states which generally depend on the import of military goods.

As military offsets are – at least potentially – a suitable instrument for a state's military interests, they potentially fall within the scope of Article 346 TFEU. The next section will examine the extent to which this provision creates legal room for offsets and examine the EU's current approach to offsets in light thereof.

63 *Ibid*, at 661.
64 *Ibid*, at 662. However, it must be noted her that the sale of the Starfighter was also part of the 'Lockheed bribery scandals'.
65 *Ibid*, at 665.
66 See for instance: E. Kapstein, 'Allies and Armaments', *Survival* 2002, pp. 141-155. For an explanation of the 'relative gains' motivation of states, see Chapter I.
67 Among which the United Kingdom, Italy, the Netherlands, Belgium and Denmark. For the political process in the Netherlands, see again: Klep, *Dossier JSF* 2014.
68 K. Waltz, *Theory of International Politics*, Random House New York 1979, p. 107.

2.4 Military offsets in light of Article 346 TFEU and the Defence Procurement Directive

Accepting military offsets as a tool of military strategy raises the question as to whether and how they should be regulated. Even when considered as a legitimate instrument, there is a variety of possible unintended consequences, such as increased corruption, which undermine the military purpose as much as the value for money. Regulation, rather than ineffectively prohibiting offsets, could potentially limit these unintended consequences. As the EU's military ambitions in the TEU are significant and the Member States are increasingly dependent on EU cooperation mechanisms for the fulfillment of their military security, it seems likely that EU involvement in the matter could be beneficial. The Commission's approach of completely rejecting military offsets as a tool of military strategy is, however, problematic. This section will elaborate this problem from a legal perspective.

To do this, I will first evaluate the Commission's approach in light of the legal substance of Article 346 TFEU. Secondly, I will consider the Directive's instruments for subcontracting requirements. As these have often been considered an alternative for offsets,[69] their functionality in providing a sound alternative to Member States determines whether they would still need to rely on offsets. If providing a sound alternative, it would not be necessary to regulate offsets, as they could be prohibited. Finally, this section will address the military logic of the European Defence Agency's Code of Conduct on Offsets and consider the value of this document for future regulatory endeavors.

2.4.1 The Commission's strict approach in light of Article 346 TFEU

In its 2006 interpretative communication on application of the (current) Article 346 TFEU the Commission still only raised its concerns about indirect civil offsets.[70] In its *Guidance Note Offsets* which it issued after the adoption of the Defence Procurement Directive in 2009, the Commission first emphasises that within the framework of the Directive there is no room for any kind of offsets since they "violate basic rules and principles of primary EU law".[71] Subsequently with regards to application of Article 346 TFEU to justify offsets, it stresses that Member States must always specify the concerned security interest and that economic considerations are not accepted. In addition, the Commission observed that justification must always concern the specific offsets and cannot merely be based on the security interest of the underlying public contract.[72] Although the Commission somewhat clarifies how it would scrutinize application of Article 346 TFEU to offsets, it fails to address the systemic concerns of Member States that actually justify the use of military offsets in practice.

69 See: Trybus, *Buying Defence and Security in Europe* 2014, pp. 406-454 (Chapter 9).
70 COM(2006) 779 final, Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement, Brussels: 7 December 2006, p. 7.
71 European Commission, D-G Internal Markets and Services, Guidance Note Offsets, p. 5.
72 *Ibid*, p. 6-7.

The Directive did not create a 'level playing field' in the European military market. Not only because Member States still extensively rely on Article 346 TFEU for directly awarding contracts domestically when necessary for their essential security interests, but also because the Directive does not address state aid and national export policies which create competitive advantages as well. In such a context, there is no support to be found in the Court's jurisprudence for the claim that justification of military offsets based on Article 346 TFEU is *in fact* highly exceptional.[73]

The legal foundations for justification of military offsets can be found in the Court's rulings in *Van Duyn* (1974) and *Campus Oil* (1984). The first judgment confirmed a dynamic approach to public policy and public security derogations, by establishing that the situations in which derogation is justified "may vary from one country to another and from one period to another".[74] For military offsets, this means that the geopolitical and industrial context in which a state pursues military-industrial policy should be appreciated. Lack of the ability to buy domestically combined with pursuing military cooperation based on interdependence creates a context in which military offsets can be a strategic instrument. The legality of preserving national industry, which is of "fundamental importance for a country's existence" as it can ensure security of supply, was confirmed by the Court in *Campus Oil*.[75]

The legal opponents of military offsets would perhaps argue that military offsets are less likely to be justified by Article 346 TFEU than buying domestically because offsets do not ensure security of supply. In a very strict sense this seems accurate. Even when offsets would ensure the complete assembling and capability to perform maintenance and reparations on national territory by domestic companies – which is unlikely – some dependency on the prime contractor remains. Such criticism, however, misses the greater function that offsets have of fostering interdependence within a military alliance.

The legal criticism has been built on the Court's line of jurisprudence that started with *Commission* v *Spain* (1999), in which it established that Article 346 TFEU like all derogations from EU Law involving security deals with "exceptional and clearly defined cases" and that economic or financial considerations will not be accepted.[76] In addition, the Court ruled in *Agusta* (2008), *Finnish Turntables* (2012) and *Schiebel Aircraft* (2014) that Member States invoking the armaments exception of Article 346 TFEU should prove necessity and proportionality.[77] From these general observations of the Court, the conclusion has often been deduced that military offsets are almost

73 Generally speaking it is accurate that exceptions in the EU Treaties "deal with exceptional and clearly defined cases", as this is the Court's general standard. See for instance: Case 222/84, *Marguerite Johnston*, ECLI:EU:C:1986:206, para. 26. Military procurement and military offsets are both, however, already *clearly defined* categories of cases. Although categorical use of exceptions is not possible, within a clearly defined category exception might not be *highly exceptional* (see again Chapter 4).

74 Case 41/74, *Yvonne van Duyn and Home Office*, ECLI:EU:C:1974:133, para. 18.

75 Case 72/83, *Campus Oil*, ECLI:EU:C:1984:256, para. 34.

76 Case C-414/97, *Commission* v *Spain*, ECLI:EU:C:1999:417, paras 21-22.

77 Case C-337/05, *Commission* v *Italy (Agusta)*, ECLI:EU:C:2008:203, para. 53, Case C-615/10, *Insinööritoimisto InsTiimi (Finnish Turntables),* ECLI:EU:C:2012:324, para. 45 and Case C-474/12, *Schiebel Aircraft*, ECLI:EU:C:2014:2139, para. 37.

always illegal.[78] This deduction, however, relies solely on the assumption that military offsets are generally economically motivated.

When considering the facts and circumstances of *Commission* v *Spain* (1999), the parallel between the Court's reference to "economic or financial considerations" and the proclaimed economic nature of military offsets becomes particularly obscure. In the proceedings of this case, Spain sought to rely on Article 346 TFEU to justify a complete exemption from the EU common system for VAT (value added tax) for intra-community imports of military equipment. According to Spain, the abandoning of this exemption would have "considerable financial consequences" and obstruct "the effectiveness of the Spanish armed forces".[79] Unlike military offsets, which aim to preserve or strengthen the national military-industrial base, Spain's tax exemption was financially motivated. The Spanish government could benefit from the tax exemption, as a very small portion of the VAT would otherwise go to the European Community. In addition, the government could allocate a smaller share of its budgets to the Defence ministry's procurement as it was exempted from VAT. Such exemption, however, has the opposite effect of military offsets, because offsets generally require a higher budget for military procurement to indirectly subsidise national industries, while the tax exemption had the effect of making military imports more financially attractive.

The cases which actually concerned public procurement – *Agusta* and *Finnish Turntables* – were cases that concerned the question whether the procured equipment was "intended for specifically military purposes" and would thus fall within the scope of application of Article 346 TFEU.[80] In *Finnish Turntables*, the Court did indeed emphasise that the referring national court should consider the necessity of the of the measure, in the sense of whether the security interests "could not have been addressed within a competitive tendering procedure".[81] The Court did not, however, elaborate on the margin of discretion of the contracting authority, nor did it elaborate on whether such a competitive tendering procedure should necessarily have been EU wide. Proportionality can also be safeguarded within national frameworks. The access to contracts which flow from military offsets, for instance, could be regulated within a national competitive procedure when there are various potential subcontractors.

2.4.2 The Directive's subcontracting regime: a serious alternative for military offsets?

Instead of regulating military offsets, the Defence Procurement Directive intends to provide an alternative to Member States by including rules on subcontracting. This alternative is strongly embedded within the internal market's legal principles as we know them. The Directive stipulates that successful tenderers shall not be required to

78 Trybus, *Buying Defence and Security in Europe* 2014, p. 417. This also seems to be the message of the Commission's Guidance Note.

79 Case C-414/97, *Commission* v *Spain*, ECLI:EU:C:1999:417, para. 17 and the Opinion of AG Saggio on this case at para. 6.

80 Case C-615/10, *Finnish Turntables*, ECLI:EU:C:2012:324, para. 40.

81 *Ibid*, para. 45.

discriminate potential subcontractors on grounds of nationality and that the tenderer shall in principle be free to choose its subcontractors.[82]

Contracting authorities may always ask or be obliged by their Member States to require from tenderers an indication of the share of the contract which will be subcontracted to third parties, the proposed subcontractor(s) and the subject-matter of these subcontracts.[83] This provides the contracting authority the opportunity to scrutinize the subcontractors and if necessary reject them when justified by objective criteria recognized by the Directive for the main procurement.[84] This means that subcontractors can, for instance, be excluded when there is evidence that the unreliability of particular subcontractors presents a risk to the security of the Member State.[85] The contracting authority will have to produce a written justification of its considerations in such a case.

The Directive also provides for an exception to the starting point of full freedom of contract which the successful tenderers possess. Contracting authorities may oblige or may be required by Member States to oblige the winning tenderer to award its subcontracts based on the public procurement principles of transparency, equal treatment and non-discrimination.[86] This includes the obligation to publish a subcontract notice in accordance with the Directive's rules that normally apply to contracting authorities, when the value of the subcontract exceeds the thresholds.[87] In addition, contracting authorities may oblige or be obliged by their Member States to require the winning tenderer to subcontract a maximum of 30% of the value of the contract to third parties, if this is proportionate to the object and value of the contract.[88] The contracting authority will, for that purpose, identify a range of values including a minimum and maximum percentage between which the value of the subcontracts must lie. As emphasized in the Directive's preamble, the proportionality principle should safeguard the "proper functioning of the successful tenderer's supply chain".[89]

First and foremost, as mentioned before (see Section 1.3.1.), the subcontracting options are *options* and thus no obligations for the Member States. There is very little incentive for Member States with prime-contracting capabilities (France and Germany in particular) to use the options when applying the Directive. When it is likely anyway that a domestic company will win the contract, it is more beneficial in terms of industrial policy to let the company freely choose its subcontractors. For Member States with sub-contracting capabilities it is consequently more beneficial to not use the Directive at all for contracts falling within the essential domain of their industrial policy. After all, if they apply the subcontracting options they are still not guaranteed that subcontracts will be awarded to their domestic industry as foreign

82 Directive 2009/81/EC, Article 21(1) and Recital 40.
83 Directive 2009/81/EC, Article 21(2).
84 Directive 2009/81/EC, Article 21(5).
85 Directive 2009/81/EC, Article 39(2)e.
86 Directive 2009/81/EC, Article 21(3), Article 50(1) and Article 51.
87 Directive 2009/81/EC, Article 52.
88 Directive 2009/81/EC, Article 21(4).
89 Directive 2009/81/EC, Recital 40.

subcontractors may be more competitive. Instead, they will then use Article 346 TFEU to exempt the contract and impose offset requirements on the selected supplier. The recent *Implementation Assessment* of the Directive shows that the use of the subcontracting options by the Member States indeed has been extremely limited.[90]

Secondly, the Directive's subcontracting requirements, even when resulting in participation of domestic industry, say very little about the substance of industrial participation. Even when a winning tenderer will subcontract 30% of the value of the contract, the positive effects for national military-industrial policy might be very limited. The Directive stipulates that tenderers may "ask the successful tenderer to subcontract to third parties a share of the contract" and that "any percentage of subcontracting falling within the range of values" shall be considered to fulfil the requirement.[91] It appears that contracting authorities are not allowed to set any qualitative requirements, *i.e.* specify which parts of the contract should be subcontracted. When understanding military offsets as an instrument of military policy (which Article 346 TFEU prescribes), their value primarily lies in technology transfers, not in economic activity as such. One cannot be sure that even when the subcontracts are awarded to domestic companies, it will provide anything close to the strategic benefits brought by military offsets which can be directly negotiated with the prime contractor.

The Directive's subcontracting options do, consequently, not provide a sound alternative to military offsets for middle sized industries (primarily consisting of subcontracting capabilities) with the ambition to maintain a domestic industrial and technological base.

2.4.3 The rationale of EDA's Code of Conduct on Offsets

The EDA *Code of Conduct on Offsets* reflects a system in which military offsets are accepted as legitimate balance-of-power strategies, even though it is an unnecessarily ambiguous and non-binding framework. The Code stresses that the participating Member States (all except Denmark) "share the ultimate aim to create market conditions […] in which offsets may no longer be needed", but that the present structure still require offsets.[92] In addition, it is highlighted that the defence market is "strongly influenced by political considerations that affect the level playing field", that offsets would not exist in a "perfectly functioning market" and that there are "other, not-offset related, practices distorting the European and global defence market".[93] In a general sense, most of the concrete requirements established in the Code are based on the strive for a system in which offsets "ensure the right balance between developing the aspired European Defence Technological and Industrial Base and the need to

90 During the covered period, the subcontracting options have only been used 11 times out of a total population of 14 165 contract notices (that is 0,078 % of the contracts awarded within the framework of the Directive). See: European Parliament, *Implementation Assessment* 2020, p. 90 and 99.

91 Directive 2009/81/EC, Article 21(4).

92 EDA, *The Code of Conduct on Offsets*, Brussels: 24 October 2008, p. 1.

93 *Ibid*, p. 2.

achieve the level playing field in the European Defence Equipment Market". This may sound cryptic or even contradictory, though it seems to imply that in absence of a 'level playing field' it remains justified to impose offset requirements on suppliers. More concretely it means that as long as the business models of large prime contractors are still based on receiving the majority of the domestic contracts or based on state aid and/or state ownership, requiring offsets when buying from them is justified.

Whereas the Commission in its 2012 communication to the European Parliament on the transposition of the Directive stressed its conviction that the "phasing out" of offsets is necessary to create a "truly European Defence Equipment Market", the Code of Conduct aims for closer convergence of offset policies, gradual reduction of their use and evolving offsets to better contribute to shaping the European Defence Technological and Industrial Base.[94] Although the document is not legally binding, the signatories committed themselves – among other things – to increasing transparency of their use of offsets, to clearly stipulate offset requirements in contract notices and to ensure that offsets will not exceed the value of the procurement contract.[95] In addition, the slightly ambiguous commitment is included that when offsets are used as a selection- or award criterion that they "will be considered of a less weight in order to ensure that a procurement process is based on the best available and most economically advantageous solution for the particular requirement".[96] Remarkably, the Code of Conduct does not distinguish between military and civilian offsets.

If we would understood the reference to "most economically advantageous" in the traditional sense of the concept, this commitment appears to be a contradiction in terms. The use of offsets, as such, deviates from awarding contracts to the most *economically* advantageous tender, as it adds the non-economic value of maintaining domestic industry for *military-strategic* reasons. Military offsets are as we know, in fact, indirect and – when designed strategically – well-targeted subsidies to domestic military industry. If we, however, focus on the reference to "best available" for understanding this commitment, its desired effect becomes clearer. Together with the transparency commitments, it is arguably better to not use offsets as selection or award criteria, but instead determine the extent of the offsets already in the contract notice as performance conditions. There can then still be competition between the tenderers based on being the most economically advantageous within the ambits of a contract that includes offsets.

Although the rationale of the Code of Conduct appears well in tune with the strategic logic of military offsets, its commitments are rather vague. The potential effectiveness of the guidelines, in providing a sound legal framework for strategic use of military offsets could benefit from transforming them into specified and legally binding rules and limit its scope of application to military offsets.[97] The sole fact that

94 *Ibid*, p. 2-3. COM(2012) 565 final, Report from the Commission to the European Parliament and the Council on transposition of directive 2009/81/EC on Defence and Security Procurement, 2 October 2012, p. 9.

95 EDA, *The Code of Conduct on Offsets* 2008, p. 2-3.

96 *Ibid*, p. 3.

97 This is also necessary if there were to be a legally binding regime, as it would be a regime within the boundaries of Article 346 TFEU which does not allow civilian offsets in the first place.

this regime should be located within the CSDP dimension of EU law is no reason for it to be non-legally binding. The CSDP's Common Position on arms exports, for instance, perhaps also consists of vague norms and like all CSDP measures falls outside the jurisdiction of the Court[98], but is still to be regarded as legally binding. Like for offsets when regulated by an intergovernmental regime, its potential effectiveness depends on the political will to adopt more strict norms.

Conclusion: regulating offsets based on the function of military procurement

Based on the country-specific examples of Section 2.2. and the theoretical approach as set out in Section 2.3. it appears that military offsets generally fulfill a military function; or at the least that they could and legitimately *should* fulfill a military function. It is undeniable that states with higher military expenditure tend to have more military-industrial activity within one's borders. This is no coincidence. Whether within a free-trading bloc such as the EU or not, states are systemically concerned with preserving their military power. Security in the EU is, first and foremost, based on the national security of the Member States. Depending on military power structures, military offsets may provide a sound strategy to improve state security by gaining a higher level of security of supply and by strengthening military interdependence within an alliance – thereby limiting asymmetrical dependence. As concluded in the previous chapter, military procurement contributes to a state's military power by i) procuring as technologically advanced and effective equipment as possible, ii) preserving or fostering domestic military industries for industrial independence and iii) strengthening military interdependence within alliances.

When states are unable to procure domestically, they will seek to fulfill the second and third function by adopting an appropriate offset policy. For the evaluation of the legal question as to whether a specific military offset requirement can be justified by Article 346 TFEU, the question should be whether it *objectively* fits the function of military procurement as defined before; *i.e.* whether it genuinely contributes to industrial independence and/or interdependence within a military alliance. If this question is answered affirmatively, it becomes irrelevant whether a state *subjectively* intends to reap the economic benefits of the military offsets as long as the economic benefits are not excessively disproportionate in relation to the security function.

Accepting military offsets as a suitable and potentially lawful tool to foster the military interests of EU Member States does not indicate complete freedom of action. Next to ensuring that military offsets fulfill the requirements of Article 346 TFEU, regulation can limit the negative effects of offsets on the effectiveness of military spending within a national context. It is important to note that inefficiencies are not *evil* in themselves. Efficiency is no overarching aim or value within the EU legal order when considering Article 3(1) TEU. Inefficiencies stemming from corruption or an excessive focus on economic benefits do, however, impede the legitimacy and legality

98 Article 24(1) TEU.

of military procurement. In that case, democracy, the rule of law and the overall effectiveness of military expenditure for the security of the people are endangered. Such inefficiencies are in fact also detrimental to the military function which offsets should serve, as military budgets of EU Member States are limited.

The EU should then not address these inefficiencies as an economic concern falling within the internal market, but as a military concern falling within the scope of the CSDP. The intergovernmental nature of this policy presupposes that European military security is the sum of the military security of the Member States.[99] European security depends then significantly on whether Member States individually spend their military budgets effectively, even more so in times of increasing defence budgets. Offsets regulation can potentially contribute to this objective. EDA's Code of Conduct provides a sound starting point for regulation, even though it is not legally binding and too ambiguous to have a significant impact on national practice.

The first two chapters have emphasised the international reality in which states need military power for their national security. This is the context of military procurement and military offsets. To move beyond this context of power politics to the legal system which ought to regulate it, the next chapter will focus on the metaphysical roots of the national security need; the concept of sovereignty. Afterwards, I will evaluate the legal basis of the Directive (Chapter 6) based on the legal context of exceptions to internal market law (Chapter 4) and EU public procurement law (Chapter 5).

99 Presupposing also that the Member States act in good faith, not against the military interests of the EU or NATO.

PART II

BEYOND POWER POLITICS: THE LAW AND ITS PURPOSE

CHAPTER 3

The Artificial Soul of the State and the Constitutional Purpose of EU Integration

Introduction

The role of sovereignty as a constraint on EU regulation of military procurement is undeniable. Recital 16 of the Defence Procurement Directive mentions that exemption on the basis of 'public security' or a Member State's 'essential security interests' can be necessary – among other things – for contracts which are "so important […] for national sovereignty" that the Directive does not sufficiently safeguard these interests. For a sound understanding of the legal characteristics of the security exceptions to the EU's internal market-based military procurement regime it is thus necessary to appreciate the concept of sovereignty in light of the European philosophical tradition that gave birth to it and the motivations for European integration after World War II.

The idea of sovereignty is rooted in the urge to end chaos and war by claiming that within a certain territory there exists supreme political authority. Centralising this authority in the sovereign state, by separating it from the empires and religion, became the predominant political regime in Europe during the renaissance. Unlike power, of which the military component can be measured by material capabilities (see Chapter 1), sovereignty is no quantifiable reality.[1] Like the holder of it (except for absolutist monarchs), which Hobbes referred to as the 'artificial man',[2] sovereignty is a theoretical construct – and therefore immaterial – rooted in legal theory and political philosophy. In other words: it is artificial. The exercise of sovereign rights, such as the UK's decision to withdraw from the EU by invoking Article 50 TEU, on the contrary, is observable in both political and legal reality. However far reaching the EU's competences and exercise thereof, Brexit showed Europe as well as Britain the harsh and complex political reality of state sovereignty.

The question addressed in this chapter is therefore not whether sovereignty constrains EU integration, but how we must understand these constraints in today's world. By elaborating the sovereignty constraint, this chapter gives body to this dissertation's law-in-context approach by bridging the gap between the *functional effectiveness* question as addressed in Part I and the *legal effectiveness* question of Part II. Whereas Chapter 1 provided an external perspective on the prospects of EU military-industrial integration, this chapter introduces the internal perspective of Part II by considering the Member States' sovereignty on which the EU has been

1 See for instance: F. Hinsley, *Sovereignty*, Cambridge University Press 1986 (first published in 1966), p. 1.
2 *Supra* note 1.

founded. More specifically, this chapter will consider this sovereignty in light of the EU's constitutional purpose to reach a better understanding of its impact on military procurement regulation.

The analysis of the system of international relations in Part I departed from Machiavelli's presupposition that power precedes morality (at least in military affairs), as there will be no effective morality without effective authority.[3] It goes beyond the purpose of this research to establish whether this applies to relations between individuals as it does to the relations between states (as Hobbes proposes; see Section 3.1.1). In liberal democracies, we certainly consider the state's internal sovereignty to be based on common conceptions of liberty, the public interest, morality and justice, while at the same time dependent on democratic legitimacy (*popular sovereignty*) and national identity. Sovereignty and military power should therefore, amongst other reasons, not be equated. When focusing on external sovereignty, which is primarily determined by military security and remains a *sine qua non* for the broader sovereignty concept, the necessity of military power is obvious. Hence, the immaterial construct depends on material capabilities. Faced with a large-scale invasion of the Russian armed forces in 2022, it was only military power that could save Ukraine's sovereignty.

To determine the extent to which external sovereignty constrains military-industrial integration, we must therefore first consider the origins and development of the concept in a European context. As the concept is rooted in political philosophy and developed by legal and political theorists alike, this requires analysis of the theories of (some of) the most influential political and legal philosophers on the idea of sovereignty as the source of the state's authority. It would go beyond the aim of this chapter – which is only an understanding of external sovereignty as a constraint on European military integration – to provide a critical philosophical examination of the theoretical foundations of the different theories. These theoretical foundations are nonetheless crucial for understanding how the different theories conceptualise 'sovereignty'. We must, however, simply accept (here) that (for instance) Hobbes and Rousseau had a completely different understanding of the human *state of nature*, which was decisive for their understanding of the state's purpose. Still, the implications of these different understandings of the state's purpose for the source of its authority – *i.e.* the concept of sovereignty – are quite similar.

After establishing the theoretical foundations of the sovereignty concept (Section 3.1) and understanding its development which resulted in modern day European integration (Section 3.2), I will evaluate how this concept is effectuated in the EU Treaties and its system of dividing competences between the EU and its Member States (Section 3.3). This will provide a solid legal-theoretical foundation for the legal analysis of the security exceptions to the internal market rules (Chapter 4), the scope of the Defence Procurement Directive in regulating military procurement (Chapter 5) and the conclusion on the legal basis of the Defence Procurement Directive (Chapter 6).

3 N. Machiavelli, *The Prince* (*De Principatibus / Il Principe*), Dover Publications 1992 (first published in 1532), p. 37.

3.1 External sovereignty as the source of political authority in international law

Amidst the wars and chaos in 16th century Italian territory, Niccolò Machiavelli considered military unity between the Italian territories under the command of a strong leader to be the only way to overcome the state of emergency.[4] To rule effectively, the ruler needed to be freed from the moral constraints of the church and act solely for the strategic interests of its territory. Although he did not define sovereignty as such, by removing religious constraints from (military) politics, Machiavelli laid the foundation for political authority based on state sovereignty.[5]

Not much later, Jean Bodin first constructed sovereignty as a theoretical concept. Like Machiavelli, Bodin considered it necessary for peace and stability to vest absolute and perpetual power in a sovereign ruler, amidst the religious wars in 16th century France.[6] For Bodin, sovereignty could only be held by him who had all the "power, authority, prerogatives and sovereign rights" transferred to him by 'the people', who consequently had given up all of their possession of it. Sovereignty as such was indivisible and the sovereign ruler was above the law, as he who imposes the laws on his subjects cannot be a subject to it himself. The sovereign could then exercise his sovereignty under "no other condition than what is commanded by the law of God and of nature".[7] Deciding on war and peace was, according to Bodin, an inherent right of the sovereign ruler, as the survival of the state depends on it.[8] The signing of the 1648 Treaty of Westphalia is generally considered to have formalised Bodin's notion of indivisible territorial sovereignty by building peace and order on the sovereignty of the European nation states (instead of transnational forces such as empire and religion).

3.1.1 Popular sovereignty derived from the 'social contract'

Bodin's sovereignty concept was certainly capable of fostering peace among nations and order within. Vesting unrestrained power in a sovereign ruler, only accountable to God, like Bodin prescribed became, however, difficult to justify by the rationalism of the age of enlightenment. Why would rational beings adhere to absolute and sovereign power vested in a single person or institution accountable to God?

Thomas Hobbes rationalised such adherence to absolute political power in his seminal work *The Leviathan*. For Hobbes, vesting sovereign power in a state is a consequence of the rational egoistic nature of 'men'. In the state of nature, where there

4 Machiavelli, *The Prince* 1532, Chapter XII and XXVI. For political stability beyond such a state of emergency, however, Machiavelli considered it necessary to maintain a political system which is not based on unity, but instead on a mix of monarchy, aristocracy and democracy, in which "one keeps watch over the other", *i.e.* some sort of *checks and balances*, see: N. Machiavelli, *Discourses on Livy* (*Discorsi sopra la prima deca di Tito Livio*), Oxford University Press 1997 (first published in 1531), p. 26.

5 As well as the foundation for a scientific method to study politics.

6 J. Bodin, *On Sovereignty: Four chapters from The Six Books of the Commonwealth* (*Six Livres de la Republique)*, Edited and translated by J. Franklin, Cambridge University Press 1992 (first published in 1576), Book I, Chapter 8.

7 *Ibid*, p. 8.

8 *Ibid*, p. 59.

is no sovereignty, men are only governed by their 'own reason'.[9] As men are all created grossly equal in their capabilities to attain certain ends and feel equally entitled to these ends, they become enemies when desiring the same thing. Hobbes therefore considered the state of nature to be a state of perpetual war of 'every man, against every man', in which anyone would live in perpetual fear and absence of security.[10] The rational nature of men then induces them to "endeavour peace, as far he has hope of attaining it; and when he cannot obtain it, that he may seek, and use, all helps, and advantages of war". As in the state of nature, one had an unlimited right to everything, one will only endeavour this peace (by limiting this natural right) as far as they are "contended with so much liberty against other men, as he would allow other men against himself".[11] Consequently, the sovereign power of the state is based on a "mutual transferring of rights" and the "mutual trust" (reinforced by the state's coercive power) that its laws will be upheld; *i.e.* sovereignty is the result of a *social contract*.

By basing sovereign power (*i.e.* the *raison d'état*) on rational choice, Hobbes could (unlike Machiavelli and Bodin) point out its limitations, as rationality prescribes that everything should be limited by its purpose.[12] For Hobbes, the reason for humans to vest sovereign power in a state was evidently "to live peaceably amongst themselves, and be protected against other men", that is peace and defence. In (EU) law these two functions of the state are referred to as internal and external security or sovereignty. Still, Hobbes' sovereignty was nearly absolute, as he considered sovereign power to be "unlimited, as long as the evil consequences of this are less evil than that of the perpetual war of every man against his neighbour". The means to fulfil the defence purpose of the state are then unlimited, as sovereignty itself depends on it. While the (internal) peace purpose is still somewhat constrained by the 'mutual transferring of rights', the defence purpose is unconstrained as external actors are no part of this mutual transferring. External forces, unconstrained[13] themselves as well in relation to the internal forces, are then an even greater threat to the survival of the state than internal threats. The ability to deal with these threats, that is the right to decide on "making war and peace with other nations" is therefore arguably the most significant *sine qua non* of sovereignty.[14] States can certainly limit their *de jure* right to exercise it by signing treaties, but they cannot abolish their *de facto* ability without losing their sovereignty itself.

Hobbes' social contract explanation of state sovereignty was – most notably[15] – further developed into the notion of 'popular sovereignty' by Charles de Montesquieu and Jean-Jacques Rousseau. For all their differences in their understandings of the

9 Hobbes, *The Leviathan* 1651, p. 86.
10 *Ibid*, p. 84.
11 *Ibid*, p. 87.
12 Under Bodin's presupposition that the sovereign is only subject to God, there is no limit to the means of the sovereign in exercising his sovereignty; at least not on earth.
13 Again based on the assumption that power, or at least individual fear, precedes individual morality.
14 Hobbes, *The Leviathan* 1651, p. 119.
15 At least for continental Europe (in the context of the French revolution, which essentially was about the endeavor for 'popular sovereignty').

state of nature,[16] Hobbes, Montesquieu and Rousseau all understood the sovereign power over matters of peace and war as the product of a social contract between equal individuals to be quite absolute.[17] Whereas Hobbes only considered sovereign power to be limited by its practical function of peace and defence, Rousseau considered sovereign power to be constrained by a constitutionally laid down *volonté générale* ('general will') only.[18] Montesquieu, in contrast, considered sovereign power in democratic republics to be embedded within the *trias politica* ('separation of powers'), the functioning of which would depend on the 'political virtue' of its citizens, which is equal to 'love of country' and thus 'love of equality', that is "the spring which sets the republican government in motion".[19] Any type of state, however, according to him, possessed a right to make war when necessary for its preservation.[20] The sovereign state thus, whether guided by the 'general will' or *political virtue*, whether a democracy or an autocracy, first requires a secure space for its survival, which according to realism-oriented theories on international relations is the functional similarity of states (see again Chapter 1). Whatever means necessary to achieve whatever purpose, sovereignty first depends on security.

3.1.2 Why we should distinct between external sovereignty and the exercise of sovereign rights

The terror of the French revolution, inspired by Rousseau's *volonté generale*, quickly showed the totalitarian danger of assigning unlimited political authority to an artificially constructed entity ('the people'). In the aftermath of the revolution, Benjamin Constant considered Rousseau's biggest mistake to have been his attempt to distinguish between the prerogatives of society as a whole (sovereignty) whose 'will' is absolute and the prerogatives of government which should only be instrumental to enforcing this 'will'.[21] Although authority can theoretically be based on the general

16 Unlike Hobbes, Montesquieu and Rousseau did not consider the state of nature to be a state of war, but instead considered inequality and conflict to arise from civilization. For Montesquieu the desire to be part of a society was one of the laws of nature. The result of his approach is then not so different from Hobbes, as for civilized humans living in societies, the 'state of war' is again inevitable. See: C. de Montesquieu, *The Spirit of the Laws* (*De L'Esprit des Lois*), translation by Thomas Nugent, Batoche Books 2000 (first published in 1748), p. 155 (Book X). J. Rousseau, *Discourse on Inequality (Discours sur l'origine et les fondements de l'inégalité parmi les hommes*), translation by F. Philip, Oxford University Press 1994 (first published in 1755*)*, pp. 55-61.

17 Following the idea of a social contract, it seems that in an international society structured by (equally) sovereign entities (with their own social contracts) internal sovereignty is always more constrained than external sovereignty.

18 J. Rousseau, *Of the social contract* (*Du contrat social; ou Principes du droit politique*), translation by H.J. Tozer Wordsworth Editions 1998 (first published in 1762).

19 Montesquieu, *The Spirit of the Laws* 1748, p. 17-18.

20 Montesquieu, *The Spirit of the Laws* 1748, p. 22 & 155 (Book I and Book X). For Montesquieu, the law of nations was naturally based on the principle "that different nations ought in time of peace to do one another all the good they can, and in time of war as little injury as possible, without prejudicing their real interests". Like Hobbes, the sovereign 'right' to make war is rather absolute, as it is only constrained by some sort of proportionality and one's own interests.

21 B. Constant, *Principles of Politics Applicable to all Governments* (*Principes de politiques applicables à tous les gouvernements représentatifs et particulièrement à la constitution actuelle de la France*), translation by D. O'Keeffe, Liberty Fund 2003 (first published in 1813), p. 17.

will, in reality it is exercised by individuals. When the prerogatives of society as a whole are defined as all-encompassing, its representatives will naturally seek its full exercise. We must then distinct between the "abstract thing", which is sovereignty, and the "real thing", which is the exercise of sovereign rights.[22] As the exercise of sovereign rights is always delegated to individuals, we must, according to Constant, carefully define and limit the abstract sovereignty to prevent abusive exercise. Constant agreed with Rousseau that all authority not derived from popular sovereignty is illegitimate. However, this does not make all authority derived from popular sovereignty necessarily legitimate, as its legitimacy "depends on its purpose as well as upon its source".[23]

The distinction between the purpose and source of sovereignty strongly relates to the distinction between external and internal sovereignty. External sovereignty refers to the condition of states being free from foreign domination (that is *military security*) and to independently shape their relations with other states and the laws regulating those relations in order to maintain their independence. Internal sovereignty is more complex but could best be defined as the supreme law-making and law-enforcing authority combined with a monopoly of legitimate use of force within its territory. Besides the monopoly of legitimate use of force, internal sovereignty is a flexible concept. A state can generally attribute the exercise of sovereign rights relating to the internal sphere to supranational organisations like the EU without losing any of its sovereignty.[24] External sovereignty, in contrast, is more absolute, as a state cannot effectively exercise external nor full internal authority without being free from foreign domination. Within the context of international relations, the scope of external sovereignty is conceptually only limited by itself; *i.e.* one's sovereignty ends where another one's sovereignty begins.[25] It is, however, only the *source* of (legal) authority in the international system. Although nearly absolute in this sense, the concept itself tells us little about its *purpose*.

When we distinguish between sovereignty and the exercise of sovereign rights, it becomes possible to think of an effective system of international law, regulating only the exercise. When doing this, we must not forget that the *abstract* thing has *real* implications for legal interpretation just as much as the real thing. To say otherwise would be rejecting the law to comprise a system with theoretical foundations, and instead approach it as a coincidental collection of rules. This may sound somewhat biased towards a strongly positivist or even strictly dualistic understanding of EU law, in which national sovereignty provides some sort of *ultimate rule of recognition* for

22 *Ibid*, pp. 18-19. As opposed to Rousseau who only distinguishes between two abstract things, sovereignty of the people and sovereignty of the government. Constant himself, however, failed to provide an alternative and consistent understanding of sovereignty as he acknowledged that 'society' does not delegate the right to change the organisation of government; calling it the exception which confirms the rule.

23 *Ibid*, p. 31.

24 As long as the EU Member States can effectively and unilaterally withdraw from the EU, as enshrined in Article 50 TEU, they remain independent in shaping their international relations; they remain sovereign.

25 Although in terms of jurisdiction there can often be overlap based on public international law. On extraterritorial jurisdiction, see for instance: C. Ryngaert, *Jurisdiction in International Law*, Oxford University Press 2015, pp. 101-144.

the validity of EU law and obstructs its primacy over national law.[26] But then again, sovereignty is just the source of authority, its purpose needs to be constitutionally defined – and continuously redefined – by values and principles, such as those present in Article 2 TEU. In addition, the fact that *external* sovereignty is the theoretical foundation of EU law says little to nothing about the extent to which EU law limits the exercise of sovereign rights by the Member States, *i.e.* the extent to which it is an autonomous legal order with primacy over the national legal order.[27] Within the legal system of which the EU legal order and the national legal orders form part, EU law certainly has primacy over national law but no 'final authority' or absolute supremacy.[28] The Member States maintained their political self-determination – most prominently enshrined in their right to withdraw from the EU Treaties – and their ability to unilaterally exercise their right to self-defence. In other words, they are still sovereign.[29]

If states can delegate so many of their sovereign rights, what is then still the *real implication* of external sovereignty for legal interpretation? It simply means that whatever values and legal principles are set, peace and security remain their foundations. Peace and security are, however, unlike sovereignty itself, no absolute concepts. Accepting an absolutist Hobbesian understanding of peace and security would, in fact, make them quite meaningless. There would be no safeguards against the tremendous harm the exercise of political power could do to individual freedom and well-being. Such a situation could hardly be called peaceful and would prevent political authority from having a *legitimate* purpose. Like Constant found that Rousseau's general will is in fact always exercised by individuals, in reality 'the people' as an absolute unity of individuals does not really exist but was invented to create stability. To distinguish between (absolute) external sovereignty and the (relative)

26 Most clearly embedded within Hart's positivist theory of law, see: H. Hart, *The Concept of Law*, Oxford University Press 1961, p. 101.

27 For the effects of external sovereignty and EU integration on internal sovereignty, see for instance: D. Grimm, *Sovereignty: The Origin and Future of a Political and Legal Concept* (*Souveränität: Herkunft und Zukunft eines Schlüsselbegriffs*, translated by Belinda Cooper, Columbia University Press 2015 (first published in 2009), pp. 92-98. Grimm considers that EU integration decreases the extent of popular sovereignty as "the legitimating principle of popular sovereignty fails in the case of acts emanating from a supranational power" (pp. 95-96). Even when presuming that legitimacy is not found elsewhere in these cases, popular sovereignty only fails to the extent that it is 'popular'. Supranational decision-making does not necessarily limit external sovereignty, as the EU Member States are still free to decide whether to be in the EU or not (Article 50 TEU) and EU Law provides safeguards which enable Member States to protect their national security (such as Article 346 TFEU).

28 This sovereignty approach is usually referred to as 'constitutional pluralism'. It asserts that within the EU's legal system, "the European order inaugurated by the Treaty of Rome has developed beyond the traditional confines of inter-national law and now makes its own independent constitutional claims, and that these claims exist alongside the continuing claims of states" and that these claims stand in a horizontal relationship, see: N. Walker, 'The Idea of Constitutional Pluralism', *The Modern Law Review* 2002, p. 337. On the difference between supremacy and primacy, see also: M. Avbelj, 'Supremacy or Primacy of EU Law – (Why) Does it Matter?', *European Law Journal* 2011, pp. 744-745.

29 Sovereignty is thus not so much within the legal sphere, where states can delegate competences and accept the primacy of rules made by supranational organisations, but within the sphere of political self-determination, see: J. Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy and Constitutionalism*, Cambridge University Press 2012, pp. 68-76.

exercise of sovereign rights is thus to distinguish between the source and purpose of political authority. The theoretical ends of the absolute but *abstract* sovereignty (peace and security) do not justify all possible means,[30] as the actual purpose of sovereignty is something which should be defined through the exercise of sovereign rights. Legitimate exercise then always is limited exercise.

Before addressing the purpose of EU integration – which is shaped through the common exercise of external sovereignty by its Member States – we must first address the source itself. In the international system, the primary purpose of the concept of external sovereignty is indeed limited to peace and security.[31]

3.1.3 External sovereignty as the source of international law

The sovereignty-security paradigm became the model of public international law after the Peace of Westphalia (1648). Although international institutions gained significant influence on processes of global politics, states have remained the primary subjects of international law and the primary bearers of rights and duties. External sovereignty remained the primary source of legal authority. It is beyond the scope of this chapter to elaborate on the legal characteristics of statehood, but it is useful to mention some of the so-called *fundamental rights* of states, which are the main principles of international law. These rights are the legal manifestation of external sovereignty, which in itself remains nothing more than a theoretical construct. Again, this makes it possible to distinct between the abstract thing that is sovereignty and the real thing that is the exercise of sovereign rights. The real thing is naturally more limited than the abstract thing. These rights include sovereign equality, independence and peaceful co-existence.[32] They aim to stabilise the relations between states as equal (thus sovereign) members of the international community.[33] As far as they succeed to do this, they create the potential of cooperation, free trade and international human rights protection beyond the territorial spheres of states.

In political terms, especially in security affairs, equality is meaningless. The larger states with greater military capabilities have more influence in the creation and maintenance of laws than the smaller states with limited capabilities. Equality just implies that smaller states have equal sovereign rights, not that they can always exercise these rights as effectively as the larger states.[34] In legal terms, however, equality

30 Again, the French revolution which degenerated into a totalitarian rage of state terror presents a clear example of this.

31 Beyond the concept of sovereignty, international law has since the founding of the UN also started to focus on the protection of human rights. It appears, however, insurmountable that the effectiveness of human rights remains largely dependent on the existence of peace and security.

32 See: M. Shaw, *International Law* (6th edition), Cambridge University Press 2011, pp. 211-216.

33 According to Morgenthau, the different 'fundamental rights of states' or principles of international law are all particular aspects of the "supreme authority of the individual state"; *i.e.* state sovereignty, see: H. Morgenthau, 'The problem of sovereignty reconsidered', *Columbia Law Review* 1948, pp. 345-347. This article was included as a chapter in H. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, 4th edn, New York: A. Knopf 1967 (first published in 1948).

34 However, within the UN system, the permanent members of the Security Council are perhaps a bit 'more equal', as they have veto rights when it comes to international peace.

is the essence of external sovereignty and a prerequisite for the right of independence. Sovereign equality implies that there is – in principle – no higher authority than that derived from national sovereignty. States are thus, in the words of Morgenthau, "subordinated to international law, but not to each other".[35] In the EU Treaties, this is confirmed by the reference to the "equality of the Member States before the Treaties" in Article 4(2) TEU and the sovereign right to withdraw of Article 50 TEU (see Section 3.3). For decision-making processes in international law, this indicates that the force of a provision of international law mostly depends on state consent, and, if not beforehand explicitly expressed otherwise (as in the EU Treaties for certain matters, see Section 3.3), unanimous decision-making is the standard.

Independence, in these regards, implies the right of states to exercise jurisdiction over their territories and populations and simultaneously the duty of non-intervention in the internal affairs of other states.[36] The latter ideally also facilitates peaceful co-existence; and where it does not facilitate peace, it justifies the exercise of the right to self-defence.[37] Independence does not, however, mean that states are *de facto* independent. In a globalised world, even for the most powerful states it can be beneficial to depend – from time to time – on others, though not as often as for the less powerful. In international law and politics, sovereignty does not refer to independency or autarky, but as emphasised by Waltz, it refers rather to the ability of a state to "decide for itself how it will cope with its internal and external problems".[38] The militarily weaker states – to some extent – always depend on stronger states for their security. Ideally, states can prevent the disbalance of complete dependence by striving for *interdependence*, both militarily and economically (see Chapter 1). Independence, as a fundamental right of states, thus merely indicates that a state cannot be placed under the legal authority of another state.[39]

To effectively prevent this from happening, states are in absence of any specific treaty-based prohibition free to produce and possess as much armaments as they deem necessary for their self-defence. The International Court of Justice (ICJ) confirmed this in several disputes, *e.g.* in *Nicaragua* v *United States* (1986) where the ICJ addressed the military conflict between Nicaragua and the US. The US' claim that the militarisation of Nicaragua as such proved its 'aggressive intent' was dismissed by the ICJ, as "in international law there are no rules other than such rules as may be accepted by the State concerned, by treaty or otherwise. whereby the level of armaments of a sovereign

35 Morgenthau, *Politics Among Nations* 1948, p. 346.

36 UN General Assembly, *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States*, 24 October 1970.

37 Article 51 UN Charter.

38 K. Waltz, *Theory of International Politics*, Random House New York 1979, p. 96: "To be sovereign and to be dependent are not contradictory conditions. Sovereign states have seldom led free and easy lives" […] "States are alike in the tasks that they face, though not in their abilities to perform them. The differences are of capability, not of function".

39 See for instance: J. Crawford, *The Creation of States in International Law*, Oxford University Press 2006, Chapter 2: 'The Criteria for Statehood: Statehood as Effectiveness', p. 65-66. Crawford refers to the opinion of Judge Anzilotti in: Permanent Court of International Justice, *Customs Regime between Germany and Austria*, Individual Opinion by M. Anzilotti, 1931.

State can be limited".[40] In its advisory opinion in *Legality of the Threat or Use of Nuclear Weapons* (1996) the ICJ decided that this even applies to nuclear weapons, as there is in international law no general and comprehensive prohibition on the possession thereof.[41] The right to self-defence can only be effectuated through the deployment of military capabilities. As Hobbes foresaw, sovereignty most crucially depends on the ability to deal with external threats. This ability is ultimately a military ability.[42] Complete dependence on one's own military capabilities, as ideal as it perhaps was in Hobbes' 17th century, is, however, too complicated and too costly in a globalised and nuclearized world. Both peaceful co-existence and self-defence therefore require military interdependence through alliance.

3.1.4 Military security through collective self-defence: NATO and the EU

Legal allocation of military security is principally derived from the 'inherent' right to individual and collective self-defence.[43] It is self-evident that any form of individual self-defence requires the immediate availability of operational- and industrial military capabilities. As self-sufficiency (of which the industrial component is also referred to as 'autarky') in military security is – at least for democracies -too costly in times of peace[44] and military power in global politics centres around nuclear deterrence, security structures in the EU still largely depend on transatlantic alliance through NATO. That the EU at the moment plays a limited role in this is for instance shown by the recent applications for NATO membership by EU Member States Finland and Sweden. Faced with a significant external threat, NATO alliance is still considered crucial for one's military security and EU membership is apparently considered to be insufficient for that purpose.[45] Alternatively, the legal system of the UN grants the Security Council with the task to maintain international peace and security.[46] It can, however, only take enforcement action when none of its five permanent members exercises its veto right.[47]

NATO is based on the right to collective self-defence as enshrined in the UN Charter. It operates, in that regard, simply by the principle that "an armed attack against one […] shall be considered an attack against them all".[48] Just as importantly, the North Atlantic Treaty (1949) obliges its signatories to "maintain and develop

40 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Judgment. I.C.J. Reports 1986, p. 135.
41 ICJ, *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion. I.C.J. Reports 1996, p. 247. Unsurprisingly in that regard, the recent UN *Treaty on the Prohibition of Nuclear Weapons* (2017) was signed by none of the nuclear powers.
42 C. von Clausewitz, *On War* (original title: *Vom Kriege*), Oxford University Press 2008 (first published in 1832), Book II.
43 UN Charter, Article 51.
44 This was noted by Montesquieu, see: Montesquieu, *The Spirit of the Laws* 1748, Book IX.
45 To a far extent because of American nuclear deterrence. Sweden and Finland formally applied for NATO membership on 18 May 2022.
46 UN Charter, Article 39.
47 UN Charter, Article 27.
48 North Atlantic Treaty, Washington D.C.: 4 April 1949, Article 5.

their individual and collective capacity to resist armed attack".[49] In 2014, the NATO countries agreed that defence expenditure should be 2% of their GNP and that 20% of this should be spend on 'major equipment'.[50] Ever since, there have been increasing tensions between the (ex-) hegemonic and major spender (US) and its European allies about fulfilling the requirement. At the same time, there has been divergence of military interests in approaching military conflicts in Iraq and Syria between US, Europe and Turkey.

There is (since the Lisbon Treaty) a similar collective self-defence clause in the EU Treaties in Article 42(7) TEU. The clause, however, proclaims that all CSDP cooperation should be consistent with the NATO commitments and that the latter remains the foundation of those Member States that are also part of NATO. Legally speaking, EU military cooperation appears to be subordinate to NATO. Out of 27, there are only 6 states no member of NATO (Sweden, Austria, Ireland, Finland, Malta and Cyprus) of which only Sweden possesses significant military industry. Apart from collective self-defence there are, thereby, no binding legal commitments relating to military expenditure that flow from the EU Treaties themselves. Only by voluntarily engaging in PESCO projects or specific military operations such commitments arise.[51] Like in NATO, there is thus in the EU a loyalty obligation, but without a treaty-based capability commitment. When it comes to European security, it seems that NATO has remained the primary instrument based on transatlantic alliance,[52] whereas EU cooperation in military affairs increasingly plays an additional role.

For NATO members, an EU approach might not always be the most suitable way to address the capability commitments of NATO. In the context of fighter planes, for instance, interoperability and alliance with the US armed forces played a decisive role in the decision-making process which led the Netherlands to buy F-35 planes from the US rather than buying EU-originated planes.[53] If there would be incompatibility with EU commitments, NATO obligations would overrule EU law, as Article 351 TFEU proclaims that "rights and obligations arising from agreements concluded before 1 January 1958 […] shall not be affected by the provisions of the Treaties". But there is no unavoidable incompatibility. NATO's purpose of military security naturally fits the different national security derogations which are present in much of EU law. This means that interpreting EU law in conformity with the North Atlantic Treaty should normally be possible. The security derogations then require wider discretionary power for the Member States when these are invoked for the sake of fulfilling NATO commitments (see Chapter 4). As emphasised in Chapter 1, the security structures

49 North Atlantic Treaty 1949, Article 3.

50 NATO, *Wales Summit Declaration*, 5 September 2014, para. 14.

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

52 For an historic explanation of this, see: K. Patel, *Project Europe: A History*, Cambridge University Press 2020, Chapter 2: Peace and Security.

53 See for instance: C. Klep, *Dossier JSF*, Boom 2014. Even Germany, one of the lead nations in the Eurofighter project, decided to procure F-35 fighter planes in addition to their Eurofighters after the Russian invasion of Ukraine in 2022.

of NATO then constrain EU military integration, whether operational integration or industrial integration.

3.1.5 Sovereignty as a natural constraint on international trade liberalisation

The components of sovereignty, such as equality, independence and peaceful co-existence aim to stabilise the relations between states. Only when their relations are sufficiently stabilised, states can build legal structures for cooperation and free trade.[54] Recent developments in the context of the so-called 'US-China trade war', which have led to the paralyzing of the judicial settlement mechanism of the WTO, underpin that the functioning of free trade regimes require geopolitical stability first.[55] The prospect of trade liberalisation then always depends on geopolitical power structures and national security, which are – as such – natural constraints on trade liberalisation. These natural constraints are explicitly embedded within the WTO's legal frameworks.

The primary purpose of the WTO is the "substantial reduction of tariffs and other barriers to trade and "the elimination of discriminatory treatment".[56] Although its instruments do not abolish tariffs (like the EU Treaties do), they seek to reduce them and prevent quantitative restrictions. For military equipment, both the General Agreement on Tariffs and Trade (GATT) and the Government Procurement Agreement (GPA) are relevant. Both frameworks include broad exceptions for governments to limit free trade when necessary for national security. These exceptions themselves do not apply to EU law, nor do the interpretations of their scopes indicate how EU law should be interpreted. They do, however, tell us on a more abstract level something about the nature of national security in trade matters and its constraining effect on it. Although trade liberalisation and its resulting interdependence can potentially foster peace, its effectiveness depends on the consent of the participating states and naturally constrained by their sovereignty.

The GPA seeks to achieve greater liberalisation of international trade, in addition to the other WTO instruments, through a multilateral framework for government procurement. Discriminatory practices and the protection of domestic industries should be banned.[57] Moreover, the agreement mentions that its signatory states and their procuring entities shall not impose or enforce any offset on foreign suppliers. According to the GPA, 'offset' should be understood as any measure which "encourages local development or improves a Party's balance-of-payments accounts". It specifically mentions, in that regard, the licensing of technology as an example of this.[58] Like

54 Somewhat ironically, stability amongst Western European states was built on the destructive effects of World War II and the US hegemonic role in protecting them from the Soviet threat afterwards.

55 The so-called 'trade-war' is essentially about security and the Chinese threat to decreasing American hegemony. US trade restrictions are often aimed at exports which could potentially strengthen the Chinese industrial and technological base of military power. The US has, in this context, blocked the appointment of new judges for the WTO's Appelate Body. See for instance: New York Times, *Trump Cripples W.T.O. as Trade War Rages*, 8 December 2019.

56 WTO, Agreement establishing the World Trade Organization, preamble.

57 GPA, preamble.

58 GPA, Article IV (7) and Article I (L).

the GATT, the agreement includes a broad exception for national security, as states cannot be prevented from taking any action which it would consider contrary to "essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes".[59]

The security exceptions to the obligations of the GATT include a special provision for all actions which one of the contracting parties "considers necessary for its essential security interests", in particular those "relating to the traffic in arms, ammunition, and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment" or "taken in time of war or other emergency in international relations".[60] The scope of this exception is much broader than the EU's armaments exception, as it can be applied to all goods which could even indirectly be trafficked for the purpose of supplying a military establishment while the EU's exception is limited to military equipment included in a certain list. In addition, applying the EU armaments exception may not "adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes". Debate about the GATT military security exception has therefore mostly been about its 'self-judging' nature with regards to its scope of application beyond purely military equipment or even the traditional dual-use goods.[61] For armaments, its self-judging nature is generally uncontested.[62]

In 1975, Sweden invoked the security exception for the justification of global import quota on certain footwear (leather shoes, plastic shoes and rubber boots).[63] The argument that Sweden raised was that the decrease of domestic production as a result of increasing import had become a "critical threat to the emergency planning of Sweden's economic defence as an integral part of its security policy".[64] Although many of the contracting parties expressed their concerns about this measure and its security nature, it did not come to the establishment of a GATT panel[65] which could have challenged it. The security exceptions to the GATT have also been used extensively to adopt more general trade measures against certain countries.[66] For instance, the exception was invoked by the US to justify its policy of economically isolating Nicaragua (1985) and by the European Community for the adoption of economic sanctions against Yugoslavia (1991).

59 GPA, Article III.
60 GATT, Article XXI (b) (ii).
61 See for instance: R. Alford, 'The Self-Judging WTO Security Exception', *Utah Law Review* 2011, pp. 697-759.
62 Only the question what should be understood as 'military' is then subject to judicial review.
63 See the notification of the Swedish government: GATT, L/4250, *Introduction of a Global Import Quota System for Leather Shoes, Plastic Shoes and Rubber Boots*, 17 November 1975.
64 GATT, Council of Representatives Report on Work since the Thirtieth Session, L/4254, 25 November 1975, pp. 17-18.
65 At the time before the establishment of the WTO, there were no permanent judicial bodies that could address such potential infringements of the GATT.
66 Alford, 'The Self-Judging WTO Security Exception' 2011, pp. 708-725.

In 2019, a WTO panel rejected the self-judging nature of the security exception in a dispute brought by Ukraine against Russia for generally denying the transit of goods through its territory. Russia argued that there was an 'emergency in international relations' which presented threats to its essential security interests and that both determining its essential security interests and determining which actions "it considers necessary" are the sole discretion of the state invoking the exception under Article XXI(b)(iii) GATT.[67] The Panel, however, concluded that it had "inherent jurisdiction", resulting from its "adjudicative function".[68] The existence of an "emergency in international relations" consisted, according to the Panel, of "an objective fact, subject to objective determination".[69] The exception is thus not entirely 'self-judging'.

Unsurprisingly, the Panel did establish that such an emergency existed between Ukraine and Russia, as since 2014 many countries had imposed sanctions on Russia because of the situation and the UN General Assembly recognised it as involving armed conflict.[70] Determination of what a state *in concreto* can consider necessary for its essential security interests is, however, according to the Panel, only limited by the obligation to apply the exception "in good faith" and not "as a means to circumvent" the GATT obligations.[71] The Panel concluded that, since the existence of an emergency (and even an armed conflict) was evident ever since 2014, while the transit bans could not be considered "so remote from, or unrelated to" it that a causal relation would be unlikely, Russia could itself determine the necessity of the measures.[72]

The factual circumstances under which the exceptions from Article XXI can be invoked thus appear not to be self-judging, and subject to judicial review. Determining which measures are actually necessary appears to remain a close to absolute exercise of a sovereign right. Like Adam Smith foresaw, in times of international conflict or war, military concerns supersede economic concerns.[73] Contrary to the approach of the EU Court of Justice to Article 346 TFEU,[74] the WTO Panel decision in *Traffic in Transit* (2019) seems to indicate that judicial review of a state's application of Article XXI GATT does not include a proportionality test. It appears that WTO bodies, being parts of what is merely a trade organisation, would lack the legitimacy to balance the security interests of its members with the obligations prescribed by trade law.

67 WTO, Report of the Panel, WT/DS512/R, *Russia – Measures concerning traffic in transit*, 5 April 2019, para. 7.27.
68 *Ibid*, para. 7.53.
69 *Ibid*, para. 7.77 & 7.102.
70 *Ibid*, para. 7.122-7.123.
71 *Ibid*, para. 7.132-7.133.
72 *Ibid*, para. 7.146.
73 See: Smith, *The Wealth of Nations* 1776, Book IV, Chapter I.
74 See: Case C-474/12, *Schiebel Aircraft*, ECLI:EU:C:2014:2139.

3.2 Sovereignty, nationalism and European integration

Sovereignty is nowadays often associated with nationalism.[75] There is a strong connection between these phenomena, as the creation of sovereignty is often build on nationalism and may arguably lead to aggressive nationalism. To understand the role of sovereignty in EU law it is necessary to appreciate the differences. Whereas the potential danger of aggressive nationalism (next to the geopolitical power structures discussed in Chapter 1) was one of the reasons which triggered European integration in the 1950s, sovereignty has remained the legal foundation of its integration process.[76] European integration based on the creation of an "independent" and "new legal order of international law"[77] has been a means to protect sovereignty from itself.

3.2.1 Europe's nationalist danger to sovereignty and democracy

For sovereignty to be effective, supreme legal authority backed by coercive power is not enough. Sovereignty must be rooted in political stability as well.[78] In the tradition of republican philosophers like Montesquieu, political stability requires citizens with political virtue, described by him as 'love of country'.[79] Rousseau considered this to be found in ensuring that every 'particular will' is in conformity with the 'general will'.[80] This implies a reciprocal relationship between citizens and their government, in which both sides are equally committed to the 'common liberty'. The state is committed to protecting the liberty and security of each citizen equally, meanwhile the 'virtuous' citizen understands that its individual liberty depends on the common liberty and is consequently devoted to protecting the liberty of others as if it is their own.[81]

As argued by Maurizio Viroli, this type of patriotism should be distinguished from nationalism, as it emphasises the value of "the republic and the free way of life that the republic permits", necessitating political and legal unity in a state. Patriotism

75 One could best understand sovereignty as a product of the 16th and 17th century philosophical tradition in Europe, while nationalism most vividly arose in the 19th century. Nationalist political rhetoric tends to use the notion of sovereignty as something which must be regained, such the 'take back control' slogan in the context of the Brexit referendum.

76 Rather than an attempt to abolish sovereignty. Both the failure of the European Defence Community (EDC) in the 1954 and the failure of ratifying the European Constitution in 2005 show the recurring force of national sovereignty. Like the Treaty of Rome presented an alternative to the EDC, the Treaty of Lisbon is an alternative to the Constitutional Treaty. Since Lisbon, the EU Treaties therefore emphasise national sovereignty, *e.g.* by Article 4(2) TEU (national security prerogative) and Article 50 TEU (withdrawal clause).

77 Case 26/62, *Van Gend en Loos*, ECLI:EU:C:1963:1, p. 12 and Case 6/64, *Costa* v *ENEL*, ECLI:EU:C:1964:66, p. 594.

78 According to Machiavelli, this does not require 'unity', but can, on the contrary, be based on social friction and division (as in the example of the Romans) when vested in 'good institutions', see: Machiavelli, *Discourses on Livy* 1531, p. 29. To a certain extent, this was also foreseen by Montesquieu in this ideas about division of power.

79 See: Montesquieu, *The Spirit of the Laws* 1748, pp. 17-18. For an extensive evaluation of the different republican understandings of Machiavelli, Montesquieu and Rousseau of 'love of country' and patriotism, see: M. Viroli, *For Love of Country: An Essay on Patriotism and Nationalism*, Oxford University Press 1995, Chapter 3.

80 See: J. Rousseau, *Discourse on Political Economy* (*Discours sur l'économie politique*), translation by Christopher Brett, Oxford University Press 1994 (first published in 1755), p. 14 and p. 18.

81 See: Viroli, *For Love of Country* 1995, pp. 86-89.

is rational, as it is based on the awareness that one's individual interests of liberty, security and prosperity eventually depend on the common interest (common liberty, common security etc.). The purpose of the state's sovereignty is to ensure this common interest, and thereby facilitate the happiness of its people.[82] Nationalism, on the contrary, emphasises the "spiritual and cultural unity of *the people* (emphasis added)" in a nation.[83] As such, nationalism is irrational, as it places the unity within the 'nation' above the sum of individual interests, and potentially above the state itself. In this sense, the 'republican' Rousseau paradoxically – and perhaps unintentionally – laid the foundation for nationalism in his *The Social Contract*, even though – as a republican – he also emphasised the value of individual liberty in other works. Nationalism, in its most extreme forms, leads to autocratic government when the 'individual' freedom becomes wholly subordinate to the unity in the nation. The latter in particular is true for the fascist and totalitarian regimes which terrorised Europe and its peoples in the 20th century. As shown by Hannah Arendt, the Nazi regime, which was founded on the cultural and ethnical superiority of the German people, and the Soviet regime under Stalin, which was founded on the ideological superiority of communism, were both 'totalitarian' in the sense that they did not merely sought to gain political power, but instead sought to eliminate individual spiritual and intellectual liberty, as "Total domination does not allow for free initiative in any field of life".[84]

Republicans like Rousseau acknowledged the relevance of national culture in the struggle of oppressed 'people' for political liberty.[85] Like the principles of sovereignty and sovereign equality, the United Nations and its legal architecture have been built on the "self-determination of peoples" as well.[86] Self-determination requires sovereignty to originate from cultural unity, while its perseverance should be based on some sort of common identity. The right to self-determination undeniably has reinforced or established the sovereignty of many nations, which transformed into states. It has therefore been at the basis of political independence for many peoples through post-World War II decolonisation of European empires. Notwithstanding the theoretical strength of sovereignty, before decolonisation European states exclusively reserved sovereignty for themselves. It was thus not based on a universal understanding of the right of self-determination of peoples. At its best, it used to be an instrument of hypocrisy. The decolonisation process showed, however, that the abuse of the concept

82 Viroli, *For Love of Country* 1995, p. 64-74. For the rational origins of patriotism, Viroli refers to: P. Doria, *La vita civile*, Naples 1729, II. I. 2 and Montesquieu, *The Spirit of the Laws* 1748, Book II.

83 Viroli, *For Love of Country* 1995, p. 2.

84 H. Arendt, *The Origins of Totalitarianism*, Meridian Books 1958 (first published in 1951), p. 339.

85 J. Rousseau, 'Considerations on the Government of Poland and on Its Planned Reformation' (*Considérations sur le gouvernement de Pologne et sur sa réformation projetée*), in: *The Plan for Perpetual Peace, On the Government of Poland, and Other Writings on History and Politics*, translated and edited by Christopher Kelly, Dartmouth College Press 2005 (first published in 1782), pp. 174-175 and 122. In particular at 22 Rousseau considers that "A single thing is enough to make it impossible to subjugate; love of the fatherland and of freedom animated by the virtues that are inseparable from it".

86 UN Charter, Article 1(2).

has not affected its relevance for being a foundation of political self-determination of peoples.[87]

Contrary to decolonisation, recent European history just as well shows us the dark side of nationalist sentiments. When arising within an entity that is already effectively sovereign, it has been nurturing autocratic, fascist and totalitarian regimes. Under the guise of *spiritual and cultural unity* as well as ideological unity, these regimes have preached superiority of own culture, ideology or even race, and sought the elimination of individual liberty and the domination of foreign sovereign states.[88] Based on such a sense of superiority, nationalism is intellectually in conflict with the principle of sovereign equality. When arising within a state with relatively-*superior* military capabilities, history shows that it poses the most severe threat to peace and the sustainment of the international legal order.

The two world wars and the Soviet threat which faced Europe during the 20th century were fuelled by nationalist rhetoric and showed the nationalist danger to European peace. For an international community based on sovereign equality and peaceful co-existence of states, nationalism can be positive when it frees peoples of oppression and facilitates their political self-determination. However, as soon as national culture has been fleshed out into a sovereign state, nationalism presents a danger to sovereignty rather than its protection. Like individual liberty in the republican community which Rousseau envisioned to be based on the awareness that one can only be truly free when all are free, the international community can only remain peaceful when there is – at least some – awareness among states that one's own sovereignty depends on sovereign equality. Unlike people, whose natural equality forms the basis of the 'social contract',[89] states are not naturally equal in capabilities; accordingly they need to seek balance of power through interdependence and alliances (see again Section 1.2). Balance of power is thus the primary condition under which peaceful co-existence based on sovereign equality is possible.

The totalitarian examples of Nazi Germany and the Soviet Union under Stalin show that rather than being a foundation for sovereignty, nationalist politics have (unsuccessfully) sought to absorb the nation into the concept of the sovereignty or – in the Soviet example – even replace it by a some sort of 'socialist society'.[90]

87 Even though the borders of former colonies were originally not necessarily drawn based on cultural unity of the people residing there, but often decided by the former colonisers. Sovereignty has thus not wiped away the impact of colonisation. Still, it provides a theoretical basis for a future of greater equality between states and greater well-being for their peoples. For an African perspective on the relevance of respect for sovereignty, see for instance the speech of Kenya's UN ambassador Kimani in response to Russia's invasion of Ukraine stating that "We chose to follow the rules of the OAU and the United Nations Charter not because our borders satisfied us but because we wanted something greater forged in peace", see: M. Kimani, *Statement to an Emergency Session of the UN Security Council on the Situation in Ukraine*, 22 February 2022.

88 See for instance: Arendt, *The Origins of Totalitarianism* 1951, Chapter 12.

89 For Hobbes, as well as for Rousseau and Montesquieu, people are created grossly equal in terms of capabilities.

90 See in that regard: Hinsley, *Sovereignty* 1986, p. 215. Hinsley refers to Hegel, "who contended that the predestined end of political evolution was that the nation should be absorbed into the state" and Marx "who retaliated with the argument that the predestined goal was that political society should annihilate the state". Arguably this was already the result of Rousseau's *The Social Contract*.

Unlike patriotism which merely requires citizens to defend their country from external aggression, nationalism causes military aggression because of its underlying sentiment of superiority.[91] The 2022 Russian invasion of Ukraine – once again – showed the aggressive and expansionist nature of nationalist politics when exercised by an autocratic government. Consequently, it has often been argued that republican patriotism (based on *popular sovereignty*) only gives rise to defensive wars, whereas nationalism in combination with autocratic government causes offensive wars.

Immanuel Kant considered, in that context, that republics with a "constitution that follows from the idea of an original contract" (*social contract*) would be much less eager to go to war, as the citizens who would eventually decide on this would also have to fight and pay the costs of such a war.[92] One could then argue that such republics – nowadays defined as 'democracies' – would only engage in defensive wars, such as the Ukrainian attempts to gain back control over its territories. Such republics would thus not go to war with one another. Even though it is plausible that constitutional democracies are generally more peaceful than autocratic or aristocratic regimes based on nationalism, such theory is unusable in practice. One would first have to abolish all non-democratic regimes – through 'defensive' war? – before 'perpetual peace' can be reached, while recent history shows that existing democracies more readily turn into autocracy than *vice versa*; based on internal nationalism for instance.[93] Nationalism thus not only endangers sovereignty in terms of peaceful co-existence of sovereign states; it also endangers democracy.

3.2.2 European integration and sovereignty

European integration after World War II presented a solution to the described danger of nationalism. The European Community of Coal and Steel (1952) and the Treaty of Rome (1957) did not seek to abolish the sovereignty of its signatories. On the contrary, these frameworks sought to bring permanent peace within Europe by Franco-German power balance, in particular through the constraining of future German nationalism. As such, European integration after World War II can be considered as part of national reassertion after the European nation states had failed so dramatically in their core functions. This is observed by Milward, stressing that "in the long run of history there has surely never been a period when national government in Europe has exercised more effective power and more extensive control over its citizens than that since the Second World War, nor one in which its ambitions expanded so rapidly" and that

91 Viroli, *For Love of Country* 1995, p. As referred to by Viroli, this argument has been made by Orwell (pp. 2-3) and Price (pp. 96-99), see: G. Orwell, *Notes on Nationalism*, Penguin Random House 2018 (first published in 1945) and R. Price, *Discourse on the Love of Our Country*, London 1790.

92 I. Kant, 'Toward Perpetual Peace' (*Zum ewigen Friede*), in: *Toward Perpetual Peace and Other Writings on Politics, Peace and History*, translated by David L. Colclasure, Yale University Press 2006 (first published in 1795), p. 74-75. Even though Kant explicitly referred to republics and not 'democracies', the theory of 'democratic peace' originates from this essay.

93 The most recent Democracy Index of the EUI shows a decline in global democracy, see: The Economist Intelligence Unit, *Democracy Index 2021: The China Challenge*, p. 4. For a theoretical critique on democratic peace theory, see for instance: K. Waltz, *Man, The State and War: A Theoretical Analysis*, Columbia University Press 1951, Chapter 4.

consequently "to supersede the nation state would be to destroy the community".[94] To bring security to the Member States, the European Community also had to be embedded within the NATO alliance which provided military protection from the external Soviet threat.[95] Balancing Soviet power further fuelled a Franco-German alliance.

That the substance of the EU Treaties is embedded in the legal construct of sovereignty is confirmed by Article 4 TEU, which decides that competences not conferred upon the EU remain with the Member States (para. 1) and that the EU shall respect the (sovereign) "equality of Member States before the Treaties" and the "essential state functions" such as national security especially (para. 2). In addition, the Treaty of Lisbon (2007) confirmed that the EU is a community of sovereign states by establishing a withdrawal clause in Article 50 TEU. Although withdrawal is certainly complicated, it is the ultimate and unilateral exercise of a sovereign right within the context of the EU Treaties, as it is according to Article 50 TEU only constrained by national constitutional requirements. The Court confirmed this in *Wightman* by stipulating that this provision should be interpreted in a way that the Member State is in full control of the withdrawal process, as the provision "depends solely on its sovereign choice" and it is the objective of the provision to enshrine "the sovereign right of a Member State to withdraw".[96]

The EU cannot be considered as a sovereign actor itself, but as pointed out by Hyde-Price, rather as a "vehicle for the collective interests of its member states".[97] Former Commission President Jacques Delors referred to this more ambitiously as the "common exercise of sovereignty".[98] In the many supranational policy areas of the EU, the Member States have, in fact, as phrased by the Court in *Van Gend en Loos* (1964) "limited their sovereign rights".[99] With the Single European Act in the 1986, the Member States confirmed this limitation of sovereignty by introducing the possibility of adopting legislation based on qualified majority voting (instead of unanimity). This possibility is, however, limited to those areas of competence to which the Member States assigned it, such as legislative acts "which have as their object the establishment

94 A. Milward, *The European Rescue of the Nation State*, Taylor & Francis Group 2000, Chapter 1: History and Theory, p. 15 and p. 2.

95 Considering the recent applications for NATO membership of EU Member States Finland and Sweden shows that only little has changed in the primacy of NATO (instead of the EU) in providing military protection to European states. Once again, it seems that external threat is the backbone of a functioning military alliance.

96 Case C-621/18, *Andy Wightman and others*, ECLI:EU:C:2018:999, paras 50 and 56.

97 A. Hyde-Price, "Normative' power Europe: a realist critique', *Journal of European Public Policy* 2006, p. 220.

98 J. Delors, 'Address at the College of Europe, 17 October 1989 [accessible through: <https://www.cvce.eu/content/publication/2002/12/19/5bbb1452-92c7-474b-a7cf-a2d281898295/publishable_en.pdf>.

99 Case 26/62, *Van Gend en Loos*, ECLI:EU:C:1963:1, p. 12.

and the functioning of the internal market".[100] The Member States thus maintained ownership over the integration process; they limited their 'sovereign rights', not their sovereignty.

By enabling the harmonisation of those laws which were potential trade barriers, the SEA had to provide a level of mutual trust based on reciprocity which the establishment of the single market required. Instead of limiting their sovereignty, the Member States reinforced the limitation of sovereign rights in the economic domain, as removing legislative trade barriers would foster the prosperity of all. As pointed out by Patel, the willingness of the sovereign European states to limit their (economic) sovereign rights was, in fact, from the beginning (Rome Treaty) triggered by the need to afford the rebuilding and strengthening of their state structures which had already been fostered under the guise of the Marshall Plan.[101] Somewhat ironically, decolonization of the European empires reinforced the idea of the nation state and its sovereignty as the obvious political framework as well, even though it also revealed the decline of military power of the European imperialistic states. European economic integration has – in the words of Adam Smith – first and foremost been an instrument for the *wealth of nations*. Having retained general autonomy over their taxation and welfare systems, these *nations* still generally decide themselves how to distribute this wealth amongst citizens.[102]

As European integration is based on reciprocal limitation of sovereign rights (and thus equality between the Member States) for the common security and prosperity, nationalism threatens the perseverance of European integration from within. In the republican tradition, sovereignty is a means to an end, not an end itself. Based on democratic decision-making, popular sovereignty should equally provide individual citizens with liberty. The EU has been founded on this tradition, as is clear from Article 2 TEU which proclaims the values which are common to the Member States, such as

100 The Single European Act (SEA) was the first revision of the Treaty of Rome, aiming to establish a 'single market'. In the aftermath of the *Dassonville* and *Cassis de Dijon* judgments of the Court, it was deemed necessary to supplement the negative integration of the Treaty of Rome by positive integration through harmonization of laws. The SEA supplemented the EEC Treaty with Article 100a (now to be found in Article 114 TFEU) which created a legal basis to "adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market". See: Article 18, *Single European Act*, Official Journal of the European Communities, 29 June 1987.

101 For Patel, it were the promises of the nation states of prosperity and security which required international cooperation, such as European integration. However, considering the issue in terms of peace and security only (as the author proposes), it remains apparent that a permanent solution was needed to constrain the nationalist threat of German military power, while wealth depends on security and provides states with resources to build their military power on. See: Patel, *Project Europe: A History* 2020, Chapter 6: Superstate or Tool of Nations?. See also: Milward, *The European Rescue of the Nation-State* 2000.

102 It should not be neglected though that the Treaty of Maastricht (1992) introduced EU Citizenship, which brings along fundamental rights protection of all EU citizens. These rights are, however, concentrated around the principle of non-discrimination on grounds of nationality and the right to move and reside freely within the territory of the EU (see Article 20 & 24 TEU; see also Directive 2004/38/EC, the 'Citizens Rights Directive'). EU Citizenship requires Member States to treat nationals from other Member States equal to their own. It does not prescribe, in that sense, whether they should enjoy benefits in the first place.

democracy, freedom, equality and the rule of law.[103] But the EU Treaties simultaneously recognise the relevance of national culture, by establishing in Article 4(2) TEU that the EU shall respect the national identities of the Member States, which are "inherent in their fundamental structures, political and constitutional". As such, the EU Treaties seem to constrain its signatories by 'common' values, which centre around democracy, human rights and rule of law. The EU does not impose these 'common values' on the Member States, as these values should have been already 'common' before accession to the EU.[104]

By transferring certain sovereign rights to the European Community[105] after World War II, European states sought to stabilise their relations and constrain the danger of nationalist expansionism. Consequently, both international balance of power (see Chapter 1) and national division of power became more complex. The EU is founded, in accordance with Article 10 TEU, on the democratic tradition based on the principle of representative democracy, in which sovereignty is either derived from the national parliaments or their citizens; *i.e.* popular sovereignty. At Union level, citizens of the Member States, who are thereby also EU citizens,[106] are represented by the supranational European Parliament, while the Member States themselves are represented by their governments in the intergovernmental European Council and the Council.

As the European Council and the Council are much more influential than the European Parliament when it comes to the big decisions in European integration, the legitimacy of representation primarily depends on the democratic accountability of national governments to their parliaments and citizens.[107] This is not so strange, as there is no 'European people', which the EU Treaty itself acknowledges by identifying itself as "a new stage in the process of creating an ever closer union between *the peoples of Europe*" aiming, among other things, to promote "the well-being of *its peoples*"(emphasis added).[108] Even though the EU Treaties confer rights upon individuals, the EU is not based on a *social contract* between them, but instead on a *political contract* between its Member States.[109] Completely democratising the EU by speaking of a 'European people' would actually contradict the EU's *raison d'être*, as it was founded to protect popular sovereignty from itself by rule of law. The

103 This is, for instance, mentioned in: B. de Witte, 'Sovereignty and European Integration: The Weight of Legal Tradition', *Maastricht Journal of European and Comparative Law* 1995, p. 147. De Witte nuances this by stating that the constitutions of The Netherlands and Denmark do not refer to the concept of 'popular sovereignty'.

104 This is confirmed by the so-called Copenhagen criteria which are requirements for accession to the EU, see: Article 49 TEU and European Council, *Conclusions of the Presidency*, Copenhagen: 21-22 June 1993.

105 In its *Costa/ENEL* judgment the Court established that Member States have "limited their sovereign rights" by granting the Community "real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community", see: Case 6/64, *Costa v. ENEL*, ECLI:EU:C:1964:66, pp. 593-594.

106 Article 20 TFEU.

107 Article 10(2) TEU.

108 Article 1 TEU.

109 However far the EU's regulations reach into the societies of the Member States, in terms of social contract, the legitimacy of the rules for citizens still depends on the consent of their Member States, which is confirmed by Article 50 TEU.

EU's purpose was not to replace national popular sovereignty by European popular sovereignty, which would be nothing but shifting the problem from the national to the European level.

3.3 Sovereignty and retained competences in a context of constitutional pluralism

When considering European integration as a means to protect the sovereignty of the Member States from itself, EU law is of great constitutional value within its own legal order as well as the legal orders of the Member States. Although few would contest that the Member States are the *Masters of the Treaties*, ever since the *Costa/ENEL* judgment of the Court it has – generally – been accepted by them that the EU Treaties establish "an independent source of law".[110] In other words: as proposed by constitutional pluralists, the EU legal order makes its "own independent constitutional claims" which stand in a horizontal relationship with national constitutional claims rather than a hierarchical relationship.[111] The legitimacy of EU constitutionalism should then, as argued by Miguel Maduro, be derived from its "constitutional added value with respect to national constitutionalism".[112] Again, the EU's purpose is not to replace, but to add to the constitutional mechanisms of the state. As pointed out by Stephen Weatherill, it would be a mistake to evaluate questions of legitimacy of EU supranational measures according to the democratic standards of the sovereign state, as the EU was in fact created to 'tame' the economic and political sovereignty of its members.[113] The purpose of *Constant*-like constitutionalism, after all, was to protect *Rousseau*-like popular sovereignty from abusive exercise; *i.e.* providing the source of political authority with a legitimate purpose.

For legality analysis, as opposed to legitimacy, we must reframe this legitimacy benchmark within the EU's constitutional order. Within this order, the achievement of common interest objectives is not just subject to the protection of individual rights (like in the national constitutional order), but also constrained by the sovereign rights of the Member States such as the national security responsibility. Evaluation of the legality of EU measures thus requires understanding how – and whether – particular measures fit within the EU's overall constitutional purpose and to what extent their potential effectiveness is constrained by the Member States' retained competences; *i.e.* their sovereign rights. Too many constraints combined with too ambitious aims

110 Case 6/64, *Costa/ENEL*, ECLI:EU:C:1964:66, p. 594.

111 See: Walker, 'The Idea of Constitutional Pluralism' 2002, p. 337. The idea of constitutional pluralism in the EU context emerged amidst the 1990s, first put forward by MacCormick in the aftermath of the so-called Maastricht decision of the German Bundesverfassungsgericht, see: N. MacCormick, 'The Maastricht Urteil: Sovereignty Now', *European Law Journal* 1995, pp. 259-266. For an overview, see: M. Avbelj & J. Komárek, *Constitutional Pluralism in the European Union and Beyond*, Bloomsbury Publishing 2012, Introduction.

112 M. Maduro, 'Three Claims of Constitutional Pluralism' in: M. Avbelj and J. Komárek (eds), *Constitutional Pluralism in the European Union and Beyond*, Bloomsbury Publishing 2012, pp. 67-84.

113 S. Weatherill, 'Competence and Legitimacy', in: C. Barnard and O. Odudu, *The Outer Limits of European Union Law*, Hart Publishing 2009, p. 27.

will result in laws which lack the *potential effectiveness* as defined in this research (see again: Introduction).

Based on this dynamic between functionalism and constitutional pluralism, the final section of this chapter sets out the general characteristics of EU law based on which the legal basis of the Defence Procurement Directive will be evaluated in Chapter 6.

3.3.1 The principle of conferral and the choice of legal basis

The main consequence of the sovereignty constraints on EU integration is the principle of conferral. According to Article 5(1&2) TEU, this principle entails that "Competences not conferred upon the Union in the Treaties remain with the Member States". As such, it requires the EU to act within the boundaries of the competences as conferred upon it by the Member States, as the EU's legal authority is derived from the external sovereignty of its members. When the EU exceeds these limits, it acts *ultra vires*. In practice this means that every act of the EU should specify and substantiate its choice of legal basis in the EU Treaties. The legal logic of this exercise is clear, as only the Treaties directly derive their legal force from the sovereignty of its signatories. According to the Court, this means that:

> "the choice of the legal basis of a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review".[114]

Only particular legal bases enable the EU to adopt legislative acts such as the Defence Procurement Directive. The choice of legal basis thus affects the substance of an act.[115] This choice, in the words of the Court, "has constitutional significance", as adopting an act on an incorrect basis can invalidate the act as a whole.[116] Moreover, the required procedures and entitled institutions vary extensively among different legal bases. Evaluating the choice of legal basis, in these regards, should be conducted in the light of the aims and means of the EU Treaties, *i.e.* the purpose of EU integration.

Since the Lisbon Treaty, the EU Treaties explicitly define their aim as to "promote peace, its values and the well-being of its peoples".[117] Both the supranational internal market (based on the idea of a *highly competitive social market economy*) and the intergovernmental CFSP (including military cooperation) are means which should contribute to the fulfilment of this aim. The Lisbon Treaty moreover established that the EU "shall pursue its objectives by appropriate means commensurate with the competences conferred upon it".[118] This indicates that when reviewing the choice of

114 Case 45/86, *Commission v. Council*, ECLI:EU:C:1987:163, para. 11. See also: Case C-300/89, *Commission* v *Council (Titanium dioxide)*, ECLI:EU:C:1991:244, para. 10.
115 *Ibid*, para. 12.
116 Opinion 2/00, *Cartagena Protocol on the Transfer of Living Modified Organisms*, ECLI:EU:C:2001:664, para. 5.
117 Article 2(1) TEU.
118 Article 2(6) TEU.

legal basis one should understand the *ultra vires* question in a broad sense. It requires evaluation of whether the most appropriate legal basis was actually chosen for the achievement of the aim of the measure and its contribution to the EU's primary aim of peace, values and well-being. When an issue, such as military procurement, can both fall within the internal market competence and the CFSP competence, one must compare these possibilities (see further in Chapter 6).

3.3.2 Different types of competence and the Common Foreign and Security Policy

The Treaty of Lisbon sought to constitutionalise the EU by removing the old pillar structure, and thus embed all policy areas within a single constitutional architecture. At the same time, the Treaty sought to clarify the division of competences by categorising EU competences into three distinctive general categories. Article 2 TFEU distinguishes between exclusive-, shared- and complementary competences. When an exclusive competence has been conferred on the EU, the Member States have completely given away their own competence, *e.g.* for the customs union and the Common Commercial Policy (CCP). In case of shared competence, the Member States can only act to the extent that the EU has not exercised its competence, *e.g.* with regards to the internal market. Regarding complementary competences, the Member States have not given away their competence, *e.g.* with regards to public health. The EU can then only act to support, coordinate or supplement the actions of the Member States and lacks the competence to harmonise the laws and regulations of the Member States. For the internal market, Article 114 TFEU does provide a legal basis for harmonisation of laws and regulations. It provided the legal basis for the EU to adopt its Directive on military procurement.

The Treaty-drafters found it necessary to exclude two policy areas from this categorisation; the EU's competence to coordinate economic and employment policies and its competence to "define and implement a common foreign and security policy, including the progressive framing of a common defence policy" (*i.e.* CFSP and CSDP). It could perhaps be argued that based on its position in Article 2 TEU the CFSP is somewhat in-between shared and complementary competence. However, the CSDP (within the CFSP framework) is rather embedded within a specific and distinctive set of rules on decision-making.[119] Looking at Article 24 TEU, two differences stand out. First, the adoption of legislation is excluded. Instead, the CFSP's actions consist of general guidelines, decisions and the strengthening of systematic cooperation between the Member States. Secondly, the policies are defined and implemented by the European Council and the Council and put into effect by the High Representative and the Member States. The Commission, the European Parliament and the Court have a very limited – and only ancillary – role to play. The intergovernmental nature

119 It could be stated that although the Lisbon Treaty got rid of the pillar structure, the CFSP framework in fact retained its distinct characteristics, see: P. Koutrakos, *The EU Common Security and Defence Policy*, Oxford University Press 2013, p. 29.

of this policy area is underpinned by the unanimity rule, requiring decisions to be adopted unanimously by the Member States (with only some exceptions).[120]

It might seem contradictory that the EU Treaties both emphasise the Member States' exclusive responsibility over their national security and a Union competence for issues of 'Common Security'. However, when considering the provisions in the Treaties on the CSDP it becomes clear that the Member States did not really transfer any competence over security to the EU. Instead the CSDP provisions provide a framework for the Member States to better deal with their own security responsibility through cooperation. This is exemplified by Article 42(1) TEU – the key provision of the CSDP – which stresses that the performance of the civilian and military tasks of the CSDP "shall be undertaken using capabilities provided by the Member States". The Member States have thus retained the competence to choose how to shape and regulate the forming of those capabilities.

3.3.3 Retained competences and the principle of sincere cooperation

Next to the principle of conferral, Article 4 TEU sets out two other guiding principles for the EU's actions.

First, Article 4(2) TEU requires the EU to respect certain key elements of the national identities of its Member States. This clause, which was added to the EU Treaties by the Lisbon Treaty (2007), according to Christiaan Timmermans, shows the "hard core of national sovereignty, which must remain immune from Union intervention".[121] The provision emphasises that the EU's actions

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

It is clear from the CFSP and CSDP provisions in the EU Treaties,[122] of which several were also added by the Treaty of Lisbon, that security is not 'immune' from Union intervention in an absolute sense. It rather indicates that all EU's engagement in security law and politics is constrained by the constitutional reality that the Member States did not transfer security responsibility to the EU and remained – at least at last resort – responsible themselves. Throughout the substantive law of the EU, this is emphasised by the extensive security derogations to the EU's different regimes (see Chapter 4).

120 For analysis of the minor exceptions to the unanimity rule, see: Koutrakos, *The EU Common Security and Defence Policy* 2013, pp. 53-55.

121 C. Timmermans, 'The Competence Divide of the Lisbon Treaty Six Years After', in: S. Garben & I. Govaere, *The Division of Competences Between the EU and the Member States*, Hart Publishing 2017, pp. 19-32.

122 As well as the provisions on the Area of Freedom, Security and Justice.

Secondly, Article 4(3) TEU includes the principle of sincere cooperation, often also referred to as Union loyalty.[123] Opposed to the first principle, which only consists of obligations for the EU, loyalty is a mutual obligation. For the Member States it means that, regardless of competence-issues, they should "facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives", *i.e.* act in good faith and loyalty with regards to the EU's purpose. In general terms, this indicates a reciprocal duty between the EU and the Member States to assist each other, in full mutual respect, in carrying out tasks which flow from the Treaties. Furthermore, it creates the specific obligation for Member States to take all necessary measures to fulfil their obligations under EU law and to facilitate the achievement of the EU's tasks and refrain from any measure which could jeopardise the attainment of the EU's objectives.

While the CSDP seeks to impose obligations on Member States to safeguard peace and security, it does not itself create the physical capabilities to meet those security requirements. National polices should therefore be given the requisite scope to realise the necessary military capabilities. As has been pointed out in Chapter 1, these capabilities consist of operational and industrial capabilities. The policy choices with regards to industrial capabilities might overlap with the area of the internal market. The principle of sincere cooperation does then not necessarily strengthen the internal market competence, as the principle is primarily concerned with the EU's overall aim of promoting peace, its values and the well-being of its peoples. The principle does, however, strengthen the obligation of the EU to choose the most appropriate legal basis for its actions. To consider which basis is in fact most appropriate, the Union should consider both the legal and political context of the aim it seeks to achieve.

3.3.4 The sovereignty constraints on the internal market

From the Treaty of Rome (1957) onwards, the internal market has been at the forefront of European integration. In *Van Gend en Loos* (1963), the Court made clear that the Member States had "limited their sovereign rights" and created a "new legal order" by the establishment of a common market, often referred to as some sort of *economic constitution*. The functioning of the internal market is primarily based on the free movement provisions in the EU Treaties, including the free movement of goods. Member States are prohibited to discriminate or impose trade barriers on foreign suppliers and, instead, should guarantee market access. To safeguard the 'retained competences' of the Member States, the free movement provisions include exceptions from the internal market regime for trade restrictions which are necessary on grounds of public policy, public security and public health.

123 This understanding of the principle of sincere cooperation is derived from a research report, co-authored by the author, see: Manunza, Meershoek & Senden, 'Het Ecosysteem voor de militair-logistieke capaciteiten van de adaptieve Krijgsmacht' 2020, pp. 20-21.

The fact that 'retained competences' are exclusively for the Member States does not indicate that they can 'freely act in that domain'.[124] When such action overlaps with a domain of EU competence, like the internal market, the Member States' competence is constrained by the legal obligations stemming from the EU Treaties. Member States should adhere to the free movement provisions in the EU Treaties unless derogation is objectively justified. When it comes to military procurement, Member States are thus obliged to refrain from discriminating foreign suppliers or imposing trade barriers unless derogation from EU law is necessary for their national security and the measure is necessary.[125] Such derogation can either be based on the general exception to the free movement of goods in Article 36 TFEU or the specific exception to EU law for military equipment in Article 346 TFEU.

Free movement is just one of the two aspects of the EU's internal market competence. To remove trade barriers which arise from legislative differences between the Member States, the EU has competence to legislate. Following Article 114 TFEU, the Council and the European Parliament can, acting in accordance with the ordinary legislative procedure, adopt measures to harmonise the laws, regulation or administrative actions of the Member States "which have as their object the establishment and functioning of the internal market". Such harmonisation might relate to policy areas in which the EU lacks legislative competence, such as health care and security policies which both have economic implications. Based on that logic, it could be argued that certain concerns of military security can be regulated within Article 114 TFEU legislation, as military industries cannot categorically be excluded from it.

The Lisbon Treaty, however, sought to bring more balance between the CSDP and internal market competences of the Union. By removing the former pillar structure, these policy domains were placed on more of an equal footing. In addition, the Lisbon Treaty did not only generally establish that the Union should pursue its aims with the most appropriate means, as established in Article 3(6) TEU, it also specifically confirmed that this also applies when choosing between *intergovernmental* CFSP and *supranational* TFEU measures. While before Lisbon (current) Article 40 TEU only established that CFSP measures may not encroach upon the so-called *acquis communautaire* (TFEU competences), it now also works *vice versa*. Hence, TFEU measures, such as those based on Article 114 TFEU, may not encroach upon the CFSP competences (including the CSDP). The aim of the Defence Procurement Directive to contribute to "developing the military capabilities required to implement the European Security and Defence Policy" at the least overlaps with the CSDP competence of the Union, triggering the question as to whether the correct legal basis was chosen for this measure.

124 B. de Witte, 'Exclusive Member State Competences', in: S. Garben & I. Govaere, *The Division of Competences Between the EU and the Member States*, Hart Publishing 2017, pp. 59-73.

125 Case C-474/12, *Schiebel Aircraft*, ECLI:EU:C:2014:2139.

Conclusion: the EU's source of authority shapes its division of competences

Both the Treaty of Lisbon and the UK's withdrawal from the EU reaffirmed that state sovereignty is far from dead in Europe. The 2022 invasion of Ukraine by the Russian Armed Forces showed – once again – that territorial integrity can quickly become the most fragile aspect of this sovereignty. For adequate evaluation of matters of European integration, we must accept that legal authority of EU law is derived from state sovereignty and therefore naturally constrained by it. This is not a bad thing when one's primary concern is with the EU's constitutional purpose of maintaining peace and upholding its values of democracy, individual freedom and rule of law rather than preoccupation with an 'ever closer union'. We must thus distinguish between the EU's source of authority flowing from national sovereignty and its purpose as enshrined in Article 3(1) TEU. Until – if ever – provided with a better alternative, it is within the sovereignty concept that we are best equipped to cherish the values that the EU seeks to promote. When accepting this reality, one cannot overstate the positive impact the EU has had on peace and democracy in Europe.[126] To preserve the EU's role as guardian of the Member States' external sovereignty, democracy and rule of law within Europe, it is necessary to evaluate questions of competence carefully.

The choice for an internal market legal basis for regulating military procurement is, in these regards, a particularly interesting case, as the maintenance of national military capabilities is within the core of the so-called retained competences of the Member States. In evaluating this issue, I will take the self-declared *military* purpose of this *economic* instrument (the Directive) seriously, by considering whether the legal structures of the internal market are appropriate to attain it. This question can only be answered in light of the aims and means of the EU Treaties as a whole, as the internal market is not a self-contained goal but in fact an instrument for the EU's purpose to promote 'peace, its values and the well-being of its peoples'. Against this background – supported by Article 40 TEU – it must be considered whether the *intergovernmental* structures of the CSDP would be more appropriate to attain military objectives than the *supranational* structures of the internal market.

To carry out this evaluation of the Directive's legal basis, Chapter 4 will first point out the legal characteristics of the security exceptions to the internal market regime, after which Chapter 5 will set out the characteristics of EU public procurement law and the ways in which the Directive sought to facilitate concerns of national security within its legal regime. Chapter 6 will then answer the question as to whether – or to what extent – the internal market can be the correct legal basis for regulating military procurement by combining the constitutional and substantive implications of the three preceding chapters.

126 While NATO has – at least historically – been the primary instrument for security. See: Patel, *Project Europe* 2020, Chapter 2.

CHAPTER 4

Military Security as an Exception to EU Public Procurement Regulation within the Internal Market

Introduction

To maintain peace in the world and provide security to their citizens, states are the primary actors under international law which can lawfully use force or authorise the use of force. International organisations and institutions like the EU and NATO play a significant role, as they can act as a vehicle for military cooperation and alliance, but they do not intervene by themselves. To use force or effectively threat with the use of force, governments need industrial- and operational capabilities, *i.e.* equipment and troops. Such equipment is usually not produced by states themselves, but procured from defence companies. As the Treaty of Rome (1959) was built on the ashes of the European Defence Community (EDC), it included an exception to the internal market regime for production and trade in armaments when related to national security and more generally it included possibilities to justify derogation based on public policy and public security.

The Treaty of Lisbon (2009) expanded the instruments for integration of the Member States' policies on military security, such as the adoption of a legal basis for permanent structured cooperation in Article 46 TEU. However, no supranational military security competences were attributed to the EU's institutions. The Common Security and Defence Policy (CSDP) is based on national capabilities. To emphasise the persistence of this sovereign right Article 4(2) TEU proclaims that "national security remains the sole responsibility of each Member State". The CSDP therefore retained its intergovernmental nature and its legal provisions remained within the TEU instead of the TFEU.

In this chapter I will seek for a legal understanding of military security as an exception to EU supranational regulation; public procurement regulation in particular. The potential scope of this exception is a crucial factor in determining the *legal effectiveness* of the Directive. In a general sense, military security can be invoked as an exception by the Member States as a particular component of the public policy, public security and national security grounds for exception in the EU Treaties. To reach this understanding, I will evaluate the rich body of case law and Advocate General (AG) opinions of the Court on the different security-related derogations from EU law, in particular the armaments exception of Article 346 TFEU.

A thorough legal understanding of military security as an exception to EU law can only be reached through a systemic approach. The roots of the EU's security system are, first, to be found in the power structures of the international system (Chapter 1)

and the legal and political characteristics of its actors (Chapter 3). These origins have shaped the constitutional system of the EU Treaties and the methodological approach for understanding the security constraint on EU law which I will elaborate in Section 4.2. Based on the methodology of legal interpretation and the legal context of the security exceptions, I will finally expose the legal constraint of military security on EU integration of military industries in a public procurement context.

4.1 Functional legal interpretation based on the EU's constitutional system

The legal complexity of European security is rooted in a paradox inherent to security in a globalized world. Globalization decreases the extent to which geographical space, borders and jurisdictions condition economic and socio-political relationships. Yet, security is conceptually still rooted in the existence of a territory in which a state can effectively exercise control. Without such a secure space there can be no effective sovereignty. To preserve the control over their territories and to protect their strategic security interests, states therefore need to set limits to globalisation. At the same time, security threats can only be understood within the global context, where peace requires balance of power and the formation of military alliances. After World War II, Western Europe could not be secure from the military Soviet-threat without US protection, and it could not be secure from internal conflict without balancing French and German military power. Although peace could last temporarily through balancing and the pooling of coal and steel, this was deemed too fragile. The Treaty of Rome's economic integration process made peace in Europe sustainable by fostering economic interdependence and economic growth.[1]

Peace alone is, however, conceptually insufficient to address the security concerns of states. On the contrary, as a self-contained goal, peace would be rather meaningless. In the words of Waltz: one could "have peace at any time – simply by surrendering".[2] In a system of sovereign equality between states, one seeks peaceful co-existence. To co-exist, one must first exist, and secondly survive. The recent Russian invasion of Ukraine once again shows us that survival still requires military capabilities, as without them one has no control over its own defence and no protection against foreign invasion. Moving beyond survival, towards peace, there should be some structure and predictability in the relations between states. Although there are no absolute guarantees, there should thus be rules. Law can then positively affect the predictability of state behaviour in security matters when the rules reflect the existing power structures and build on the shared interests of the participating states.

For law to be an effective force, its interpretation should be based on its function within the legal system of which it forms part and the political system to which it

1 Referred to as the *liberal national security motivation* of European integration, see for instance: A. Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach', *Journal of Common Market Studies* 1993, p. 484.

2 K. Waltz, *Man, the State, and War: a Theoretical Analysis*, Columbia University Press 2018 (first published in 1954), p. 236.

owes its existence. Legal interpretation should, in the words of Morgenthau, be built on the assumption that law and social forces stand in a 'dual functional relationship'. Law is the "function of the civilization in which it originates", but at the same time it is itself a "social mechanism working towards certain ends".[3] EU law is the function of the society of European nation states pursuing their survival, while at the same time a socio-political mechanism working towards the promotion of peace, well-being and the EU's values, as established by Article 3(1) TEU. The source of its legal authority is thus to be found in its original function to mutually protect national sovereignty from self-destruction, while its purpose has to go far beyond merely facilitating peace to be considered legitimate.

Legal interpretation should in that regard both acknowledge the *static* source of legal authority rooted in the sovereignty concept and facilitate the achievement of its *dynamic* purpose.

4.1.1 From constructive ambiguity towards a systemic understanding of EU law

To give body to this dynamic purpose within EU law, the EU Court of Justice traditionally uses a combination of systematic – focusing on legal function – and teleological – focusing on political function – interpretation methods, building on a linguistic (grammatical) understanding of the law.[4] Linguistic interpretation is a necessary starting point for the application of the law for it to be predictable and thereby contribute to legal certainty. However, linguistic interpretation on its own is especially problematic in EU law, as all 24 language versions of the EU Treaties and other acts of EU law are authoritative. In addition, the provisions in the EU Treaties are a reflection of political compromise between all 27 Member States. The result is therefore sometimes referred to in terms of 'constructive ambiguity'; as a text can be kept general, vague, unclear and multi-interpretable, or may contain legal loopholes in order to reach a political compromise.[5] The relevance of the linguistic interpretation method may be further diminished by the extent to which the context or reality at the time of the adoption of old, long-standing provisions has now become unimportant or outdated; the existence of conflicting standards; and strong or stronger counter-arguments of a different type that override the regular power of a linguistic argument, for example the importance of systematic coherence.[6] This scenario, and in particular the limitations of the linguistic interpretation method, can be seen very clearly when

3 H. Morgenthau, 'Positivism, Functionalism and International Law', *The American Journal of International Law* 1940, pp. 274-275.

4 Sections 1.1.1 and 4.1.2 are partly derived from the methodological approach developed in a research report of Elisabetta Manunza, Linda Senden and the author which was commissioned by the Dutch Ministry of Defence, see: E. Manunza, N. Meershoek & L. Senden, 'Het Ecosysteem voor de militair-logistieke capaciteiten van de adaptieve Krijgsmacht: In het licht bezien van het NAVO-Verdrag, de EU-Verdragen en het nationale aanbestedings- en mededingingsrecht', Utrecht University Centre for Public Procurement & RENFORCE 2020, Part II.

5 See for instance: M. Jegen and F. Merand 'Constructive Ambiguity: Comparing the EU's Energy and Defence Policies', *West European Politics* 2014, pp. 182-203.

6 G. Beck, *The Legal Reasoning of the Court of Justice of the EU*, Hart Publishing 2012, p. 161.

interests are weighed that concern the internal market on the one hand, and issues of international politics and security on the other hand.

When it comes to the armaments exception of Article 346 TFEU, a result of political compromise in the 1950s, a purely linguistic understanding would be especially flawed. First, it would indicate that there can be no substantial EU law obligation for Member States when it comes to armaments within neither the internal market, nor the CSDP framework . The literal meaning of the provision indicates that it is completely to the Member States to adjudicate whether and when derogation from EU law is justified for the procurement of military equipment. It would be a system of self-judging. Secondly, a purely linguistic interpretation would neglect the EU's increasing influence on military security ever since the signing of the Maastricht-Treaty (1991). For a Union with the ambition of *strategic autonomy* and a common defence policy, having no influence whatsoever on the military-industrial policies of the Member States would be a fundamental failure. Considering the EU system as a whole, the question one must ask is not whether the EU should be concerned with military procurement, but instead whether the internal market frameworks are most appropriate for that purpose.

The concept of military security cannot be understood in isolation of its international context, where potential threats to military security arise (Chapter 1). Neither can it be understood in isolation of its roots; national sovereignty (Chapter 3). Clearly, this concept and the derogations in the EU Treaties which are based upon it should be interpreted through a combination of systematic- and teleological interpretation methods. The international scope of context, as elaborated in Chapter 1, bears consequences for the nature of teleological interpretation. The latter is often considered to reinforce the function of the EU-system as a whole, namely to establish 'an ever closer union'. In that regard, rules of integration are interpreted broadly and derogations to it narrowly. However, when one approaches EU law in a global context, concepts such as security first have a national function before common interest can possibly trigger cooperation. Functionalism then balances between expansionism and 'teleological reduction' of EU competences.[7]

The systematic interpretation method is rooted in the ideal of coherence and non-contradiction of law and policy and expresses a basic requirement of consistency, namely that concepts are used consistently and standards are compatible not only with the regulations of which they form part but also with other relevant components of the law and of the legal system more generally, including general legal principles.[8] Systematic interpretation is thus a crucial element to test the *legal effectiveness* of regulation. In addition, the ideal of coherence ensures consideration of the overall division of competences between the EU and its Member States, *e.g.* it ensures that the CSDP is considered for understanding the security-derogations to the internal market regime.

7 K. Lenaerts and Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice', *Columbia Journal of European Law* 2014, pp. 37-44.

8 Beck *The Legal Reasoning of the Court of Justice of the EU* 2012.

Where reliance on the legislation itself and the broader legal context does not lead to an unambiguous or satisfactory explanation, the teleological interpretation method comes into play, according to which the Court is guided by the goal envisaged by a provision as well as its function in the system of which it forms part. In this regard, it will take into account not only the values and objectives of the specific legislation in question, but also those laid down at Treaty level and, in doing so, arrive at an interpretation 'in the spirit' of the EU Treaties.[9] Teleological interpretation is of utmost importance, as it safeguards the *effet utile* principle (effectiveness of EU law). This means that provisions of EU law must not be interpreted in such a way that it leads to an outcome that is inconsistent with the objectives pursued or impedes its effective and practical operation.[10] In addition, the Court takes into account not only the legal consequences of its decision, but also the possible social, political and economic consequences thereof. Specific provisions of EU law should therefore be interpreted in consistency with the general aims of the EU Treaties.

When considering that the CSDP was integrated within the EU's legal order in the 1990s, while the internal market and its security derogations were already established with the Treaty of Rome in the 1950s, it becomes clear that the EU Treaties can best be understood as a 'living constitution'. To substantiate this functional approach in light of the idea of a 'living constitution', it is necessary to consider the most recent changes to the EU Treaties made by the Lisbon Treaty in 2007.

4.1.2 The EU Treaties as a 'living constitution' after Lisbon: distinguishing between aims and means

The EU's legal order and its founding Treaties can thus best be regarded as a 'living constitution'. This concept refers on the one hand to the written constitution, but also, on the other hand, to the unwritten constitution and the scope that exists for taking into account any social, political and historical realities changing over time that were not envisioned by its drafters.[11] Although the EU lacks a formal 'Constitutional Treaty for Europe', as early as the mid-1980s the Court characterised the (then) EEC Treaty as "the constitutional charter" on which the Community was based.[12] As regards their content, the current EU Treaties can still be seen as the constitutional foundations on which the European legal order is based, and they contain important basic principles as regards the EU's objectives, values and tasks and the relations of competence between the EU and its Member States; who is allowed to do what, for what purpose and under what preconditions? The many amendments to the Treaties show that these

9 See e.g. the Court's judgment in *Van Gend en Loos* where it considered 'the spirit, the general scheme and the wording' of the Treaty provision to assess whether it could have direct effect or not. See: Case C-26/62, *Van Gend en Loos,* ECLI:EU:C:1963:1.

10 See for instance: Case C-218/82, *Commission* v *Council*, ECLI:EU:C:1983:369, para. 15 and Case C-403/99, *Italy* v *Commission*, ECLI:EU:C:2001:507, para. 37. See also: Beck, *The Legal Reasoning of the Court of Justice of the EU* 2012, p. 211.

11 See for instance: D. Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution*, Oxford University Press 2009.

12 See for instance: Case 294/83, *Les Verts* v *European Parliament*, ECLI:EU:C:1986:166, para. 23.

constitutional foundations are not static, but in a continuous process of evolution. The changes introduced by the Lisbon Treaty in 2009 to the central objective of the EU – now having an explicit focus on the realisation of peace – and to the legal framework for the protection of national constitutional identity and the CSDP, which will be discussed below, are a concrete reflection of this 'living', dynamic core characteristic of the EU's constitutional basis.

With the Lisbon-Treaty it was codified in Article 3(1) TEU, that the EU's overall purpose is to "promote peace, its values and the well-being of its peoples". Safeguarding and realising peace and security in Europe has thus become one of the central, guiding principles of the EU's actions and, as such, must also be a benchmark for the interpretation of EU law. Those actions are not only embodied by the CFSP and CSDP. The internal market, too, is one of the means of achieving this goal (through economic interdependence) and is subordinate to it, in the sense that internal market law must be interpreted and applied in such a way that it does not merely lead to a social market economy, such as that provided since Lisbon by Article 3(3), in so many words, but that it also contributes to the fundamental goal of peace and security in Europe.

As there are different means to contribute to the fulfilment of the EU's purpose, which are structured around different division of competences between the EU and its Member States, it is decisive for the EU's effectiveness that it pursues "its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties" as emphasised by the Lisbon Treaty in Article 3(6) TEU. This is in line with the principle of conferral of competences laid down in Articles 4(1) and 5(2) TEU, according to which the EU must act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. These provisions now also explicitly state that competences not conferred upon the EU by the Treaties remain with the Member States.

As stressed in Chapter 3, national security is part of these so-called 'retained competences'. In the pre-Lisbon version, the former Article 6(3) TEU stated simply that "(t)he Union shall respect the national identities of its Member States". Article 4(2) TEU in the post-Lisbon version is much more specific and first of all makes it clear that the EU respects the national identities of the Member States inherent in their fundamental structures, political and constitutional, and more specifically:

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

Security objectives have thus remained a national responsibility. For the interpretation of the security derogations from the EU Treaties this means that the closer certain circumstances relate to a Member State's essential state functions, the more likely it is that derogation can indeed be justified. Concerning *national security* as mentioned in Article 4(2) TEU, the Court considered in *La Quadrature du Net* (2020) and *Privacy*

International (2020) that it goes beyond the general concerns of *public security*, and consequently is "capable of justifying measures entailing more serious interferences with fundamental rights".[13] Norms of EU law should according to the Court, in that context, not be interpreted as restricting Member States to effectively pursue "the prevention and punishment of activities capable of seriously destabilising the fundamental constitutional, political, economic or social structures of a country and, in particular, of directly threatening society, the population or the State itself, such as terrorist activities".[14]

The implication of external sovereignty for EU law, as emphasised in Section 3.2.2, is the constitutional value of peace and security. In line with the argument of constitutional pluralism made by Maduro, legal interpretation of EU law should be based on a systemic understanding of the EU Treaties, going beyond concrete teleological interpretation of a particular legal provision towards a more meta-teleological understanding of that provision as part of the overall EU legal order.[15] Like a state's legitimate exercise of its sovereignty should be constrained by its purpose and its values, so should the EU's actions. Unlike the nation state, which turns into an authoritarian regime when adopting a Hobbesian understanding of its peace-and-security 'purpose', the EU's peace-and-security purpose has historically been built on economic integration and intergovernmental mechanisms.

The strengthening of the nationally-retained security competence in the EU Treaties is just one side of the Lisbon-Treaty's security evolution. Simultaneously, the Member States expanded the instruments for Treaty-based military cooperation in the context of the CSDP. The most important additions to the legal base of military cooperation in Article 42 TEU were the foundation for PESCO and the addition of a collective self-defence clause. For performance of the CSDP tasks the EU, however, still relies on "the capabilities provided by the Member States".[16] In case of an 'armed aggression' against one of the Member States, there is now an obligation of "aid and assistance", even though this obligation must be consistent with commitments under the North Atlantic Treaty (see again Chapter 3).[17] Moreover, there are legal obligations for the participating Member States under PESCO (see Chapter 1).[18] These commitments also rely on cooperation based on national capabilities. The commitments for integration of military (industrial) capabilities are therefore phrased vaguely, adhering to the notion of *constructive ambiguity*.

13 See: Case C-623/17, *Privacy International*, ECLI:EU:C:2020:790, paras 74-75 and Joined Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net*, ECLI:EU:C:2020:791, paras 135-136. It should be noted here that these cases were about the fundamental right of privacy through the protection of personal data, as opposed to the economic free movement rights which the focus of this study is on. As argued in Section 4.1.3, the intensity of the proportionality principle is more severe when a *fundamental* right is concerned than for an *economic* right.

14 *Ibid*.

15 M. Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism', *European Journal of Legal Studies* 2007, p. 140.

16 Article 42(1) TEU.

17 Article 42(7) TEU.

18 Council Decision (CFSP) 2017/2315 establishing permanent structured cooperation (PESCO).

The military message of the Lisbon-Treaty is then two-dimensional. First, considering PESCO and the collective self-defence clause, it is self-evident that national security and European security are intertwined. National security starts with European security. Only when European security shatters, security becomes a genuinely 'national' matter relying on bilateral or multilateral alliance. Secondly, there is the message that both European- and national security rely on national capabilities and sector-specific *military interdependence*. There is a plethora of EU and international obligations requiring investments by the Member States in the creation and maintenance of these capabilities. When these obligations conflict with the internal market regime, which is based on the idea of cross-sector *economic interdependence*, one should consider this legal tension in the context of the overall system which structures the military security of the Member States. Otherwise, European security turns into a house of cards, potentially collapsing because of political developments in a single Member State.

4.1.3 The limits of the proportionality principle in EU law

The principle of proportionality plays a pivotal role in law in general and in EU law in particular. In a general sense, the principle can be considered a tool for the judiciary to solve legal disputes in which there is a conflict between rights or between a fundamental right and a public interest or between a public and private interest. It then requires the balancing of these rights and interests, taking into account their function within the legal order and the concrete question whether less restrictive measures were possible.[19] However, as observed by Harbo and Sauter, a genuine 'balancing exercise' in the Court's case law is rare.[20] Instead, a methodological variety exists in how the Court applies the proportionality principle. When seeking justification for measures restricting the internal market freedoms, Member States are, according to Sauter, usually subject to the so-called *least restrictive means test*, except for particular cases in which there is no harmonisation.[21]

The intensity of the proportionality principle when applied to resolve clashes between competing national- and EU policies thus appears to primarily depend on the division of competences. As a general principle of EU law, it should, according to Lenaerts and Gutierrez-Fons, "not operate as an excuse for a "competence creep" via judicial activism", but instead seek to create a "common constitutional space".[22] Where fundamental rights and/or principles are involved, a stricter approach will often be feasible, as the protection of human rights is part of the EU's values, the promotion of which is part of the EU's aims.

19 See for instance: T. Harbo, 'The Function of the Proportionality Principle in EU Law', *European Law Journal* 2010, pp. 158-185.

20 *Ibid* and W. Sauter, 'Proportionality in EU law: A Balancing Act?', *Cambridge Yearbook of European Legal Studies* 2013, p. 461.

21 *Ibid*, p. 453. Sauter considers the degree of harmonization to be an important variable in determining the intensity of the proportionality test.

22 K. Lenaerts & J. Gutierrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law', *Common Market Law Review* 2010, pp. 1668-1669.

The free movement provisions encompass the fundamental right of non-discrimination, more generally established in Article 18 TFEU as part of the provisions on EU citizenship. The function of the free movement provisions goes, however, way beyond abolishing discrimination, as these provisions seek to ensure *market access* for economic operators and cross-border mobility for workers.[23] This *economic* function is a consequence of the division of competences as established with the Rome Treaty, and as such naturally limits the application of the provisions and the proportionality principle. As elaborated in Chapter 3, sovereignty naturally constrains economic integration. This constraint is most apparent in Article 45 TFEU which excludes the application of the non-discrimination principle for employment which entails exercise of official authority, such as employment within the military or police forces (see further in Section 4.2.1), without being subject to a proportionality review. The function of economic rights within the EU's legal order is, in these regards, naturally more narrow than the function of the *fundamental* rights of the EU Charter on Fundamental Rights. Apart from their direct link to the EU's values as enshrined in Article 2 TEU, this is illustrated by the Court's case law in which it established that EU fundamental rights still apply in a situation in which a Member State derogates from the internal market rules.[24]

The 'balancing exercise', which is usually considered to be part of the proportionality principle, thus becomes most problematic when the public interest at stake closely relates to an 'essential state function' as prescribed by Article 4(2) TEU, while the private interest is a product of an *economic* right which forms part of a regime (internal market) that is naturally constrained by its *economic* function. Consequently, the Member States possess wider discretionary powers in those cases to deviate from the EU's public procurement rules. Even though the role of the proportionality principle might be more limited in certain cases, it often remains decisive within the national legal context after a Member State has successfully derogated from EU internal market law.[25]

4.2 Public policy, public security and national security as grounds for derogation from EU law

Functional understanding of the security derogations in EU law thus requires interpreting them as integral parts of a coherent system. Legal interpretation should, in that regard, be consistent with the fundamental principles of international law and

23 Sauter, 'Proportionality in EU law' 2013, p. 454-455. Sauter substantiates this by using examples from the Court's case law on the public health exception to the internal market rules.

24 See for instance: Case C-260/89, *Elliniki Radiophonia Tileorassi*, ECLI:EU:C:1991:254, para. 43 and Case C-390/12, *Robert Pfleger*, ECLI:EU:C:2014:281, para. 35. In other cases, however, the Court also established that when the exercise of free movement rights conflicts with the exercise of fundamental rights, these must be balanced. See for instance: Case C-112/00, *Eugen Schmidberger*, ECLI:EU:C:2003:333.

25 For an analysis of the legal principles which would apply in the Netherlands: see: Manunza, Meershoek & Senden 'Het Ecosysteem voor de militair-logistieke capaciteiten van de adaptieve Krijgsmacht' 2020, Part IV.

the constitutional traditions of the Member States, as these principles and traditions have shaped the EU system as well. In international law, the right to self-defence is fundamental, as it comes with the right for states to arm themselves. Most Member States also codified – to some extent – their military-operational sovereignty in their constitutions.[26]

In this Section I will discuss the broad range of jurisprudence of the EU Court of Justice with regards to security exceptions to EU law. This will show that the Court uses a contextual approach to interpretation of the security exceptions. Geopolitical factors like geography, membership of military alliances like NATO and global power structures are often decisive for the outcome of cases. Because there is no theoretical difference[27] between applying security exceptions to the free movement of goods, services, workers or capital, or even other areas of EU law such as social policies on equal treatment and citizenship, these will be addressed together in this contribution.

4.2.1 Employment in the public service

The 'public service' exception to the rules on free movement of workers (Article 45 TFEU), is the clearest expression of state sovereignty within the frameworks of the free movement rules. The exception in Article 45(4) TFEU simply reads that the freedom "shall not apply to employment in the public service". The Court adopted a functional interpretation of the concept 'public service', by only including activities which are "directly and specifically connected with the exercise of official authority", instead of exempting all public employment.[28] Such a connection does not exist, for instance, when activities that are "auxiliary or preparatory to the exercise of official authority".[29] In addition, the activity must involve "exercise of powers conferred by public law and with responsibility for safeguarding the general interests of the State".[30] Derogation is only possible for employment which entails exercise of official authority that arises directly from the sovereignty of the Member State. For many activities within the public sector the Court therefore decided that employment cannot be reserved to nationals. The recruitment of the military and the police forces of the Member States falls within the exception ground, enabling direct discrimination on grounds of nationality for those positions.

4.2.2 The theoretical basis for derogation: the fundamental interests of the state

Formally speaking, public policy is a separate ground for justification in the EU Treaties and secondary legislation. There is, however, substantial overlap between

26 For example, the Netherlands have most explicitly incorporated this in Article 97(2) of their constitution, which reads: "The Government shall have supreme authority over the armed forces". See: The Constitution of the Kingdom of the Netherlands 2008 (official translation), Article 97.

27 The differences are in the context of the circumstances which necessitate derogation, and thus a national approach instead of adherence to an EU integrated framework.

28 See for instance: Case C-114/97, *Commission* v *Spain*, ECLI:EU:C:1998:519, para. 35. First emphasised by the Court in: Case 2/74 *Reyners*, ECLI:EU:C:1974:68, para. 45.

29 See for instance: Case C-293/14, *Gebhart Hiebler*, ECLI:EU:C:2015:843, para. 34.

30 Case 149/79, *Commission* v *Belgium*, ECLI:EU:C:1982:195, para. 7.

the two. It could very well be argued that the protection of public security is a more concrete example of public policy.[31] Military security would then, in its turn, be a more concrete component of public security, while all gradations are rooted in the more abstract sovereignty concept (see Chapter 3) which in EU law is derived from the 'essential state functions' mentioned in Article 4(2) TEU.

The 1970s case law of the Court on the free movement of workers underpins this. In *Bouchereau* (1977), the Court had to consider the French worker Bouchereau who had been convicted for unlawful drug possession by a court in the UK which subsequently considered to recommend his deportation. The Court, however, observed, in its preliminary ruling, that justifying such a severe restriction of the free movement of workers by 'public policy' requires more than a mere "perturbation of the social order which any infringement of the law involves". Instead, the Court established that to justify such a restriction there must be a "genuine and sufficiently serious threat affecting one of the fundamental interests of society".[32]

Much, however, depends on the legal and societal context in which a case arises. In *Van Duyn* (1974), the Court accepted the UK's decision to deny the Dutch Van Duyn to be employed by the Scientology movement in the UK, even though it did not deny such employment for its own citizens. The Court observed that that although derogations must be interpreted narrowly for the effectiveness of EU law, situations in which public policy concerns can justify such derogation "may vary from one country to another and from one period another".[33] Although the organization was not prohibited as such, the UK's competent authorities had clearly established the activities of the organization in question to be "socially harmful" and taken measures to counteract these activities.[34] In such a context, the Court established that a Member State can refuse foreign nationals the benefit of the right to free movement of workers, even though it allows its own nationals to be employed by this organisation.[35] As the Court would not allow arbitrary restrictions, it appears that the Court acknowledged with its judgment that the amount of effective control a Member State has over its own nationals is generally larger than over nationals from other Member States.

The opinion of AG Mayras, on which the Court based its most important considerations, went even further. Mayras considered that Member States have "sole power" to safeguard their public security and "to decide the circumstances under which that security may be endangered". According to the AG, a 'Community public

31 The concept of 'public policy' should be seen as an 'overarching concept' including different types of 'essential national interests, see: E. Manunza, *EG-aanbestedingsrechtelijke problemen bij privatiseringen en bij de bestrijding van corruptie en georganiseerde criminaliteit*, Deventer: Kluwer 2001, p. 294. This is also suggested by Barnard, see: C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (5th edition), Oxford University Press 2016, p. 452.

32 Case 30/77, *Regina and Pierre Bouchereau*, ECLI:EU:C:1977:172, para. 35.

33 Case 41/74, *Yvonne van Duyn and Home Office*, ECLI:EU:C:1974:133, para. 18.

34 *Ibid*, para. 19.

35 *Ibid*, para. 23. In *Adoui* (which concerned prostitution), however, the Court slightly nuanced this by stating that a Member State cannot expel a national of another Member State when it "does not adopt, with respect to the same conduct on the part of its own nationals repressive measures or other genuine and effective measures intended to combat such conduct", see: Joined Cases 115/81 and 116/81, *Rezguia Adoui* v *Belgian State and City of Liège; Dominique Cornuaille* v *Belgian State*, ECLI:EU:C:1982:183, para. 8.

policy' only existed in areas where "the Treaty has the aim or the effect of transferring directly to Community institutions powers previously exercised by the Member States". Such a common public policy could then only be an 'economic public policy'. Deducing a 'Community concept of public security' would be impossible, as the "requirements of public security vary, in time and in space, from one State to another".[36] As mentioned, the Court followed the opinion, only removing the addition "from one State to another", even though this is implied in the concept of 'space' as States are geographically demarcated. Refraining from 'deducing a Community concept' of either public policy or public security, the Court also refrained from balancing the Community interests against the national public interests.[37] One cannot genuinely balance against an interest which is not precisely defined.

In the context of the free movement of goods, the Court accepted in *Thompson* (1978) an export ban on silver coins which were no longer valid currency on the basis of public policy, as it was adopted to prevent the coins from being melted which was illegal. The Court came to this ruling by stating that the right to mint their own coinage and to prevent them from being destructed was exclusively for the Member States.[38] More importantly, the Court found that this could fall within the public policy justification as it was "traditionally regarded as involving the fundamental interests of the state".[39]

By its nature, the public policy exception is the legal materialisation of sovereignty (see Chapter 3), as it is institutionalised in the EU Treaties by Article 4(2) TEU which refers to the "essential State functions". No doubt security is a sufficient part of this, as Article 4 TEU refers to national security as being the "sole responsibility of each Member State" in particular. External military security can even be considered the primary function of the state in international relations (see Chapter 1). In that sense, the public policy exception is a residual category for those measures without a serious public security dimension but which anyway pursue a fundamental state interest. As far as providing security (similarly to public health) to society is the competence and function of the Member States, the justification ground requires a significant degree of autonomy for the Member States within its national legal and societal context, as acknowledged by the Court in *Van Duyn*. This in particular is the case for determining security needs. The role for EU law is mostly in reviewing the suitability and proportionality of the chosen measures, which should be applied consistently within the national legal and societal context.

4.2.3 The sex discrimination jurisprudence: no general reservations

The Court addressed the freedom of the Member States to derogate from EU law based on security in several judgments concerning sex discrimination in employment.

36 Opinion of AG Mayras in Case 41/74, *Yvonne van Duyn and Home Office*, ECLI:EU:C:1974:123, p. 1357.
37 See for this observation: H. Boonk, *De openbare orde als grens aan het vrij verkeer van goederen, personen en diensten in de E.E.G.*, Dissertation Rijksuniversiteit Groningen 1977, p. 139.
38 Case 7/78, *Ernest George Thomspon and others*, ECLI:EU:C:1978:209, para. 32.
39 *Ibid*, para. 34.

These disputes arose in the context of Council Directive 76/207/EEC[40] which (like the current Directive) was based on the EU's social policy competence and prohibited all discrimination on grounds of sex (Article 2).

The first case in which the Court dealt with a security derogation in the context of a sex discrimination case was *Marguerite Johnston* (1986). Johnston had been a police officer in Northern Ireland from 1974 to 1980 without being armed. After a significant increase in assassination of police officers over a number of years the Chief Constable decided that police officers should all be armed, but that only men could be equipped with fire arms. Consequently, general police duties were no longer assigned to women and the Chief Constable refused to renew Johnston's contract because of the change in policy.[41] The Sex Discrimination order of Northern Ireland facilitated this policy change, as it provided that none of its provisions "shall render unlawful an act done for the purpose of safeguarding national security or of protecting public safety or public order" and that a certificate signed by the Secretary of State which confirmed that an act specified in that certificate was done for the purpose of national security "shall be conclusive evidence that it was done for that purpose".[42] Judicial review was thus not possible, as soon as such a certificate was issued, which happened in the case of Johnston.

The UK argued that the different Treaty derogations based on public policy, public security and national security show that neither the Treaty (EEC Treaty), nor the laws derived from it such as Directive 76/207/EEC, apply to security affairs.[43] Accepting this line of reasoning would exclude all judicial scrutiny of the Court over the use of security derogations. Consequently, it would severely undermine the binding nature and *effet utile* of EU law. The Court therefore rejected the UK's arguments by stating in a general manner that all derogations in the EU Treaties which deal with 'public safety' can only be used in "exceptional and clearly defined cases", these derogations therefore "do not lend themselves to a wide interpretation" and can never constitute a basis for a general reservation.[44]

In 1994, the UK Royal Marines adopted a policy which excluded women from service in a particular combat unit, as their presence would be "incompatible with the requirement of interoperability", which was deemed necessary for the purpose of 'combat effectiveness'. Women were deemed incapable of being deployed in all types of combat in a situation of war. After Mrs Sirdar was made redundant from the Royal Artillery in 1995, she received an offer to transfer to the Royal Marines. When they found out that she was a woman, they informed her that she was ineligible because

40 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards to access to employment, vocational training and promotion, and working conditions. Replaced by: Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

41 Case 222/84, *Marguerite Johnston* v *Chief Constable of the Roual Ulster Constabulary*, ECLI:EU:C:1986:206, paras 4-6.

42 *Ibid*, para. 3.

43 *Ibid*, para. 24.

44 *Ibid*, para. 26.

of the policy of excluding women.[45] In the first part of the judgment, the Court addressed the issue whether such employment issues of the armed forces are excluded from the application of EU law. This is not the case, as the Directive, contrary to the free movement of workers, applies also to employment in the public service.[46] This is possible because the legal basis of the prohibition of sex discrimination is social policy and not the internal market. Consequently, the Court had to assess whether women could be excluded from the Marines because it would concern: "occupational activities for which, by reason of their nature or the context in which they are carried out, sex constitutes a determining factor".[47]

Although derogations from individual rights must be interpreted strictly, national authorities do have a "certain degree of discretion" when adopting measures they deem necessary for public security reasons.[48] The Court concluded that the argument of the Royal Marines of interoperability for combat effectiveness justifies the exclusion of women. It did not, however, substantially rule on the question whether women are indeed always incapable of fulfilling the interoperability requirements, as this was apparently within the discretion of the authorities. Instead, it stresses the special nature of the organization of the Royal Marines which "fundamentally differs from other units in the British armed forces", as they are a small unit and the first line of attack in case of war.[49]

In *Tanja Kreil* (2000), the German Bundeswehr had adopted a similar exclusion of women from certain positions. Tanja Kreil had applied for voluntary service in weapon electronics maintenance (which she was trained for), but was rejected because women were excluded from all military positions which involved the use of arms.[50] In addressing the issue, the Court used the same line of reasoning as in *Sirdar*. But the circumstances fundamentally differed, as the exclusion applied to "almost all military posts".[51] The derogation of the Directive can only apply to (more) specific activities, categorially excluding such a significant part of the military from EU law would be contrary to the notion that derogations are interpreted strictly. The Court concluded that the German exclusion was thus in violation with the Directive.

In *Alexander Dory* (2003), the exclusion of women from compulsory military service by German law was brought before the Court. It was argued that if women have a right of access to voluntary posts in the military (as exemplified by the case of *Tanja Kreil*), that also the compulsory service should apply to them, as otherwise the compulsory service would be unlawful discrimination against men.[52] Germany, France, Finland and even the Commission all argued that compulsory military service falls outside the scope of EU law, as it falls within the sovereignty of the Member

45 Case C-273/97, *Angela Maria Sirdar*, ECLI:EU:C:1999:523, paras 7-9.
46 *Ibid*, para. 18.
47 Council Directive 76/207/EEC, Article 2(2).
48 Case C-237/97, *Angela Maria Sirdar*, ECLI:EU:C:1999:523, paras 23 and 27.
49 *Ibid*, para. 30.
50 Case C-285/98, *Tanja Kreil*, ECLI:EU:C:2000:2, para. 10.
51 *Ibid*, para. 27.
52 Case C-186/01, *Alexander Dory*, ECLI:EU:C:2003:146, para. 16.

States on defence matters and does not constitute employment at all.[53] The Court followed these arguments by stating that although the organization of their armed forces cannot be completely excluded from EU law, as revealed by *Sirdar* and *Kreil*, "it does not follow that Community law governs the Member States' choices of military organisation for the defence of their territories or of their essential interests".[54]

These cases illustrate the Court's general approach to the military autonomy of the Member States when conflicting with EU law norms. Member States have apparently retained significant "discretion" when it comes to military security (*Sirdar*), particularly when relating to "choices of military organisation for the defence of their territories" (*Alexander Dory*), although – too broad – categorical exclusions are usually not accepted by the Court (*Tanja Kreil*). However, these cases concerned a conflict between national policies and the EU law principle of equality between men and women. As a part of the EU's values enshrined in Article 2 TEU, its applicability is not limited by its purpose. Such is the case for the application of the *economic* free movement provisions, which will be discussed in the next section.

4.2.4 Public security as security of supply and its connection to international politics

The foundational case for understanding the limit which (national) security sets to the internal market is the Court's judgment in *Campus Oil* (1984). Ireland had set up a state-owned oil company in 1979, which took over Ireland's only refinery in 1981, to secure the supply of oil. This was necessary as otherwise Ireland would have become almost fully dependent on imports from the UK. To maintain the viability of this only refinery in the country, importers of petroleum products were obliged to purchase at least 35% from the state-owned refinery. One of the Community Directive which sought security of energy supply on a European level prescribed Member States to maintain minimum stocks of petroleum products on which its essential services could last for 90 days.[55] In the proceedings, the Irish government stressed its military vulnerability in times of war crisis, as it was (still so today) not a member of NATO and it had no domestic crude oil, meanwhile it was highly dependent on oil as a source of energy. The plaintiffs and the Commission, on the other side, argued that the measures were imposed 'for economic reasons', in particular because merely possessing a refinery would not be effective in dealing with a shortage in fuel supplies (the actual resource). According to the Commission, the real solution was to be found in holding adequate stocks, as the Community rules prescribed.[56]

The Court ruled that the existence of Community measures in the field of security of energy supply cannot exclude Member States from taking complementary measures based on the public security exception. The Community measures did indeed reduce

53 *Ibid*, paras 23-28.
54 *Ibid*, para. 35.
55 Council Directive 72/425/EEC of 19 December 1972 imposing an obligation on Member States of the EEC to maintain minimum stocks of crude oil and/or petroleum products.
56 For the arguments of the parties, see: Opinion of AG Sir Gordon Slynn in Case 72/83, *Campus Oil*, ECLI:EU:C:1984:154, p. 2759.

the risk of (vulnerable) Member States to be left without essential supplies. In times of a crisis, such as war, there would, however, be no guarantees, as intra-community export licenses could be suspended.[57] Although holding adequate stocks is of high value for security of energy supply, this does not take away that having a refinery within one's territory has significant additional value in increasing the guarantee of supply in times of crisis.[58] Complete prohibition of national measures would then be problematic. Petroleum was deemed of 'exceptional importance' as an energy source in modern economy and thereby even for the existence of a country.[59] Measures which aim to protect domestic industries from foreign competition (and potentially from elimination) are normally excluded from the security justification, as these are considered protectionist. However, securing a minimum amount of petroleum to be supplied by a national company was considered by the Court to go much beyond the economic interests of Ireland. The mere fact that the measure also brought economic benefits for Ireland along did not alter this conclusion.[60]

The Court gave more clarity in *Commission* v *Greece* (2001), where the measures to secure the supply of petroleum could not be justified by Article 36 TFEU. Under the Greek legislation, there was a storage obligation for the 'marketing companies' of petroleum products to ensure the continuity of supply in Greece. These companies acted as the intermediaries between the refineries and the petrol stations. Only the Greek army could directly purchase from one of the refineries. As their storage capacities were limited or inefficient, there was the possibility to transfer the obligation to one of the Greek refineries only for the volume these marketing companies purchased from the same refinery.[61] So the marketing companies could not transfer the obligation for volumes imported from other Member States, even though the supplies would be stored at a Greek refinery. Consequently, the Court considered this measure to discriminate against foreign suppliers of petroleum. To justify the measure on basis of public security, the Greek government argued that it would excessively restrict the 'fundamental right to economic freedom' if the refineries would be obliged to store the petroleum of the marketing companies which they did not purchase from them.[62] The Court rejected this argument, as it was of a purely economic nature and less restrictive measures to secure the supply of petroleum would have been possible.[63]

As pointed out by AG Ruiz-Jarabo, Greece had failed to prove why the refineries could not simply store petroleum imported by the marketing companies, except for the 'economic' argument of securing national production.[64] According to the Greek government, securing national production by the refineries was also necessary to supply the armed forces with the special fuels that they use. The AG rejected this argument, as it could not reasonably be assumed that without the measure favouring

57 Case 72/83, *Campus Oil*, ECLI:EU:C:1984:256, para. 30.
58 *Ibid*, para. 39.
59 *Ibid*, paras 34-35.
60 *Ibid*, paras 36.
61 Case C-398/98, *Commission* v *Greece*, ECLI:EU:C:2001:565, para. 25.
62 *Ibid*, para. 21.
63 *Ibid*, paras 30-31.
64 Opinion of AG Ruiz-Jarabo in Case C-398/98, *Commission* v *Greece*, ECLI:EU:C:2001:96, paras 43-44.

national production, the refineries would cease to operate at all or to an extent that they would be incapable of meeting the demand of the armed forces. There is a clear logic in this, as also for this purpose the measures seem to have gone much further than necessary. Regarding the fact that the refineries were directly supplying the Greek military, the AG pointed out that "it is not essential in order to preserve the public security of a Member State that the fuels used by its armed forces must necessarily produced or supplied by the national refineries".[65] The Court, however, did not in any way intervene with the prerogative of Greece to supply their armed forces with fuels that come from their own refineries. Its decision could therefore have been different if the measure only pursued to protect national production for the military. The measure went, however, way beyond securing a minimum national supply of petroleum. Unlike Ireland in *Campus Oil*, Greece was also not in a particularly dependent position which necessitated national measures. The AG did not explain how the Greek army should supply itself with fuels in times of export restrictions due to a (military) crisis.

It is clear that economic benefits of measures aimed at the preservation of national energy production or stocks do not necessarily obstruct the possibility to derogate from EU law based on Article 36 TFEU. In its recent judgement in *Hidroelectrica* (2020) the Court considered that this is different for national legislation which primarily focuses on restricting direct exports to prevent the negative effects on the evolution of the price of electricity, as this is a purely economic and commercial consideration.[66] The Romanian legislation at stake, in any case, was not appropriate to secure the supply of electricity because indirect exports through a trading platform with an exclusive license was still allowed.[67]

4.2.5 Export control of dual-use goods as a tool of foreign policy

In *Aimé Richardt* (1991), Luxembourg successfully invoked the public security exception enshrined in Article 36 TFEU. The Court had to address preliminary questions which had come about in criminal proceedings against Mr. Richardt and others for the transit of goods to the Soviet Union for which a license was required due to their 'strategic nature'. This included equipment for production of bubble memory circuits (computer data storage) which had been imported from the US to France and enjoyed free movement within the European Community. The French authorities had granted the necessary license for export to the Soviet Union. It was, however, taken to the airport in Luxembourg in transit after a flight from France to Moscow had been cancelled. The machinery was seized, as the Luxembourg authorities did not agree with the French license and considered the equipment to be of a 'strategic nature'. In its consideration of Article 36 TFEU, the Court first stated that it the concept of 'public security' covers "both a Member State's internal security and its external security".[68]

65 *Ibid*, para. 46.
66 Case C-648/18, *ANRE* v *Hidroeléctrica*, ECLI:EU:C:2020:723, paras 42-43.
67 *Ibid*, para. 40.
68 Case C-367/89, *Aimé Richardt*, ECLI:EU:C:1991:376, para. 22.

The export of goods capable of being used for 'strategic' (military) purposes could then obviously affect the public security of Luxembourg. The Court therefore concluded that Member States can adopt legislation which requires authorization for the transit through its territory of strategic goods.

In *Leifer* (1995) the Court elaborated on the discretion which Member States enjoy on basis of public security considerations to decide on granting an export license. A license can be conditioned upon the applicant proving the civil use of the good. But, also then, depending on the political circumstances in the country of destination, it is still possible to refuse a license when "those goods are objectively suitable for military use".[69] In this case, it concerned the unauthorized exportation of chemical plant equipment and chemicals to Iraq in the period 1984-1988, which were possibly used in Iraq's development of chemical weapons.[70] The equipment and chemicals themselves could, however, also be used for civilian purposes.

In *Werner* (1995), the Court was asked about the nature and scope of the Common Commercial Policy (CCP) when it comes to export control. Mr. Werner filed a request for a license to export a vacuum-induction smelting and cast oven to Libya.[71] This license was refused by the Bundesamt für Wirtschaft, as it was considered to negatively affect the security and/or foreign policy interests of Germany. According to the Federal Minister for Economic Affairs, the machinery could be used for the production of missiles.[72] In appeal, the Verwaltungsgericht Frankfurt am Main established, however, that the refusal was rather to protect the reputation of Germany in its international relations than to actually protect its public security.[73] More concretely, even if used for military purposes, there was no direct threat to Germany coming from Libya. At the Court, Germany argued that there was at least one EU Member State which it sought to protect, as Italy would be within the reach of the missiles that Libya was pursuing the production of. Moreover, Germany argued to pursue the avoidance of a "serious disruption of its foreign relations", referring to previous participation of German companies in the construction of a factory for the production of poisonous gas in Libya which had seriously disrupted its foreign relations with the US and Israel.[74] Consequently, the question was submitted to the Court whether Germany was allowed to pursue such a foreign policy objective in its export control or whether this would fall exclusively within the EU's competence on CCP.

In principle, the competence for foreign commercial policy was transferred to the EU, meaning that all restrictions on export to third countries are governed by EU law. Only those goods falling within the armaments exception of the EU Treaties

69 Case C-83/94, *Peter Leifer*, ECLI:EU:C:1995:329, para. 35.
70 Opinion of AG Jacobs in Case C-83/94, *Peter Leifer and* C-70/94, *Fritz Werner Industrie Ausrüstungen* GmbH, ECLI:EU:C:1995:151, paras 11-12.
71 Case C-70/94, *Fritz Werner Industrie Ausrüstungen GmbH*, ECLI:EU:C:1995:328, para. 3.
72 *Ibid*, para. 5.
73 *Ibid*, para. 6.
74 Opinion of AG Jacobs in Case C-83/94, *Peter Leifer and* C-70/94, *Fritz Werner Industrie Ausrüstungen* GmbH, ECLI:EU:C:1995:151, paras 48-49.

are excluded from this responsibility. The export regulation at issue,[75] however, like the EU Treaties, provides for derogation on basis of public security. Following *Aimé Richardt*, this concerns both internal- and external security. As pointed out by AG Jacobs in his opinion on *Leifer* and *Werner*, the Court notes that it is difficult (and too artificial) to draw a hard distinction between security and foreign policy, as the former necessary depends on the latter. In a globalized world, it would be dysfunctional to consider the security of a state in isolation and to neglect the overall security of the international community. Therefore, the Court concluded that "the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations may affect the security of a Member State".[76] By accepting this 'risk' as a situation which can justify derogation from EU law, the Court acknowledged that derogation is also possible for preventive measures.[77]

The legal framework for authorizing export of dual-use goods has since 2009 been harmonized by the EU on the legal basis of the CCP (Article 207 TFEU).[78] Authorisation, however, is still executed by national authorities and subject to national security considerations. Likewise, the intra-community transfers of armaments has been harmonized by the EU on the legal basis of the internal market (Article 114 TFEU), still providing the possibility to revoke licenses.[79] Armaments exports to third countries, in contrast, are regulated by a common position of the Council in the context of the CSDP.[80] The Common Position leaves much discretion to the Member States in strategically deciding where to export armaments to.

4.2.6 Free movement of capital against the security of the state

In the case of *Alfredo Albore* (2000), the Court had to decide on the legality of an authorization prescribed by Italian law for the sale of immovable property located in a territory designated as of military importance. Such authorization was not required for Italian citizens. The complaint was made by the notary Albore against the Naples Registrar of Property which had refused to register the sale of properties to two German nationals, as they had not been authorized. The Court, first of all, establishes that the Italian law is a discriminatory restriction on capital movements between Member States.[81] Interestingly, the Italian government had not invoked any security

75 Council Regulation (EEC) No 2603/69 of 20 December 1969 establishing common rules for exports. Currently embodied in: Regulation (EU) 2015/479 of the European Parliament and of the Council of 11 March 2015 on common rules for exports (codification).

76 Case C-70/94, *Fritz Werner Industrie Ausrüstungen GmbH*, ECLI:EU:C:1995:328, paras 25-27.

77 See for this observation: Manunza, *EG-aanbestedingsrechtelijke problemen* 2001, p. 301.

78 Currently established in: Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast).

79 Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community.

80 Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment.

81 Case C-423/98, *Alfredo Albore*, ECLI:EU:C:2000:401, paras 14-16. The free movement of capital is enshrined in the EU Treaties in Article 63-65 TFEU.

justification, as it had argued that the preliminary question was inadmissible in the absence of an exercise of free movement. The Court addressed the public security dimension of the authorization therefore on its own motion.[82]

It considered that the principle of proportionality must be observed. This means that public security cannot be an excuse for arbitrary discrimination and that a "mere reference to the requirements of defence of the national territory" does not suffice. In crisis situations which fall within derogation on basis of Article 347 TFEU (see Section 4.2.8) this would be different according to the Court, although it did not elaborate on that. It is for the Member State to demonstrate in similar cases that free movement would expose its military interests "to real, specific and serious risks which could not be countered by less restrictive procedures".[83] The main principle which can be extracted from this judgement is that proportionality requires a casuistic approach and that categorical derogations from the internal market rules are not permitted.

In some of the so-called *Golden Shares* jurisprudence of the Court, national security has also been addressed in the context of limiting the free movement of capital. In *Commission* v *Belgium* (2002), the Belgian government had granted itself such Golden Shares in two energy companies. This meant that the state had to be given *ex ante* notice of any transfer, use as security or change in destination of the major energy infrastructures of the companies. The responsible minister could then oppose such decisions when considered contrary to the national interest in the energy sector. It also gave this minister the right to appoint two government representatives to the board of directors with veto rights. According to the Commission, this constituted an infringement of the free movement of capital, as the Belgian legislation had not set out "precise, objective and permanent criteria" for approval or opposition of the prescribed interventions in the strategic decision-making of the companies.[84] Belgium's defence primarily stressed the applicability of the public security justification of Article 65(1) TFEU. Like in *Campus Oil*, the measures sought to secure the national energy supplies. According to the Belgian government, the golden shares were necessary and proportionate, as annulment of strategic decisions could only take place under specific circumstances where the national energy policy is negatively affected. Moreover, the minister needs to adopt a formal statement of reasons for such a decision against which appeal at a court is possible.[85]

The Court first stressed that certain concerns may justify a degree of influence for Member States in privatised companies "where those undertakings are active in the fields involving the provision of services in the public interest or strategic services".[86] The Court subsequently confirms that, like in *Campus Oil*, the safeguarding of (national) energy supplies in the event of a crisis falls within the scope of the public security justification and can be relied on as long as there is "a genuine and sufficiently

82 *Ibid*, para. 19.
83 *Ibid*, paras 20-23.
84 Case C-503/99, *Commission* v *Belgium*, ECLI:EU:C:2002:328, para. 1.
85 *Ibid*, paras 26-29.
86 *Ibid*, para. 43.

serious threat to a fundamental interest of society".[87] The Court ruled that this was indeed the case. It also considered the Belgian legislation to fulfil the requirement of proportionality, as it did not impose a system on the company of prior approval and government intervention could only take place within strict time limits and was limited to certain strategic assets of the companies.[88] The possibility of judicial review obligated the Belgian government for each case to show how its national energy policy would be affected by a decision of the company.

4.2.7 Security of information as a derogation from EU public procurement law

The public procurement directives do not apply to public contracts of which the procurement or performance are declared to be secret when such secrecy cannot be safeguarded within the frameworks of these directives.[89] This exclusion is based on Article 346(1 a) TFEU. The latter consists of a proportionality analysis based on the question whether the secondary law instrument sufficiently facilitates the legitimate security concerns of national authorities as to prevent derogation from EU law. Secondary law, such as the public procurement directives, should be compatible with primary law, including the national security derogations to it. But legislation can clarify and elaborate the least restrictive (thus proportionate) measures which a Member State can implement to protect its security interests within EU law. If these options are not flexible enough to genuinely ensure the protection of the specific national security interests involved, it is nonetheless possible to fall back on treaty-based derogation. This was the issue in *Commission* v *Belgium* (2003) and *Commission* v *Austria* (2018).

In *Commission* v *Belgium*, the matter was a contract for the performance of coastal surveillance services by aerial photography. The Commission had brought an action for infringement of the procurement directive (Directive 92/50), which Belgium primarily claimed to not be applicable because of the necessary special security measures that had to be taken due to the secrecy of the contract performance.[90] It was deemed necessary for the performance of the contract that the economic operator was in possession of a military security certificate. These certificates enable the service provider to receive a list of classified items, which the contract performer can then conceal before distributing the photographs. The Court, first, acknowledged that Belgium is responsible for the security of not only its own military installations, but also those on the premises of NATO.[91] Moreover, as put forward by Belgium, obtaining the required certificate involved a particularly 'thorough vetting' because of which the Court concludes that it was not a 'merely administrative formality'.[92] The latter was asserted by the Commission, arguing that it was just an authorization requirement

87 *Ibid*, paras 46-47.
88 *Ibid*, paras 49-50.
89 Directive 2014/24/EU, Article 15(3) and Directive 2009/81/EC, Article 13(a).
90 Case C-252/01, *Commission* v *Belgium*, ECLI:EU:C:2003:547, paras 24-25.
91 *Ibid*, para. 30.
92 *Ibid*, paras 32-34.

which could be included in an open procurement procedure.[93] The Court concluded therefore that Directive 92/50 did not apply to the public contract at issue because of the special security measures that were necessary.

The most recent case of the Court on public procurement and national security was its ruling in *Commission* v *Austria* (2018) which concerned a public contract for the printing of all types of official documents such as passports. Under Austrian law, all federal printing contracts were exclusively awarded to the formerly state-owned company *Österreichische Staatsdruckerei GmbH* (ÖS) when secrecy or compliance with security rules was deemed necessary.[94] Consequently, Austria argued at the Court that directly awarding these service contracts protects the essential security interests of the country and that the contracts therefore fall outside the scope of the EU Treaties and the public procurement directives.[95] With regards to the EU Treaties, the Court based its analysis primarily on Article 346(1)a TFEU which excludes application of EU law when this would impose on Member States obligations "to supply information the disclosure of which it considers contrary to the essential interests of its security". Even if the specific exclusions of the public procurement directives would apply, the EU Treaties would still oblige a more open and transparent public procurement procedure than directly awarding the contracts, except when that would be strictly necessary for the involved security interests.[96] According to the Commission, Austria had not proved that directly awarding these contracts was genuinely necessary for its security interests, as a public call for tenders could have been organized in such a way that only printing companies which can fulfil the security requirements participate.[97]

Most crucial is to understand that it is for the Member States only to define their essential security interests in the sense of Article 346(1)a TFEU, as the Court takes as a starting point.[98] It is then only for the Court (and EU law in general) to test whether a specific measure fits the way in which the Member State has defined its security interests and whether it does not go beyond what is necessary to meet the defined interests. The burden of proof for this is on the Member States. The Court clarified this by stating that it is for the Member States to show that a derogation is necessary in order to protect its security interests and that these could not have been protected within a competitive tendering procedure as provided by the secondary legislation.[99] Such a proportionality assessment was still neglected by the Court in the previously discussed *Commission* v *Belgium* (2003). In the present case, Austria failed to prove that its essential security interests could not have been protected within a

93 *Ibid*, para. 28. The Commission referred to Article 30(1) Directive 92/50. In Directive 2014/24/EU, such a certificate requirement can be found in Article 44.

94 Case C-187/16, *Commission* v *Austria*, ECLI:EU:C:2018:194, paras 14-16 referring to the Bundesgesetz zur Neuordnung der Rechtsverhältnisse der Österreichischen Staatsdruckerei (Federal law on the reorganisation of the legal relationships of the ÖS, Bundesgesetzblatt I, 1/1997, 'the StDrG'), in particular paragraph 1 & 2.

95 *Ibid*, para. 37.

96 Strangely, Austria did not rely on Article 346(1)a TFEU during the hearings, as mentioned by Kokott, see: Opinion of AG Kokott in Case C-187/16, *Commission* v *Austria*, ECLI:EU:C:2017:578, para. 41.

97 Case C-187/16, *Commission* v *Austria*, ECLI:EU:C:2018:194, para. 39.

98 *Ibid*, para. 75.

99 *Ibid*, paras 78-79.

more open procurement procedure in which more economic operators would have been considered. It claimed that directly awarding was necessary because of I) the need for centralized performance, II) the exercise of administrative supervision, III) guaranteed provision and IV) to ensure the trustworthiness of tenderers.

The first argument was most easily rejected by the Court, as both Directive 92/50 and 2004/18 facilitate such centralized performance after an open and competitive procurement procedure. The second argument was of more fundamental importance, as for effective administrative supervision it was deemed necessary that the contractor had its production and storage premises in the Member State of supervision. It did not, however, justify the direct awarding to ÖS, because such supervision could just as well be exercised over other economic operators within Austrian territory. Even economic operators established in other Member States could be required to accept security controls, visits or inspections by the Austrian authorities.[100] Although not mentioned by the Court, one could think of the requirement for foreign suppliers to produce and store the documents and data on Austrian territory.[101] The proportionality of this would be open to debate. In any case, it would be less restrictive than directly awarding to the state-owned company. For the trustworthiness of the tenderers and the guaranteed provision (security of supply), the Court simply reasoned that Austria failed to show that these requirements could not be secured within a competitive tendering procedure and the different legal instruments which the public procurement directives include for this.

The manufacturing of official state documents, such as passports, is a fundamental state function, just as the military. As put forward by AG Kokott, it is therefore beyond any doubt that secrecy and security requirements for the procurement of the printing of these documents is of utmost importance.[102] According to AG Kokott, it is even allowed to derogate from EU law 'simply' because a Member State wishes to not disclose security-related information to foreign economic operators or economic operators controlled by foreign nationals. This in particular is the case where such foreign entities could be required to cooperate with the intelligence services of their residence countries. In the present case, the ÖS was privatized by Austria without any restrictions on foreign ownership. Therefore, it could hardly be argued by Austria that the protection of security-related information justified the categorical refusal to open the contract up to other economic operators.[103]

4.2.8 EU law and the outbreak of crises and war: prevention and contextual implications of Article 347 TFEU

In addition to Article 346 TFEU foresees in an instrument for Member States to permanently exclude application of EU law in specific cases determined by

100 *Ibid*, paras 84-86.
101 This is mentioned by the AG, see: Opinion of AG Kokott in Case C-187/16, *Commission* v *Austria* (2017), para. 63.
102 *Ibid*, para.1
103 *Ibid*, paras 70-72.

governments as necessary for essential security interests. Next to this there is Article 347 TFEU which potentially covers the whole of the internal market and beyond, but only in times of crisis. Member States will, however, still have a duty to coordinate such measures to limit their impact on the functioning of the internal market. There are four types of crisis situations under which the derogation can be invoked by a Member State: 1) "in the event of serious disturbances affecting the maintenance of law and order", 2) "in the event of war", 3) "serious international tension constituting a threat of war" and 4) "in order to carry out obligations it has accepted for the purpose of maintaining peace and international security".

There is little to no guidance from the Court on the requirements for application of the derogation. In *Johnston* and *Sirdar,* it stressed that the provision could only be relied on in situations which are "wholly exceptional".[104] From these cases and the wordings of the provision ("in the event of") it seems that the derogation cannot be used for permanent measures. It has been pointed out by AG Darmon in *Johnston* and AG Jacobs in *Werner* and *Leifer* that Article 347 TFEU is "in effect a 'safeguard clause' of general application" which consequently "only applies in absence of special rules" and can therefore be considered an exception of last resort (*ultima ratio*).[105] According to AG Pergola in *Sirdar* both Article 346 and 347 TFEU have an "qualified exceptional character", as there would be no "general State sovereignty proviso" underlying the EU Treaties.[106] This indicates that only in cases not covered by the more general security exceptions in EU law (particularly those of the free movement provisions) these derogations could be applied. Trybus goes even one step further by arguing that Article 347 TFEU has a "triple-exceptional character", as it is also exceptional from Article 346 TFEU.[107] Pergola, moreover, stated that Article 347 TFEU cannot be used preventively, whereas the UK argued that it should also apply to the preparation for war by ensuring combat effectiveness. Consequently, measures falling within the derogation should be temporary and responding to a crisis that has occurred.[108] The Court did not rule on the applicability of Article 347 TFEU, as the measure at issue could be justified under the applicable Directive.

Contrary to the previous interpretation, AG Cosmas attached more systemic meaning to Article 347 TFEU in his opinion in *Albore* (2000). In his view, the provision shows the "demarcation line between the normal circumstances in which national and Community institutions function and difficult situations of national danger" which bring "about significant changes to the nature, strength and extent of the ties binding the national legal order to the Community legal order".[109] For the provision to be practical useful, Cosmas considered it not to be necessary that one of the prescribed situations already occurred, as long as the adopted measures are

104 Case 222/84, *Marguerite Johnston*, ECLI:EU:C:1986:206, para. 27 and Case C-273/97, *Angela Maria Sirdar*, ECLI:EU:C:1999:523, para. 19.

105 Opinion of AG Darmon in Case 222/84, *Marguerite Johnston*, ECLI:EU:C:1986:44, para. 5 and Opinion of AG Jacobs in Case C-83/94, *Peter Leifer and* C-70/94, *Fritz Werner*, ECLI:EU:C:1995:151, para. 63.

106 Opinion of AG Pergola in Case C-237/97, *Angela Maria Sirdar,* ECLI:EU:C:1999:246, para. 13.

107 M. Trybus, *European Union Law and Defence Integration*, Hart Publishing 2005, p. 173.

108 Opinion of AG Pergola in Case C-237/97, *Angela Maria Sirdar,* ECLI:EU:C:1999:246, paras 20-21.

109 Opinion of AG Cosmas in Case C-423/98, *Alfredo Albore*, ECLI:EU:C:2000:158, para. 27.

"directly and exclusively linked to those situations" and the preventive measures are also of a temporary nature.[110] When this is the case, full judicial review in the sense of a proportionality test is not needed.[111]

4.3 The security constraint on 'free' trade of military equipment

Based on Article 346(1b) TFEU, Member States can derogate from EU law in cases when this is considered "necessary for the protection of the essential interests of its security which relate to the production of or trade in arms, munitions and war material". The difference with sub a of the same provision is that sub b is about military capabilities rather than security-related information. There is obviously a strong link, as the possessing of military capabilities comes with all types of security-related information. Service contracts for the military which relate to the maintenance of capabilities could particularly include such security-related information. The scope of sub b is, however, much narrower, as there must be a direct link with the production of or trade in arms, munitions and war material. Moreover, even those measures which cover the production and trade of goods which only have a military purpose may not distort the functioning of the internal market for goods which (also) have a civilian function. As most companies which are active in the military sector also produce civilian goods, in practice this limit adds to the complexity of the exception.

The second paragraph of the exception mentions the list of war materials which the Council drafted on 15 April 1958 to clarify the reach of the exception, which has not been amended ever since. The exact legal status of the list is still not clear as it has never been officially published. It appears to be an integral part of the EU Treaties. In 2008, the Council did provide a written version of the list to the European Parliament, which will be used in this contribution.[112] The list contains general categories of military equipment, by for instance referring to 'Aircraft and equipment for military use'.

4.3.1 The national security standard of the armaments exception

The Court addressed the nature of the armaments exception for the first time in *Commission* v *Spain* (1999). In 1996, the Commission had already started criticizing the widespread practice of fully excluding EU law in the field of armaments by the

110 *Ibid*, paras 31-32.

111 *Ibid*, para. 29. Alternatively, although acknowledging that the extent of judicial review over application of Article 347 TFEU is more "limited" than over other security exceptions, Koutrakos indicates that some sort of proportionality test should be applied by asserting that it would be the role of the Court to "struck 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", see: P. Koutrakos, 'Is Article 297 EC a "Reserve of Sovereignty"', *Common Market Law Review* 2000, pp. 1354-1355.

112 Council of the EU, *Extract of the Council decision 255/58 of 15 April 1958*, document 14538/4/08, Brussels: 26 November 2008. For a discussion of the legal status and characteristics of the list, see: Trybus, *Buying Defence and Security in Europe* 2014, Chapter 3, para. 2.

Member States.[113] To some extent, the judgment is a confirmation of the approach which the Commission developed in the aftermath of the collapse of the Soviet Union and the coming about of EU policies on military security. It is, however, necessary to assess this case, like all others, in light of its factual circumstances and the specific regulatory context.

The regulation at issue in *Commission* v *Spain* was Directive 77/388/EEC, which harmonized 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 import from outside the Community. Only aircraft and warships were excluded from the scope of this fiscal regime. Spain had subsequently adopted a law which exempted the intra-community imports of armaments, munitions and other equipment exclusively for military use from VAT.[114] The Directive did not provide for such an exemption. At the Court, Spain claimed that this exemption was necessary for the "achievement of the essential objectives of its overall strategic plan and, in particular, to ensure the effectiveness of the Spanish armed forces".[115] The exemption from VAT of military imports contributed to this purpose, according to Spain, because it created "the economic and financial basis of the overall strategic plan", as abolishing the exemption would have "considerable financial consequences".[116]

AG Saggio was not impressed by this argument. It was for Spain to prove that the exemption was necessary for its essential interests of national security, meanwhile their only argument was of a financial nature. In any case, as continued by the AG, the revenue deriving from VAT would flow back into the finances of the Spanish federal government itself, except only for a "trifling percentage" which would go to the Community.[117] The Court agreed. More generally it 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".[118] This means that it always is for the Member State which invokes such an exception to provide evidence that the specific circumstances fall within the limited scope of the specific exception.

In *Commission* v *Germany* and *Commission* v *Finland* (2009), the Court confirmed that increased costs of military equipment, whether because of customs duties (for imports from third countries) or VAT, cannot justify exempting these from fiscal rules of the EU. Otherwise, this would allow Member States to circumvent the "obligations which the principle of joint financing of the Community budget" impose on them at the expense of those Member States that do collect and pay such taxation. Moreover, it clarified that even though a linguistic understanding of the armaments exception

113 EU Commission, COM 96 10 final, *Communication from the Commission: The challenges facing the European defence-related industry, a contribution for action at European level*, Brussels: 24 January 1996.
114 Case C-414/97, *Commission* v *Spain*, ECLI:EU:C:1999:417, para. 5.
115 *Ibid*, para. 17.
116 Opinion of AG Saggio in Case C-414/97, *Commission* v *Spain*, ECLI:EU:C:1999:156, para. 6.
117 *Ibid*, para. 12.
118 Case C-414/97, *Commission* v *Spain*, ECLI:EU:C:1999:417, para. 21.

indicates a self-judging nature, the article cannot "be read in such a way as to confer on Member States a power to depart from the provisions of the Treaty based on no more than reliance on those interests".[119] So, the burden of proof is on the Member States. This is not only so for showing that a certain case fits the material scope of the exception (military goods and no distortion of the internal market for civilian goods), but also for providing evidence that the measure is suitable for fulfilling the security needs of the Member State. The suitability of a specific measure (such as the tax exemption) is under legal scrutiny of the Court, whereas determining the – more abstract – security needs (such as the effectiveness of the Spanish armed forces) is the sole discretion of the Member State.

The Court's judgment in *Commission* v *Spain* triggered the Commission to pursue supranational regulation in the area of military procurement.[120] The actual substance of the Court's judgment is, however, nothing more than a reiteration of its considerations in *Marguerite Johnston* (1986), where it held that the security derogations, such as those based on Article 346 TFEU, "deal with exceptional and clearly defined cases".[121] Categorical exemptions are not allowed, also not for military equipment. At the same time, military procurement is already a "clearly defined case" within the scope of the most specific exception, that is Article 346(1)b TFEU. Judicial scrutiny at the EU level is then naturally more limited.[122] 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 intensity of judicial review. Unlike the tax exemption in *Commission* v *Spain*, military procurement always has a link with national security as its sole purpose is to contribute to military security.

In *Fiocchi Munizioni* (2003), the Court of First Instance found an action against the Commission for a declaration of failure to act on basis of the EU's regime on state aid to be inadmissible. Nonetheless, the judgment gives some insights into the application of competition law to the armaments sector. Fiocchi had filed a complaint at the Commission about the subsidies of the Spanish government to its public economic operator Santa Barbara. The main concern of Fiocchi related to Santa Barbara's activities on the market for munitions, on both the market for military use and civilian use. Fiocchi argued that there was a distortion on the market for military use, as the subsidies had enabled Santa Barbara to export munitions for a lower price to Italy, where it had won a tender of the Italian Defence Ministry; hence, the complaint of Fiocchi.[123] Although the Commission did eventually not adopt a decision (as the judgment was about *failure to act* only), it did in its communication with the Spanish authorities express the view that subsidies for production of military (as well as civilian) weapons intended for export cannot be considered necessary for

119 Case C-372/05, *Commission* v *Germany*, ECLI:EU:C:2009:780, para. 70 and 73 and Case C-284/05, *Commission* v *Finland*, ECLI:EU:C:2009:778, para. 47 and 50.

120 M. Blauberger & M. Weiss, "If you can't beat me, join me!' How the Commission pushed and pulled member states into legislating defence procurement', *Journal of European Public Policy* 2013, p. 1129.

121 Case 222/84, *Marguerite Johnston*, ECLI:EU:C:1986:206, para. 26.

122 See also: Trybus, 'The EC Treaty as an Instrument of European Defence Integration' 2002, p. 1372.

123 Case T-26/01, *Fiocchi Munizioni* v *Commission*, ECLI:EU:T:2003:248, para. 88.

the essential security interests of Spain and thereby falling within the scope of the armaments exception.[124]

The Court, however, stressed that the armaments exception grants the Member States a "particularly wide discretion" to determine their security needs when it comes to the armaments which fall within the exception.[125] As mentioned by Trybus, exports (so also within the EU) might be necessary for the economic viability of national industrial capabilities, which could be part of the determined security needs of the Member State.[126] Due to the procedural nature of the case, the Court did not adopt a decision on this matter. It seems that subsidizing exports is not per se problematic, as the exception can also exclude the application of state aid law, if these subsidies are limited to military equipment from the Council's list.

Again, as was reiterated by the Court in *Commission* v *Austria* (2018) and more generally by the Treaty drafters in Article 4(2) TEU, it is an exclusive competence of the Member States to define their 'essential security interests'.[127] Eisenhut, on the contrary, argues 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 should "be perceived as being consistent throughout the European Union".[128] Consequently, it should be more difficult for the Member States to rely on Article 346 TFEU in their military procurement activities. This approach is, however, problematic. The enhanced cooperation within the frameworks of the CSDP is based on the intergovernmental premises of the CFSP, best reflected by the reference of Article 42(1) TEU to the CSDP being based on 'national capabilities'. As I explained in Chapter 1, these intergovernmental frameworks facilitate the *military* logic present in the military procurement of the Member States, while it conflicts with the supranational *economic* logic of the internal market frameworks. In addition, as argued by Heuninckx, the security interests of the Member States still vary extensively, while export restrictions have remained a threat to security of supply.[129] These variations do not only follow from geographical reasons, but also from the fact that some Member States will prioritise NATO cooperation while others are not even members of this alliance.

124 *Ibid*, para. 8.

125 *Ibid*, para. 58. According to Pourbaix, this case illustrates, like *Commission* v *Belgium* (2003) the Court's approach of "self-restraint" in cases that actually fall within the scope of Article 346 TFEU, see: N. Pourbaix, 'The Future Scope of Application of Article 346 TFEU', *Public Procurement Law Review* 2011, p. 5.

126 Trybus, 'Buying Defence and Security in Europe' 2014, p. 104.

127 Case C-187/16, *Commission* v *Austria*, ECLI:EU:C:2018:194, para. 75. This is also acknowledged by the Commission, see: COM(2006) 779 final, Interpretative Communication *on the application of Article 296 of the Treaty in the field of defence procurement*, Brussels: 7 December 2006, p. 4.

128 D. Eisenhut, 'The special security exemption of Article 296 EC: time for a new notion of "essential security interests"?', *European Law Review* 2008, pp. 577-585. This perspective is also visible in the Interpretative Communication of the Commission, see: COM(2006) 779 final, p. 7.

129 B. Heuninckx, '346, the number of the beast? A blueprint for the protection of essential security interests in EU defence procurement', *Public Procurement Law Review* 2018, p. 63.

It appears that the consideration of AG Mayras in *Van Duyn* (1974) that it is impossible to deduce a Community concept of security in absence of supranational competences in this field still holds truth in the military context.[130]

4.3.2 The thin line between single and dual use equipment

Besides the question whether and to what extent Member States need to prove the security-suitability of a measure, an often-disputed issue is the division between purely military goods within the scope of the armaments exception and dual-use goods. Trade restrictions on dual-use goods such as directly awarding a public contract or export control cannot benefit from the armaments exception. Instead, Member States can invoke the public security justification of the previously discussed Article 36 TFEU.

The Court addressed this issue in 2008 in two judgments which came about in the context of infringement decisions against Italy for directly awarding contracts for the supply of helicopters. In *Agusta* (2008) the existence of a military purpose was the central issue, whereas in – previously discussed – *Commission* v *Italy* (2008) the civilian purpose of the helicopters was quite obvious. The matter of concern was a general practice of directly awarding contracts to Agusta for the purchase of helicopters by various governmental bodies.[131] For all the supplies intended for the military corps, Italy argued that these were excluded from the application of EU law by the armaments exception, because these helicopters were dual-use items which "may serve as well for civilian as for military purposes" and the 1958 list refers to 'Aircraft and equipment for military use'.[132] This was not accepted by the Court, as the armaments exception clearly phrases that the "conditions of competition in the common market regarding products which are not intended for specifically military purposes" may not be altered. Now that the helicopters were certainly purchased for civilian use and only possibly for military purposes, one cannot speak of 'specifically military purposes'. Consequently, the armaments exception could not properly be invoked by Italy.[133]

According to AG Mazák, the strict nature of EU law derogations implicates that the armaments exception should be applied by Member States on a case-by-case basis, meaning that procurement contracts which are directly awarded on that basis should be assessed individually. Mazák extracted, moreover, from the wordings of the exceptions that if application of it would affect competition on the internal market,

130 Opinion of AG Mayras in Case 41/74, *Van Duyn* v *Home Office*, ECLI:EU:C:1974:123, p. 1357.

131 It concerned a general practice, of which the Commission referred to specific contracts of the *Corpo dei Vigili del Fuoco* (Corps of Fire Brigades), the *Carabinieri* (military police), the *Corpo Forestale dello Stato* (forestry police), the *Guardia Costiera* (Coastguard), the *Guardia di Finanza* (Revenue Guard Corps), the *Polizia di Stato* (State Police) and the Department of Civil Protection in the Presidency of the Council of Ministers. But many other governmental bodies in possession of helicopters seemed to exlusively or predominantly have Agusta helicopters, see: Case C-337/05, *Commission* v *Italy (Agusta)*, ECLI:EU:C:2008:203, para. 28.

132 *Ibid*, paras 30 & 45. See also: *Council decision 255/58*, para. 10.

133 *Ibid*, paras 45-48.

it is for the Member State to prove that the equipment is "intended for specifically military purposes".[134]

The distinction was further clarified by the Court in *Finnish Turntables* (2012). The Finnish Defence Force (FDF) had procured tiltable turntable equipment for the purpose of simulating combat situations without prior publication of contract notice as was required by Directive 2004/18. The applicant in the (national) proceedings claimed that the equipment constituted a technical innovation from the civilian sector and that the design of the turntable at issue merely required appropriate selection and attachment of components which fall within this sector as well.[135] The FDF, however, relied on the armaments exception by claiming that the equipment was purchased for "specifically military purposes" and that the equipment at issue was designed for the study of weapons intended for military use.[136] Consequently, it would fall within one of the categories of the Council's list.[137] The Court concluded that the mere fact that certain equipment has a largely identical civilian application does not exclude reliance on the armaments exception. The contracting authority, however, needs to show that it is "intended for specifically military purposes" (subjective test) and that this "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).[138] This appeared to be the case for the turntable equipment.[139]

4.3.3 The legal fiction of balancing between the free market and military security

The Court did not fully review the armaments exception in *Finnish Turntables*, as the preliminary question of the Finnish court merely concerned the issue whether the equipment could be considered purely military instead of dual-use. It, however, used the opportunity to stress that the referring court should:

> "determine whether the Member State which seeks to take advantage of that Treaty provision can 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".[140]

The burden of proof regarding the existence of a link between the measure taken and the identified national security interest rests on the Member States. But the question remains what an appropriate legal test would look like. AG Kokott stressed in her opinion on the case that mere reliance on national security is not sufficient

134 Opinion of AG Mazák in Case C-337/05, *Commission* v *Italy* (Agusta) ECLI:EU:C:2007:421, paras 57-59.
135 Case C-615/10, *Insinööritoimisto InsTiimi Oy*, ECLI:EU:C:2012:324, para. 19.
136 *Ibid*, paras 20-21.
137 'Military electronic equipment' for instance, see: *Council decision 255/58*, para. 11.
138 Case C-615/10, *Insinööritoimisto InsTiimi Oy*, ECLI:EU:C:2012:324, para. 40.
139 *Ibid*, para. 43.
140 *Ibid*, para. 45.

for derogation.[141] According to her, Member States indeed have a wide discretion in defining their security needs, but need to prove that derogation appeared necessary and is proportionate.[142] Confidentiality could be such a security interest, but requires that this is genuinely pursued with the measure.[143] For the armaments exception, this seems not to be the most important aspect, as confidentiality considerations could also justify derogation on the basis of Article 346(1)a TFEU. AG Kokott, however, also stresses that derogation 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, in particular undertakings or persons from non-member countries. A Member State can also legitimately ensure that it does not become dependent on non-member countries or on undertakings from non-member countries for its arms supplies".[144]

It is unclear – and seemingly inconsistent – why for the first part of this statement (confidentiality) the AG refers to foreign entities and for the second part (security of supply) to non-member entities. There is no structure in the EU which completely secures the supply of armaments for all Member States. The latter is the exact rationale behind the armaments exception. When it comes to non-member entities, EU public procurement law does, moreover, not include much stricter obligations than the WTO-rules to give access to public contracts. In cases where non-member entities effectively control entities which are legally established in one of the Member States this becomes more complex. Like AG Kokott, Trybus has argued as well that the armaments exception includes a proportionality test. According to him, the test for the armaments exception would be characterized by a much lower degree of intensity than the regular derogations.[145]

The latter is somewhat confirmed by the Court in *Schiebel Aircraft* (2014). At issue was a preliminary question concerning Austrian legislation which conditioned the trade in military goods on the possession of Austrian nationality by either the natural person or the statutory representatives of an economic operator engaging in such activity.[146] As this was also a preliminary ruling case, the Court did not scrutinize 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 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".[147]

141 Opinion of AG Kokott in Case C-615/10, *Insinööritoimisto InsTiimi Oy*, ECLI:EU:C:2012:26, para. 61.
142 *Ibid*, paras 62-63.
143 *Ibid*, paras 64-65.
144 *Ibid*, para. 66.
145 Trybus, 'The EC Treaty as an Instrument of European Defence Integration' 2002, pp. 1347-1372. See more recently: Trybus, 'Buying Defence and Security in Europe' 2014, p. 111.
146 Case C-474/12, *Schiebel Aircraft*, ECLI:EU:C:2014:2139, paras 4-7.
147 *Ibid*, para. 37.

Proportionality traditionally consists of three steps: 1) suitability, 2) necessity and 3) proportionality *strictu sensu* in the shape of a balancing exercise.[148] Balancing would in this case be between, on the one hand, the internal market objectives and, on the other hand, the national security interest of the Member State. The question, whether the measure did not impede cross-border trade more than *strictly* necessary, should then be answered affirmatively. In the limited amount of jurisprudence on the issue, the Court has mostly referred to necessity, as this word is also used in the Treaty-text and in *Schiebel Aircraft* it referred to the principle of proportionality. According to Trybus, proportionality in the armaments exception would be characterized by a lower intensity of judicial scrutiny in all of the three steps. For the balancing exercise, this would mean that balance "is manifestly not present".[149]

It is, however, questionable whether the armaments exception includes a full proportionality test, meaning that all the three requirements should be fulfilled. When it comes to suitability and necessity there is judicial review foreseen by the Treaty drafters, as otherwise abuse of the derogation could seriously harm the effectiveness of internal market law. This is also mentioned by the Court in *Schiebel Aircraft*, although the use of the term proportionality is confusing in that regard. In its Interpretative Communication on the application of Article 346 TFEU, the Commission does also not indicate the existence of something like a full balancing exercise. It merely emphasises that Member States should identify an essential security interest to which the specific procurement decision is connected, and that non-application of EU public procurement law is actually necessary for the protection of this interest.[150] Heuninckx rightfully observes that the essential security interest should, in that regard, be "officially defined in generally applicable terms".[151] This relates to the requirements of coherence and consistency which are apparent throughout the case law of the Court on the security derogations.[152]

Contrary to the measures which were the subjects of the Court's judgments in *Finnish Turntables* and *Schiebel Aircraft*, the purpose of the armaments exception is to respect the military sovereignty of Member States in securing their supply of armaments. In procurement cases, this security-of-supply rationale will naturally be more directly present than in authorization cases like *Schiebel Aircraft*, as regulatory measures have a more general character than procurement activities. Only measures which genuinely pursue the military aim can therefore fall within the derogation, to prevent abuse by measures which primarily have economic aims. Like in *Campus Oil*, the mere fact that such a measure brings economic benefits to a Member State does not stand in the way of applying the derogation. When looking at the overall EU-system,

148 See for instance: Harbo, 'The Function of the Proportionality Principle in EU Law' 2010, p. 165. Harbo based its understanding of the proportionality principle mainly on the work of German constitutional theorist Robert Alexy, see: R. Alexy, *A Theory of Constitutional Rights*, translation by J. Rivers, Oxford University Press 2002, pp. 66-67.

149 Trybus, 'The EC Treaty as an Instrument of European Defence Integration' 2002, p. 1372.

150 COM(2006) 779 final, Interpretative Communication, p. 8.

151 Heuninckx, '346, the number of the beast?' 2018, p. 62.

152 As discussed before, these requirements caused the Court to dismiss the arguments of Austria in Case C-187/16, *Commission* v *Austria*, ECLI:EU:C:2018:194.

military cooperation structures are based on national capabilities. In crisis-situations and military conflicts of interests, Member States will then still be primarily self-reliant. In such a system, there is no room for a thorough proportionality assessment by the judiciary when reviewing the armaments exception. There are no trade-offs between prosperity and security, as the latter is a precondition for the former.

Conclusion: sovereignty and interdependence as grounds for exception

Security is a dynamic concept in EU law. This was already acknowledged by the Court in *Van Duyn* (1974), in the context of the public policy derogation, where it noted that these interests "may vary from one country to another and from one period to another".[153] In a general sense, Member States decide on their own national security policies and the strategic-military needs which they result in. The Court does not interfere with the ways in which Member States define their security interests.[154] The only limit to this is that such interests cannot be defined in a way to generally stimulate national economy.[155] Economic benefits which may come along with security policy should be linkable to the security interest and not excessively close off non-military markets to foreign competition. Neither does EU law limit the (general) policy choices governments may take for the organization of their military.[156] To act in compliance with EU law, most of all, means to act in consistency with one's own security strategy.

The two most apparent military security constraints to EU integration are security in terms of foreign policy[157] and in terms of security of supply. An intrinsic element of the foreign policies of Member States is the choice between neutrality and alliance. Both when security measures derogating from EU law can be linked to obligations arising out of pre-existing NATO membership (*Commission* v *Belgium*) and when they trace back to vulnerability which comes along with neutrality (*Campus Oil*), the Court has given more discretionary power to the Member States. This room for manoeuvre is based on their responsibility, as Article 4(2) TEU stresses that national security is the "sole responsibility of the Member States". Security of supply is more directly related to crisis situations. Although EU law includes regulation which seeks to harmonise the intra-community transfers of military equipment, in crisis situations there may still be export restrictions between EU Member States. In *Campus Oil*, the Court decided therefore that security of supply may require measures which ensure the maintenance of national-industrial capabilities, complementary to EU-measures which serve the same purpose.

The EU Treaties explicitly distinguish between military equipment and dual-use equipment. However, in practice the Court focuses on the intensity of the involved security interest rather than the legal ground for derogation. The difference in

153 Case 41/74, *Van Duyn* v *Home Office*, ECLI:EU:C:1974:133, para. 18.
154 See again: Case C-252/01, *Commission* v *Belgium*, ECLI:EU:C:2003:547, para. 30.
155 See: Case C-398/98, *Commission* v *Greece*, ECLI:EU:C:2001:565.
156 See: Case C-186/01, *Alexander Dory*, ECLI:EU:C:2003:146, paras 35-36.
157 See again: Case C-83/94, *Peter Leifer*, ECLI:EU:C:1995:329 and Case C-70/94, *Fritz Werner Industrie Ausrüstungen GmbH*, ECLI:EU:C:1995:328.

application of Article 346(1 a) TFEU and Article 36 TFEU in cases which concern military security is therefore insignificant. Both grounds for derogation are based on the presuppositions that they can only be used in "exceptional and clearly defined cases" and therefore "do not lend themselves to a wide interpretation".[158] Although the armaments exception – as opposed to Article 36 TFEU – *prima facie* has a completely self-judging nature, the Court clarified that this is not the case. According to the Court, the provision "cannot be read in such a way as to confer on Member States a power to depart from the provisions of the Treaty based on no more than reliance on those interests".[159] As the Court stressed in *Albore*, for each measure it must be specifically demonstrated that "non-discriminatory treatment of the nationals of all the Member States would expose the military interests of the Member State concerned to real, specific and serious risks".[160] These risks should be pre-determined in the general national security policy and can – as mentioned before – only include economic objectives as far as these are subordinate to the security purpose.

Military procurement, however, to a far extent already constitutes an exceptional and clearly defined case which inherently exposes "the military interests of the Member State concerned to real, specific and serious risks". The only implication of the Court's case law is that military procurement cannot – as a whole – be categorically excluded from the application of EU law. Each military contract for which derogation is pursued should include its own motivation on the security risks, which can relate to security of supply, security of information or maintaining a minimum level of industrial capabilities. When a specific measure, such as a direct award or a military offsets requirement, fits the general policy framework[161] of the Member State, the Court will most likely refrain from substantially testing the suitability of the measure.[162] Member States enjoy a wide discretion to determine which means are most appropriate to achieve the security aims, while they enjoy full discretion to determine their security interests in the first place. The Court also refrains from balancing between the internal market objectives and the national security objectives. Such a balancing exercise would be problematic, as one cannot genuinely balance between the source of authority (sovereignty) and one of the several means to achieve its purpose (the internal market).

The constraint of the security exceptions in the EU Treaties on the *legal effectiveness* of the Directive is thus severe. The EU Commission initiated legislation and policies to push Member States towards economic integration of military procurement. Yet, there are many circumstances thinkable which could justify derogation from the

158 Case 222/84, *Marguerite Johnston*, ECLI:EU:C:1986:206, para. 26.

159 Case C-372/05, *Commission* v *Germany*, ECLI:EU:C:2009:780, para. 73 and Case C-284/05, *Commission* v *Finland*, ECLI:EU:C:2009:778, para. 50.

160 Case C-423/98, *Albore*, ECLI:EU:C:2000:401, para. 22.

161 Many EU Member States have implemented such national-industrial policies which indicate which contracts they will exempt from EU law. See for instance in case of the Netherlands: Ministerie van Defensie and Ministerie van Economische Zaken en Klimaat, *Nota: Defensie Industrie Strategie*, November 2018. And in the case of Germany: Die Bundesregierung, *Strategiepapier der Bundesregierung zur Stärkung der Sicherheits- und Verteidigungsindustrie*, February 2020.

162 Such as it did in *Sirdar*.

EU's internal market regime for military procurement. These circumstances are particularly present in cases where derogation from EU law is deemed necessary for foreign policy objectives, such as industrial cooperation within NATO or other alliances and where derogation is necessary to ensure security of supply in times of crisis. The legal obligations resting on the Member States are then more procedural than material, requiring them to provide sufficient motivation which consistently fits within a coherent policy framework. Both additional objectives of military procurement as identified in the conclusion of Chapter 1 – industrial independence and military interdependence – can potentially constitute reason to derogate from EU law. Sovereignty and interdependence thus shape the legal structures of the security exceptions.

As long as the EU lacks its own supranational military forces, there seems to be no strong legal basis in the EU Treaties for integration of military industries in a manner which comes close to how other industries have been integrated. Although one can find a legal basis for a common defence in Article 42 TEU, the prospect of materialising this in supranational terms remains unlikely. Even if consensus on the establishment of a common defence would be reached, it would raise more questions than it answers. Would it be a step towards a European federation? What type of federation would this be, considering that there still are tremendous differences between the Member States in adherence to rule of law, human rights and their attitudes towards migration? And how to reconcile the diverging military interests of the Member States within the decision-making procedures of a common defence? These questions, as hypothetical as they might seem, perhaps explain best why national military capabilities will remain the basis for European security; while sovereignty will remain the source of legal authority in the EU's legal order.

CHAPTER 5

Functional Limits to EU Public Procurement Regulation in the Military Sector

Introduction

The Defence Procurement Directive imposes obligations on the EU's Member States to organise non-discriminatory tenders for their procurement of military equipment (military procurement), thereby seeking to liberalise the European markets for military equipment. The aim of such liberalisation is to strengthen the EU's strategic autonomy as a global actor by becoming more self-sufficient in producing military equipment. However, the commercial implications of military equipment are covered by the special exception to EU law of Article 346(1)(b) TFEU, which was introduced by the Rome Treaty to safeguard the military autonomy of the Member States. More generally, as elaborated in the previous chapters, there are severe constraints relating to military power, sovereignty and national security on European economic integration in this sector. As a result of the division of competences between the EU and the Member States, national procurement policies are guided by rationales of national *military* power rather than by the rationales of European *economic* power.

The Directive is usually framed as a regime that provides "security through flexibility".[1] By incorporating security concerns into public procurement contracting authorities are deemed to be facilitated to select suppliers based on reliability and to impose security-requirements on suppliers. There are more lenient rules on the use of procedures, as it is not prescribed to use the open procedure. In addition, there are possibilities to include conditions relating to security of supply and security of information throughout the different phases of procurement procedures. However, when procuring military equipment, national security is generally understood in terms of military power, more specifically in terms of military capabilities and military interdependence (see Chapter 1). The industrial components of these capabilities are still best ensured when located within the same territory and jurisdiction of the operational capabilities. This chapter therefore seeks to expose the limits of the proclaimed 'flexibility' of the regime by comparing it to Directive 2014/24/EU (further referred to as 'the regular PP Directive').

For that purpose, I will consider the function and origins of public procurement regulation in the EU and its fundamental legal principles in the first section. Afterwards, in the second section, I will look into both the room for 'secondary

1 See for instance: M. Trybus, *Buying Defence and Security in Europe*, Cambridge University Press 2014, Chapters 7 & 8.

policies' and some of the functional limitations of EU public procurement law. In the third section I will examine the sector-specific adjustments of the Directive and compare those to the rules of the PP Directive. Based on this comparison, I will draw some general conclusions on the types of security the Directive effectively protects and the types of security which can still only be protected outside the scope of the internal market. Together with the findings of the previous chapters, this assessment provides a solid groundwork to consider the *legal effectiveness* of the legislation and answer the question as to whether it has been adopted under the correct legal basis in the EU Treaties, which I will do in the next chapter.

5.1 The function of EU public procurement law and its dynamic interplay with Treaty reforms

With the creation of the internal market by the Treaty of Rome (1957) economic integration was constitutionalised through the adoption of legally enforceable principles,[2] aiming to ban all obstacles to the optimal functioning of the market. The procurement practices of the Member States, however, remained rather discriminatory.[3] This was – among other things – revealed by the widespread use of *secondary policy objectives*, meaning policies for a certain purchase which are not directly connected to the actual purchase. Secondary policy objectives have in common that they often prefer domestic suppliers and products over those from other EU Member States. Before the 1970s these policies were often oriented towards the protection of national industry or at least had this as a result. Simply put, the goal was to create jobs for the local workforce: to support employment in declining industries or in areas suffering from underemployment or lack of development. These domestic policies were applied for strategic reasons, *e.g.* in purchases of defence goods or aerospace systems. In the absence of concrete rules limiting the wide discretion which contracting authorities had in applying the domestic preference policies ('buy national'), the consequences in the long term for the integration of the common market economy were disastrous.

Identifying and removing all kinds of discrimination in the award of public contracts by limiting the discretion of national public contracting authorities to foster the fulfilment of the internal market, was thus seen to be necessary by the EEC and resulted in the adoption of the first public procurement Directives in the 1970s.[4] These directives obligated public contracting authorities to take steps to identify and to remove all forms of discrimination in procurement procedures by introducing common

2 W. Sauter, 'The Economic Constitution of the European Union', *Columbia Journal of European Law* 1998, p. 47.

3 Section 5.1. is based to a large extent on the first part of a contribution of Elisabetta Manunza and the author in Public Procurement Law Review, see: E. Manunza and N. Meershoek, 'Fostering the social market economy through public procurement? Legal impediments for new types of economy actors', *Public Procurement Law Review* 2020, pp. 353-368.

4 Directive 71/305/EEC on *works* and Directive 77/62/EEC on *goods*. See for instance: E. Manunza, *EG-aanbestedingsrechtelijke problemen bij privatiseringen en bij de bestrijding van corruptie en georganiseerde misdaad*, Kluwer 2001, pp. 1-4 and F. Pennings and E. Manunza 'The room for social policy conditions in public procurement law', in: A. van den Brink, M. Luchtman and M. Scholten (eds.), *Sovereignty in the shared legal order of the EU*, Intersentia 2015, pp. 173-196.

transparent, objective, proportionate and non-discriminatory rules. An integrated EU market could not exist if such an important market segment remained local. Although many improvements were made since then, the public procurement practices of Member States, however, remained largely nationally oriented.[5]

In the (most recent) 2014 revision of the Public Procurement Directives, the discretionary powers of contracting authorities to pursue secondary policy objectives were expanded.[6] The wider contractual discretion granted again to public contracting authorities in the 2014 Directives was meant in the first place to include room for secondary policy objectives related to solving global (and European) problems such as sustainability and making the internal market more socially oriented. The legislature considered public procurement to be a "market-based instrument to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds", and therefore explicitly pursued to "enable procurers to make better use of public procurement in support of common societal goals".[7] The PP Directives now facilitate comparing different bids on the basis of life-cycle-costing (including recycling costs and environmental externalities) and social aspects relating to the subject-matter of the contract.[8] The discretionary power of contracting authorities to exclude tenderers on the basis of violations of environmental law and employment regulations has been expanded as well.[9]

This renewed approach should be understood in light of the Treaty of Lisbon (2007) reforms to the internal market concept, by establishing in Article 3(3) TEU its underlying economic model to be that of a 'highly competitive social market economy'. The objective of establishing an internal market now goes beyond the "abolition of […] obstacles to the free movement".[10] Instead of focusing on banning discriminatory practices through procedural rules as was the case under the former directives, public procurement in the current framework is seen as a strategic tool for designing a sustainable and just society.[11] Contrary to the former policy objectives aimed at giving priority to domestic suppliers above those from other Member States, secondary policy objectives nowadays can result in giving priority to domestic

5 Monti observed in his 2010 report on the future of the internal market that direct cross-border procurement is still rather limited, as it is only the case for on average 2% of the contracts, see: M. Monti, Report to the President of the European Commission, A New Strategy for the Internal Market: At the Service of Europe's Economy and Society, p. 76. This context is further elaborated in: E. Manunza, 'Naar een consistente en doelmatige regeling van de markt voor overheidsopdrachten', in: J. Hebly, E. Manunza and M. Scheltema, *Beschouwingen naar aanleiding van het wetsvoorstel Aanbestedingswet*, Instituut voor Bouwrecht 2010, p. 78.

6 See also: Manunza & Meershoek, 'Fostering the social market economy through public procurement?' 2020.

7 Directive 2014/24/EU, Recital 2.

8 Directive 2014/24/EU, Article 67(2) and Article 68.

9 Directive 2014/24/EU, Article 57(4)a and Article 18(2).

10 Article 3(1)c, TEC.

11 See: Manunza, 'Naar een consistente en doelmatige regeling van de markt voor overheidsopdrachten' 2010, pp. 51-52. E. Manunza, 'De Kunst van het Kiezen', *Ars Aequi* 2017, pp. 962-964 and E. Manunza, 'Achieving a sustainable and just society through public procurement? On the limits of relative scoring and of the principles of equal treatment and transparency', in: E. Manunza and F. Schotanus, *The Art of Public Procurement – Liber Amicorum Jan Telgen*, 2018, pp. 139-158. The Commission established this approach by encouraging Member States to use procurement as a strategic tool, it being '*a crucial instrument of policy delivery*', see: COM(2017) 572 final, *Making Public Procurement work in and for Europe*, para. 5.

suppliers, but only when execution by local suppliers is more suitable for realising these European social and sustainable goals. Preferential treatment or the stimulation of domestic industries to combat unemployment may never be a goal in itself.

The military security policies of the Member States differ, however, significantly from their social and environmental policies, as these are still within the remits of an 'exclusive national responsibility'.[12] While social and environmental policy objectives were already integrated in the function of legislating the internal market with the Amsterdam Treaty (1997), national security has mostly remained immune from supranational Europeanisation.[13] Harmonisation of environmental laws has a specific legal base in Article 191(1) TFEU, while harmonisation of certain areas of labour law has been very common throughout the process of European integration, based on the legal base of the free movement of workers, equal pay for men and women and the internal market.[14] More generally, since the Nice Treaty (2002), the EU Treaties include an obligation to integrate environmental protection in all the EU's laws and policies.[15] The Lisbon Treaty (2007) added such a clause for social aspects in Article 9 TFEU and – more broadly – added an obligation of consistency between different policy areas in Article 7 TFEU, *e.g.* between the EU's social policies and public procurement.

5.2 The logic of the regulation: cross-border liberalisation by legal principles

The motivation for regulating public procurement in the EU context has thus been the integration of the markets for public contracts. Although other strategic policy objectives, such as environmental protection, social policy and anti-corruption have become equally important, the EU can only effectively intervene in a market which is genuinely 'European'. In line with the course of the European project, economic integration works as a foundation for political intervention. The political Union, so to say, was built on the Economic Community. The internal market rules have historically often been considered to form an 'economic constitution'.[16] The constitutional nature of the Rome Treaty, which lies at the basis of the EU's integration method, was established by the Court in *Van Gend en Loos* (1963). The Court confirmed in that seminal judgment that the internal market rules did not just constitute obligations between states, but had created legally enforceable (economic) rights for individuals.[17] EU

12 Article 4(2) TEU.

13 In 1985, the Member States adopted the Single European Act which moved away from the principle of unanimity for adopting legislative measures which "have as their object the establishment and the functioning of the internal market" (in Article 100a EEC Treaty), see *Single European Act*, Official Journal of the European Communities No L 169/1, 29 June 1987, Article 18. With the 1997 Treaty of Amsterdam, the Member States added to this provision that when proposing legislation, the Commission will take as a base a high level of protection concerning health, safety, environmental protection and consumer protection, see: Treaty of Amsterdam, Official Journal of the European Communities C 340, 10 November 1997, Article 73q.

14 Article 46 TFEU, Article 157 TFEU and Article 114 TFEU.

15 Treaty establishing the European Community (TEC), Article 6. Which can now be found in Article 11 TFEU.

16 Sauter, 'The Economic Constitution of the European Union' 1998, p. 47.

17 Case 26/62, *Van Gend en Loos* v *Administratie der Belastingen*, ECLI:EU:C:1963:1.

public procurement law has been built on this notion of integration. The EU's regime seeks to integrate and liberalise the markets for public contracts by harmonisation of laws, *i.e.* by imposing legal principles on the procurement of the Member States and creating economic rights for economic operators.[18]

5.2.1 Non-discrimination as a ban on protectionism

The principle of non-discrimination on grounds of nationality is, as a general principle of EU law, most prominently enshrined in Article 18 TFEU. In addition, this principle is the core of the internal market rules on free movement in the EU Treaties which – because of their economic context – also more broadly refer to 'restrictions'.[19] For public procurement activities the principle implicates that, in absence of any justification, all selection- or award criteria which relate to the nationality or place of residence of the tenderer are prohibited. The Court often distinguishes in its case law between direct discrimination and indirect discrimination. Direct discrimination in public procurement would consist of pro-active 'buy national' policies.[20] These are usually more difficult to justify than indirect discrimination. The latter could consist of directly awarding contracts to national suppliers or conditioning the award of a contract on the establishment or production in the contracting authority's state. It is generally presumed that when contracting authorities follow the rules of the PP Directive, the principle of non-discrimination is complied with. The case law of the Court on the general principles therefore mostly stems from situations in which the procedural rules of the PP Directive did not apply.

In *Unitron Scandinavia A/S* (1999), the Court held that the principle of non-discrimination on grounds of nationality did not indicate, by itself, that the tendering procedures of the PP Directive[21] should be complied with. The Court did, however, decide that the principle "cannot be interpreted restrictively" and for procurement activities implies an obligation of transparency "to enable the contracting authority to satisfy itself that it has been complied with".[22] Without some *ex ante* transparency on the award of a public contract it is impossible to determine *ex post* that the principle of non-discrimination has been complied with, as potential foreign suppliers were not aware of the award of the contract. In *Telaustria* (2000), the Court confirmed this by stating that the transparency obligation consists in ensuring "a degree of advertising

18 For such an approach, see for instance: W. Janssen, *EU Public Procurement Law & Self-Organisation – A Nexus of Tensions & Reconciliations*, Eleven International Publishing 2018, p. 30.

19 Article 34-35 TFEU (free movement of goods), Article 45 TFEU (free movement of workers), Article 49 TFEU (freedom of establishment), Article 56 TFEU (freedom to provide services) and Article 63 TFEU (free movement of capital and payments).

20 For a general perspective on the different types of 'domestic preference policies' and their rationales, see: A. Reich, *International Public Procurement Law: The Evolution of International Regimes on Public Purchasing*, Kluwer Law International 1999, Chapter I (The Problem of Protectionist Procurement Policies).

21 In this case it was Directive 93/36/EEC. The tendering procedures of this directive did not apply to bodies which were granted special or exclusive rights to engage in a public service activity by a contracting authority. It did, however, require these bodies to comply with the principle of non-discrimination on grounds of nationality in relation to the contracts they award to third parties.

22 Case C-275/98, *Unitron Scandinavia A/S*, ECLI:EU:C:1999:567, paras 29-31.

sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed".[23] In the PP Directive this is ensured by the obligation to publish contract notices and award notices via the EU's Publications Office.[24]

5.2.2 Equality of opportunity as a basis for effective and healthy competition

EU internal market law, however, requires more from governments than to refrain from discriminating foreign suppliers. In the seminal judgment in *Dassonville* (1974), the Court held that all governmental market interventions "capable of hindering, directly or indirectly, actually or potentially, intra-Community trade" are in principle prohibited by the provisions on the free movement of goods.[25] So even rules which only potentially hinder intra-Community trade are to be abolished. Regarding public procurement, directly awarding contracts will sometimes only theoretically affect intra-Community trade, as there might be no interested foreign suppliers. Nonetheless, such behaviour excludes opportunities for foreign suppliers and is therefore prohibited by EU law. In the context of the freedom to provide services the Court referred to this principle in *Alpine Investments* (1995) as a prohibition on measures which "directly affect access to the market" of a certain Member State.[26]

For EU public procurement law, the market access approach of the Court implies that a contracting authority should not just refrain from discriminating on grounds of nationality. Instead, contracting authorities should comply with the principle of equal treatment between tenderers in the sense of pro-actively providing them with equality of opportunity.[27] According to the Court in *University of Cambridge* (2000), such far-reaching equal treatment is necessary in light of the aims of the PP Directive to avoid preferential treatment of national suppliers and to avoid "the possibility" that contracting authorities "choose to be guided by considerations other than economic ones".[28] As the EU's public procurement regime has since this judgment increased the possibilities of including other strategic policy objectives into public procurement procedures, the Court's use of the term 'economic' appears to refer rather to a notion of objectivity and equality of opportunity of tenderers than to a restrictive notion of economic value.

In *Succhi di Frutta* (2004), the Court considered the aim of the principle of equal treatment to be "the development of healthy and effective competition" between tenderers because of which they should "be afforded equality of opportunity when formulating their tenders".[29] In *Stadt Halle* (2005) the Court specified that the EU's rules on public procurement intend to open-up the markets for public contracts to

23 Case C-324/98, *Telaustria Verlags GmbH*, ECLI:EU:C:2000:669, paras 61-62.
24 See: Directive 2014/24/EU, Article 49-51.
25 Case 8/74, *Dassonville*, ECLI:EU:C:1974:82, para. 5.
26 Case C-384/93, *Alpine Investments*, ECLI:EU:C:1995:126, para. 38.
27 Joined Cases C-285/99 and C-286/99, *Impresa Lombardini SpA – Impresa Generale di Costruzioni*, ECLI:EU:C:2001:640, para. 37.
28 Case C-380/98, *University of Cambridge*, ECLI:EU:C:2000:529, para. 17.
29 Case C-496/99 P, *CAS Succhi di Frutta SpA*, ECLI:EU:C:2004:236, para. 110.

"undistorted" and "the widest possible competition".[30] As the Court clarified in *Assitur* (2009), this is usually ensured through "the widest possible participation by tenderers in a call for tenders".[31] With the 2014 reforms of the PP Directive, competition between tenderers was also added as one of the principles of public procurement in Article 18, establishing that a procurement should not be designed with the "intention" of "artificially narrowing competition".[32]

5.2.3 The practical implication of objectivity

The legal principles are in practice ensured by a certain standard of objectivity.[33] In the PP Directive, this objectivity standard can be found in the rules for technical specifications, labels, exclusion grounds, selection criteria, award criteria and contract performance conditions. The objectivity requirement comes in two different shapes.

First, there is the requirement that technical specifications which do not form part of the material substance of the works, supplies or services, as well as prescribed labels, award criteria and contract performance conditions, should be "linked to the subject-matter of the contract".[34] The Directive is, however, much more flexible on this condition. For the technical specifications, the objectivity is safeguarded by the proclamation that these "shall afford equal access for tenderers and shall not have the effect of creating unjustified obstacles to the opening up of procurement to competition".[35] Only with regards to the award criteria the principle fully applies.[36] This means that the criteria on which the award of a contract are based are either the "most economically advantageous tender" (MEAT) or the "lowest price only". As examples of criteria linked to the subject-matter of the contract, the Directive does, however, also refer to "security of supply, interoperability and operational characteristics".[37] The complexity of formulating such defence-specific award criteria will be discussed in Section 5.4.6. below. The Directive's broad approach to subject-matter of the contract does fit with the later judgment of the Court in *Max Havelaar* (2012), where the Court decided that the subject-matter is not limited to the "intrinsic character" of a product.[38] The legislature codified this by stating that award criteria should relate to the "works, supplies or services to be provided under that contract in any respect and

30 Case C-26/03, *Stadt Halle*, ECLI:EU:C:2005:5, para. 43 and 47. This has been reitatered in different cases. See for example: Case C-337/06, *Bayerischer Rundfunk*, ECLI:EU:C:2007:786, para. 39.

31 Case C-538/07, *Assitur Srl v. Camera di Commercio*, ECLI:EU:C:2009:317, para. 26.

32 This is a rather subjective test based on the 'intention' of a contracting authority, see for instance: A. Sanchez-Graells, 'A Deformed principle of competition? – the subjective drafting of Article 18(1) of Directive 2014/24', in: G. Skovgaard Ølykke and A. Sanchez-Graells (eds.), *Reformation and Deformation of the EU Public Procurement Rules*, Edward Elgar Publishing 2016, pp. 80-100.

33 Directive 2014/24/EU, Recital 90: "Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment, with a view to ensuring an objective comparison of the relative value of the tenders in order to determine, in conditions of effective competition, which tender is the most economically advantageous tender."

34 Directive 2014/24/EU, Article 42(1), Article 43(1)a, Article 67(2) and Article 70.

35 Directive 2009/81/EC, Article 18(2).

36 Directive 2009/81/EC, Article 47(1)a.

37 *Ibid*.

38 Case C-368/10, *Commission v. Netherlands (Max Havelaar)*, ECLI:EU:C:2012:284, para. 91.

at any stage of their life-cycle […] even where such factors do not form part of their material substance".[39]

Secondly, the conditions which relate to the person of the tenderer are exhaustively listed in the exclusion grounds and selection criteria. This ensures the compliance of contracting authorities with the principles of non-discrimination and equality of opportunity by preventing them from applying their own grounds for allowing tenderers into the award phase. Member States can neither implement national exclusion grounds nor national selection criteria in their national implementation of the PP Directive and the Directive.

5.2.4 Proportionality as a general principle of law

As discussed in Chapter 4, application of the proportionality principle is limited when the conflict to be solved arises between a European economic right and a public interest which is part of an "essential state function". The intensity of judicial review of measures taken to safeguard the military security of the Member States is therefore low. If, however, the public procurement rules apply, proportionality is decisive for setting the conditions and requirements tenderers must meet to have a chance at being awarded the contract and for setting the conditions for the performance of the contract. In the PP Directive, the principle of proportionality is enshrined in Article 18 which requires contracting authorities to "act in a proportionate manner".[40] Throughout the regulatory framework, the principle is specified by *e.g.* requiring technical specifications to be proportionate to the contract value in Article 4(1) and selection criteria to be proportionate to the subject-matter of the contract in Article 58(1).

5.3 Functional limitations to EU public procurement regulation

There are two dimensions in which the function of the EU's internal market regime constrains the application of EU public procurement law, as the latter is a product of the former.[41] The first dimension consists of the economic scope of the internal market rules, as these only apply to 'economic activity'. The second dimension consists of the Treaty-based derogations to the internal market rules, based on public policy, public security and public health, which were discussed in the previous chapter.

39 Directive 2014/24/EU, Article 67(3).

40 Directive 2014/24/EU, Article 18. In Directive 2009/81/EC we find a reference to this general principle in Recital 15 of the Preamble.

41 This paragraph is based to a large extent on the contribution of Elisabetta Manunza and the author in Public Procurement Law Review, see Manunza & Meershoek, 'Fostering the social market economy through public procurement?' 2020, pp. 353-368.

5.3.1 Scope of application of the internal market

The first dimension can be found in the regulation's limited scope of application. The EU legislature introduced sector-specific regulation in addition to the Rome Treaty's internal market regime in the 1970s to foster the integration of this significant part of the internal market. This was deemed necessary, as the markets for public contracts were still mostly nationally demarcated. Like the internal market freedoms, its prime function was to foster cross-border market access, and therefore it only applied to 'economic activity'.

In this light, EU law does not (at least not fully) take away the discretion of Member States to organise public tasks, as it does not generally regulate how Member States should organise certain sectors; in other words, whether a sector should be economic (and thus part of the internal market) or not. The extent to which health care and social services, for instance, are provided by the state or by economic operators differs extensively throughout the EU.[42] It is clear that Member States have kept much more of their discretion in this sector than in other sectors, because the EU does not have the competence to impose regulatory standards.[43]

More specifically, in the context of public procurement, EU law does not touch upon the discretion of governments to provide goods or services to themselves, exemplified by the in-house exemptions in the public procurement directives.[44] Exempting this fits the function of the regulation. When activity is kept within the public sphere, there is no market to which foreign economic operators should be granted access. When a Member State chooses, however, to outsource public tasks to third parties, the public procurement rules normally apply. In other words, to a large extent Member States control which domains should be considered public (non-economic) and market-based (economic) falling within the scope of the internal market. The more fundamental question, what type of operator or public body is the most suitable for the provision of certain services (or goods), remains untouched by EU law.[45]

Like in other segments of EU internal market law, such as the competition rules, the scope of application of the rules is then determined by the concept of 'economic

42 For choices about the organisation of social services, national sovereignty is still the point of departure within the EU, although internal market obligations may intervene if a market-based approach is chosen, see: G. Bouwman, *Instrumenten voor het Uitbesteden van Diensten in het Sociaal Domein: Scheidslijnen tussen de overheidsopdracht & de subsidie, vergunning, concessie en het openhousemodel*, Uitgeverij Paris 2022, pp. 65-104.

43 Case C-70/95, *Sodemare Sa*, ECLI:EU:C:1997:301, para. 27.

44 See: E. Manunza, 'Naar een consistente en doelmatige regeling van de markt voor overheidsopdrachten' 2010, pp. 111-117 and E. Manunza & W. Berends, 'Social services of general interest and the EU public procurement rules', in: U. Neergaard et al (eds.), *Social services of general interest in the EU*. TMC Asser Press 2013, pp. 347-384. This is also considered to fall within the right of Member States to organise themselves, see: W. Janssen, *EU Public Procurement Law & Self-Organisation* 2018, Chapter 3.

45 See: E. Manunza, 'Naar een consistente en doelmatige regeling van de markt voor overheidsopdrachten' 2010, pp. 115-117.

activity'.[46] The concept of 'economic operator' as part of the scope of application of the PP Directives is therefore interpreted broadly by the Court.[47] In *CoNISMa*, the Court stressed that such a broad understanding of the concept of "economic operator" in public procurement law relates to one of its primary objectives "to attain the widest possible opening-up to competition".[48] In that regard, competition can also take place between commercial and non-profit operators. Entities, subsequently, do not need to have the "organisational structure of an undertaking", neither is it required that they are regularly present in the market.

5.3.2 Justified derogation based on public health, public policy and public security

The second dimension of limitation consists of the Treaty-based derogations on grounds of public interests of the state. The public policy and security grounds for derogation from EU law have been extensively discussed in Chapter 4. Like the Defence Procurement Directive, also the regular PP Directive recognises the applicability of the Treaty-based derogations.[49] An interesting example of a case in which the Court accepted derogation from EU public procurement law based on public health is its judgment in *Spezzino* (2014).[50]

In *Spezzino*, Italian legislation which facilitated directly awarding contracts for medical transport services to voluntary organizations was accepted by the Court on grounds of public health. The Court considered it to be the full discretion of the Member State to decide on "the level of protection of public health and to organise its social security system". According to the Court, measures which counter the risk of undermining the "financial balance of a social security system" and measures which have the objective of maintaining a "balanced medical and hospital service open to all" can fall within the derogation ground on public health "in so far as it contributes to the attainment of a high level of health protection".[51] Although restrictions to the fundamental freedoms are also prohibited in the health care sector, the Court clearly granted more discretion in this context to national authorities in derogating from the main rule than in other sectors. Moreover, according to the Court, EU law needs to take into consideration that the contested national rule on the organisation of ambulance services was part of the constitutional and legal provisions in Italian law which promote the voluntary activities of citizens.[52] For those reasons, a Member

46 In Case C-119/06, *Commission* v *Italy*, ECLI:EU:C:2007:729 the Court established that like for the application of EU competition law, it is not relevant for the concept of 'economic operator' whether the entity is for-profit or non-profit. See in the context of EU competition law: Case C-475/99, *Ambulanz Glöckner*, ECLI:EU:C:2001:577, para. 20 and Case C-41/09, *Höfner*, ECLI:EU:C:1991:161.

47 On this topic, see also: G. Bouwman, *Instrumenten voor het Uitbesteden van Diensten in het Sociaal Domein* 2022, pp. 345-386.

48 Case C-305/08, *CoNISMa*, ECLI:EU:C:2009:807, para. 37.

49 Directive 2014/24/EU, Recital 41.

50 The analysis of this case is derived from: Manunza & Meershoek, 'Fostering the social market economy through public procurement?' 2020.

51 Case C-113/13, *Spezzino*, ECLI:EU:C:2014:2440, para. 57.

52 Article 118 Italian Constitution and Legge-quadro nr. 266 sul volontariato. See: Case C-113/13, *Spezzino*, ECLI:EU:C:2014:2440, paras 53-54.

State may take the view that emergency ambulance services should only be granted to voluntary associations considering the 'social purpose' of its health care system and to 'control the costs'.[53] The main requirement is that a framework agreement under which contracts are directly awarded to these associations actually contributes to the functioning of such a system.

Most striking about the judgment, at first sight, seems to be the unwillingness of the Court to elaborate on the proportionality-test.[54] As Advocate-General Wahl mentioned in his Opinion on the case, it is questionable whether excluding any form of competition, even among non-profit-making entities, would benefit public finances *per se*, whereas competition usually stimulates economic efficiency.[55] In other words: other means which are non-discriminatory and less restrictive to the internal market would have contributed to the 'social purpose' and 'controlling the costs' as well or even better than the measure chosen on the basis of Italian legislation. The Court, to the contrary, decided to leave this choice of means within the discretion of the Member States.

The legal reasoning of the Court in *Spezzino*, is similar to the procurement cases *Commission* v *Belgium* (2003) and *Commission* v *Austria* (2018) where it held that defining the security interests on basis of which derogation can be sought is within the full discretion of the Member States (see Chapter 4).[56] In *Spezzino* the Court did not apply the proportionality principle, as it left the question untouched whether the social purpose of the Italian system could have been achieved by less restrictive measures, particularly those measures which are included in the PP Directive.[57] The fact that the right to voluntary work was included in the Italian constitution was deemed more important by the Court; triggering this lenient approach.[58] The national identity-clause of Article 4(2) TEU both refers to national security and national constitutions as areas which EU law cannot intervene with. As elaborated in Chapter 4, the EU judiciary refrains from adjudicating on national constitutional provisions and security policies.[59] In cases where they lay at the basis of an obstacle to free movement, the Court usually considers whether a Member State acts in consistency with its own policies, instead of applying the proportionality principle in the sense of balancing between the internal market interest and the national (sovereign) interest.

This functional limitation to EU public procurement law should be seen as a natural consequence of the division of competences between the EU and the Member

53 *Ibid*, para. 59.

54 This is also mentioned in: R. Caranta, 'After Spezzino (Case C-113/13): A Major Loophole Allowing Direct Awards in the Social Sector', *European Procurement & Public Private Partnership Law Review* 2016, p. 19.

55 Opinion of AG Wahl in Case C-113/13, *Spezzino*, ECLI:EU:C:2014:291, paras 55-61.

56 Case C-252/01, *Commission* v *Belgium*, ECLI:EU:C:2003:547, para. 30 and Case C-187/16, *Commission* v *Austria*, ECLI:EU:C:2018:194, para. 75.

57 Contrary to the AG's opinion, see: Opinion of AG Wahl in Case C-113/13, *Spezzino*, ECLI:EU:C:2014:291.

58 Case C-113/13, *Spezzino*, ECLI:EU:C:2014:2440, paras 53-54. For a more extensive analysis of this case, see: Manunza & Meershoek, 'Fostering the social market economy through public procurement?' 2020, pp. 365-367.

59 Except when the actual purpose of the provision would be to hamper the functioning of the internal market. That would not be reconcilable with the duty of loyal cooperation which is also enshrined in Article 4, TEU.

States. In particular, it is based on the sovereignty-clause of Article 4(2) TEU which emphasises among other things the constitutional identities of the Member States and their national security.

5.4 The sector specific adjustments of the Defence Procurement Directive

The Defence Procurement Directive's method of regulation is similar to the regular PP Directive, and many other internal market-based legislative frameworks. Like the regular directive, the rules seek liberalisation through legal principles of non-discrimination and equal treatment. Member States are *prima facie* obliged to open their procurement of military equipment to competition based on equal treatment of tenderers. The message of the Directive seems to be that derogation based on Article 346 TFEU is only possible when a Member State can prove that the legal frameworks of the Directive cannot sufficiently safeguard the essential interests of national security.[60] As national security exclusively is a national competence, this immediately raises the question whether such a message fits the constitutional architecture of the EU Treaties and its division of competences between the EU and the Member States (to be discussed in Chapter 4). Before that question can be addressed, we must evaluate what types of national security interests the legal framework of the Directive can effectively ensure.[61]

5.4.1 Excluded contracts to foster military interdependence

Significant parts of military contracts are excluded from the scope of application of the Directive. As opposed to a justified derogation based on Article 36 TFEU or Article 346 TFEU, the effect of exclusion from a directive is limited. The general rules of the EU Treaties are still applicable, *i.e.* based on the jurisprudence discussed in Section 5.2. the legal principles of public procurement law could still apply. For these public contracts it is, however, likely that a treaty-based derogation can be applied as well, if derogation from EU law can be considered proportionate. Derogation from EU law would then potentially still require a motivation.

Like the regular PP Directive, the Directive includes threshold amount for contracts below which the regulation does not apply, as stipulated in Article 9. Ever since the latest revision of these amounts in 2019 this is the case for contracts which have an estimated value below EUR 428 000 for supply and service contracts and EUR 5 350 000 for works contracts.[62] The threshold for supply contracts is quite higher

60 This has been – more or less – confirmed by the Court, based on the competitive frameworks of the regular PP Directives, as the Defence Procurement Directive was not yet adopted. See: Case C-337/05, *Commission* v *Italy*, ECLI:EU:C:2008:203, para. 53 and Case C-187/16, *Commission* v *Austria*, ECLI:EU:C:2018:194, paras 78-79.

61 Parts of these section were previously used by the author in: N. Meershoek, 'Nationale veiligheid als natuurlijke begrenzing van EU aanbestedingsliberalisering', *Tijdschrift Aanbestedingsrecht & Staatssteun* 2021, pp. 24-36.

62 See: Commission, Delegated Regulation (EU) 2019/1830 amending Directive 2009/81/EC of the European Parliament and of the Council in respect of the thresholds for supply, service and works contracts.

than the threshold for supply contracts of central governments in the PP Directive (EUR 139 000).[63] This is, however, rather insignificant, as military equipment contracts of strategic relevance usually have a value much above both thresholds.

Much more significant are the different exclusions which aim to facilitate military interdependence. As emphasised in Chapter 1, fostering military interdependence through industrial collaboration is often considered a *second-best* policy in military procurement, when full domestic development and production are unrealistic.[64] Bilateral and multilateral collaboration projects for the development, production and procurement of military equipment are not organised based on the market principles of the Directive, but instead on the political principles of military power. Contracts which are awarded within such projects are usually divided amongst companies in the participating states based on political negotiations.[65] In such a context, it is unsurprising that the Member States ensured to exclude such contracts from the scope of the Directive.

Article 12(a) stipulates, in that regard, the exclusion of contracts which are governed by "specific procedural rules pursuant to an international agreement or arrangement" which includes the participation of a third country. 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, which are usually based on an international agreement or arrangement.[66] This exclusion also covers collaborative projects within the framework of an international organisation in which third countries participate, such as NATO and OCCAR.[67] Contracts are also excluded when governed by specific procedural rules which relate to "the stationing of troops and concerning the undertakings of a Member State or a third country" and specific procedural rules "of an international organisation purchasing for its purposes, or to contracts which must be awarded by a Member State in accordance with those rules.". Both of these exclusions are less far-reaching than the international agreement, particularly as procurement of international organisations "for its purposes" is usually limited. It would become legally complex when both the internal procurement rules of such an international organisation and the Directive would apply.

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 and, where applicable, the later phases of all or part of the life-cycle of this product". These intergovernmental

63 See: Commission, Delegated Regulation (EU) 2019/1828 amending Directive 2014/24/EU of the European Parliament and of the Council in respect of the thresholds for public supply, service and works contracts, and design contests.

64 E. Kapstein, 'International Collaboration in Armaments Production: A Second-Best Solution', *Political Science Quarterly* 1991-92, pp. 657-675.

65 This is referred to as 'work-sharing' or *juste retour*, see Chapter 2.

66 See: L. Butler, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, Cambridge University Press 2017, pp. 129-131. See also: B. Heuninckx, *The Law of Collaborative Defence Procurement in the European Union*, Cambridge University Press 2018, p. 175.

67 This is also suggested in: Heuninckx, *The Law of Collaborative Defence Procurement in the European Union* 2018, p. 166-167.

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. Article 13 also excludes contracts which are "awarded in a third country […] carried out when forces are deployed outside the territory of the Union and operational needs require them to be concluded with economic operators located in the area of operations" and military contracts awarded by a government to another government.

As extensively discussed in Chapter 4, most of these contracts can be concluded outside the frameworks of EU law based on Article 346, TFEU or Article 36, TFEU, as military interdependence is an asset to national security. It appears that the Member States sought to as generally as possible exclude collaborative procurement from the scope of the Directive. Collaborative procurement within the intergovernmental frameworks of an international organisation, such as the EU, NATO or OCCAR, potentially strengthens military interdependence between allies, though it needs flexibility as compared to a free market approach. By excluding these contracts from its scope of application, the Directive will not substantively influence the strategic decisions which those intergovernmental projects involve. The intergovernmental regimes that are currently applicable to collaborative procurement will be further discussed in Chapter 7 to consider how that could fit within a renewed military procurement regulation. For now, it can already be concluded that the exclusion of much of collaborative procurement from the application of the Directive already obstructs the ambitious aim of the Directive to systemically change the procurement practices of the Member States.

5.4.2 Choice of procedure in the Directive: possible limits on competition and transparency

The first substantive difference between the regular PP Directive and the Defence Procurement Directive that stands out is the choice of procurement procedure. The regular PP Directive's legal default is the open procedure, which is not included in the Directive whatsoever. The open procedure is usually considered to be the most competitive and most transparent procedure. As made clear in Article 27(1) PP Directive, "any interested economic operator may submit a tender in response to a call for competition" in such a procedure. All tenders of economic operators which fulfil the selection criteria should be substantively evaluated based on the technical specifications and the award criteria which are communicated in the contract notice. As pointed out by Trybus, the open procedure is unsuitable for "complex" military contracts, because it will not be possible to fulfil the requirement of finalising detailed specifications at the beginning of the procedure and negotiations are prohibited. For complex military contracts, such as the procurement of tanks and fighter planes, the number of potential tenderers will be limited in any case. Consequently, the open procedure could have perhaps been suitable for "simple off-the-shelf procurement",

e.g. for ammunition and equipment maintenance.[68] Possibly also certain simple military vehicles could be procured off-the-shelf through the open procedure.

Restricted procedure, negotiated procedure or competitive dialogue?
In absence of special circumstances which require a competitive dialogue or negotiated procedure without publication of a contract notice, contracting authorities should choose between applying the restricted procedure or the negotiated procedure with publication of a contract notice.[69]

As opposed to the open procedure, both the restricted procedure and the negotiated procedure within the Directive allow contracting authorities to limit the number of suitable candidates they will invite to tender to a minimum of three candidates. This limitation should take place based on objective and non-discriminatory criteria indicated in the contract notice.[70] The criteria for qualitative selection are particularly suitable for this assessment. Not all interested economic operators which fulfil the selection criteria will consequently be invited to tender. These procedures limit the administrative burden, both for the contracting authority and the economic operators. Theoretically speaking, these procedures also limit competition. In the military sector this is doubtful, as preparing a tender for military contracts often comes with significant investment. For economic operators, this investment will sooner be justified when the chances of winning, after being selected first, are higher because of the limited number of tenderers.

The difference between the restricted procedure and the negotiated procedure is in the award phase. While in the restricted procedure contracts are awarded solely based on an evaluation of which submitted tender scores best on the award criteria, the negotiated procedure allows for negotiation. Contracting authorities can negotiate with the tenderers on the submitted tenders, "in order to adapt them to the requirements they have set in the contract notice".[71] Instead of publishing detailed technical specifications at the beginning of the procedure, contracting authorities only need to express their needs and requirements. During the negotiations, these can then be specified and adapted as long as the equal treatment of tenderers is ensured.[72] The award criteria, in contrast, may not be altered during the negotiation process. The advantage of negotiating is that it stimulates tenderers to come with innovative solutions, rather than solutions which are beforehand prescribed in detail by the contracting authority.

The prescribed application of the restricted procedure and the negotiated procedure are similar to those procedures in the PP Directive. Unlike the PP Directive, the Directive does not condition the use of these procedures on the existence of circumstances justifying this.[73] According to the legislature, the unconditioned

68 Trybus, *Buying Defence and Security in Europe* 2014, p. 316.
69 Directive 2009/81/EC, Article 25.
70 Directive 2009/81/EC, Article 38(3).
71 Directive 2009/81/EC, Article 26(1).
72 Directive 2009/81/EC, Article 26(2). See also: Trybus, *Buying Defence and Security in Europe* 2014, p. 323.
73 See: Directive 2014/24/EU, Article 26(4).

use of the negotiated procedure is justified, as defence and security contracts are "characterised by specific requirements in terms of complexity, security of information and security of supply", which often require "extensive negotiation".[74]

The competitive dialogue is similar to the negotiated procedure, although its use is limited to "particularly complex contracts".[75] Like the negotiated procedure, the contract notice does not include detailed technical specifications from the beginning, but instead only requires the contracting authority to express its needs and requirements. Subsequently, a dialogue is started by the contracting authority with candidates that fulfil the selection criteria to "identify and define the means best suited to satisfying their needs".[76] Compared to the negotiated procedure, negotiations in the competitive dialogue are more strictly regulated. It is for instance prescribed that contracting authorities will refrain from revealing confidential information of one of the tenderers without their consent and it is prescribed that contracts will only be awarded based on 'most economically advantageous tender'. As its use is more strictly regulated while its flexibility for negotiating is similar to the negotiated procedure, the added value of including this procedure in the Directive is questionable.[77] Because of the wider margin of discretion in the negotiated procedure, contracting authorities will mostly prefer it in cases of 'particularly complex contracts'.

Negotiated procedure without publication of contract notice

Like in the PP Directive, there are only certain circumstances which can justify the use of a negotiated procedure without publication of a contract notice, *i.e.* a procedure without competition or only including competition between the tenderers chosen by the contracting authority.[78] Compared to directly awarding or tendering military contracts outside the legal frameworks of EU law based on Article 346 TFEU, the negotiated procedure without publication only differs in the obligation of *ex ante* transparency. This means that the contracting authority should justify the use of this procedure in the contract award notice, as prescribed by Article 28(1) and Article 30(3) of the Directive. This option is a measure of last resort – within the scope of the Directive – as it is the least competitive procedure. Like in the regular PP Directive, the use of this procedure can, for instance, be justified in case of "extreme urgency" and the contract can only be awarded to one economic operator because of certain intellectual property rights. The Directive includes also two types of options to use this procedure which are specific to defence and security procurement.[79]

The first type of contracts which justify the use of the negotiated procedure without publication the defence and security specific circumstances which justify procurement without publication of the contract notice is a situation in which, according to Article 28(1)c of the Directive: "the periods laid down for the restricted

74 Directive 2009/81/EC, Recital 47.
75 Directive 2009/81/EC, Article 27(1).
76 *Ibid*, Article 27(2).
77 This is also mentioned in: Trybus, *Buying Defence and Security in Europe* 2014, pp. 331-336.
78 Directive 2009/81/EC, Article 28 and Directive 2014/24/EU, Article 32.
79 These are also discussed by Trybus, see: Trybus, *Buying Defence and Security in Europe* 2014, pp. 336-347.

procedure and negotiated procedure […] are incompatible with the urgency resulting from a crisis". According to the legislature, this urgency limits itself to the existence of a crisis, because of which preventive measures are excluded.[80] This in particular is clear from the provision's reference to the incompatibility of the time 'periods' of the other procurement procedures with the urgency at stake. The urgency to use this procedure should therefore not relate to the incompatibility with the principles of non-discrimination and equal treatment as such, but only with the time it costs to adhere to these principles. National security strategies which seek to procure certain military equipment (or parts thereof) from domestic industry to maintain certain military-industrial capabilities can therefore not be based on Article 28 of the Directive. Likewise, Article 28(5) of the Directive, provides for a justification to use the negotiated procedure without publication when the time periods of the other procedures are incapable of safeguarding the effectiveness in cases of: "contracts related to the provision of air and maritime transport services for the armed forces or security forces of a Member State deployed or to be deployed abroad". Meanwhile, contracts which are in that context awarded in a third country required by the operational needs of forces deployed there are excluded from the scope of application of the Directive.[81]

The second type of contracts for which the negotiated procedure without publication is justified are contracts relating to "research and development services other than those referred to in Article 13". Research and development (R&D) services contracts which are awarded within cooperative programs conducted by at least two different Member States fall completely outside the scope of the Directive, based on Article 13 of the Directive. Such programs are often conducted by Member States in the context of the Common Defence and Security Policy, for instance based on the Council's PESCO-decision.[82] Contracts for R&D services which are commissioned by just one Member State can then be awarded through the negotiated procedure without publication.

The legislature intended to stimulate R&D investments by including this option of using the negotiated procedure without publication, as this is crucial for the competitiveness of European industries. The use of this procedure should then, according to Recital 55 of the Directive:

> "not preclude fair competition in the later phases of the life cycle of a product" and "should therefore cover activities only up to the stage where the maturity of new technologies can be reasonably assessed and de-risked".

80 Directive 2009/81/EC, Recital 54. This makes the provision not suitable to facilitate structural cooperation systems between Defence ministries and the (national) private sector in the context of the idea of 'Total force'. The Dutch Ministry of Defence pursues this by reference to 'Adaptieve krijgsmacht' (English: Adaptive armed forces). For such cooperation systems derogation from EU law can, under strict conditions, be justified. See: Manunza, Meershoek & Senden, 'Het Ecosysteem voor de militair-logistieke capaciteiten van de adaptieve Krijgsmacht' 2020.

81 Directive 2009/81/EC, Article 13d.

82 Council Decision establishing permanent structured cooperation.

To effectively ensure fair competition in the later phases of the life cycle of the product, a full transfer of technology is necessary. Intellectual property rights which are a result of the R&D service should then in particular be transferred to the contracting authority, as otherwise it would be impossible to use the restricted or negotiated procedure with publication for the follow-up contracts.

Concluding remarks on procedures in the Directive

The Directive provides more discretionary powers to Member States in choosing the most appropriate procurement procedure. Unrestrained use of the restricted procedure and negotiations can effectively take away practical concerns which would arise when using the open procedure for complex military contracts. Innovation is essential for the competitiveness of military industries. It will therefore often be ineffective to publish detailed technical specifications in the contract notice. The benefits of the free use of procedures do not, however, reach beyond these practical issues. Except for the negotiated procedure without publication – which can only be used in exceptional cases – the procedures do not compromise on non-discrimination and equal treatment. The security benefits of the Directive concerning the procurement procedures are therefore limited.

5.4.3 Technical specifications: interoperability within and beyond Europe

Contracting authorities, generally, enjoy the greatest discretionary power in formulating the technical specifications. The what-to-buy decision is a sovereign decision, especially in a military context. In principle, the specifications should, however, afford equal access for tenderers and should not unnecessarily hamper competition.[83] This requirement is envisioned by Article 18(8) of the Directive which prohibits reference to "a specific make or source, a particular process, or to trade marks, patents, types or a specific origin of production" when this leads to preferential treatment or the elimination of certain suppliers or products.

The effectiveness of military procurement, however, greatly depends on the interoperability of equipment with other equipment used by military troops for whom it is procured and their military allies. Alliance and interoperability with third-country allies, such as the UK and the US, may require procurement outside the scope of the Directive and EU law. In the context of the F-35 fighter planes (which were directly purchased from the US government and could therefore have been excluded based on Article 13 of the Directive), the Dutch government primarily chose to procure these planes because it granted interoperability with the US Air Force (see Chapter 1). As the technologies of the F-35 planes mostly remained within the possession of the US government, there are then no alternative solutions.

83 Directive 2009/81/EC, Article 18, para. 2.

5.4.4 Performance conditions: the limited character of a foreign supplier's security 'commitments'

Both security of supply and security of information are not defined by the Directive, as defining one's security interests has remained the sovereign right of the Member States.[84] The level of security required by contracting authorities from tenderers may therefore substantially differ between the procurement activities of – for instance – France and Lithuania. It cannot be stated in general terms for which types of procurement the legal options of the Directive sufficiently guarantee security of supply or security of information, as it depends on national security policy. Nonetheless, by regulating these options for contracting authorities to require tenderers to comply with their security interests, the regulation aims to minimise the need for contracting authorities to resort to Article 346 TFEU or other Treaty-based derogations. Although these rules sometimes limit the effects of the principle of transparency, they do not generally compromise on the principles of non-discrimination and equal treatment. Instead, they seek to capture the security interests of the Member States in objective criteria.

The conditions for the performance of contracts were first regulated by the 2004 PP Directive. It was established that contracting authorities can "lay down special conditions for the performance of a contract" which can relate to social or environmental policies.[85] This provision was simply taken over in Article 20 of the Directive with the addition that "these conditions may, in particular concern subcontracting or seek to ensure the security of classified information and the security of supply required by the contracting authority". These conditions concern the conditions for the performance of a contract, and therefore do not alter the subject-matter of a contract as such. They should be indicated already in the contract notice.

Security of information: the consequence of nationally based security clearance systems
Military contracts and their contract management often involve classified information. Article 13(a) of the Directive excludes from the application of the Directive those contracts "for which the rules of this Directive would oblige a Member State to supply information the disclosure of which it considers contrary to the essential interests of its security". Likewise, these contracts are already exempted from the application of EU law by Article 346(a), TFEU. To determine whether exception is possible, it should first be considered whether the provisions on security of information in the Directive can take away this concern.

There is, however, no European centralisation or legislative harmonisation of national security clearances. Fully taking this concern away through a procurement directive alone is then impossible. This regulatory reality is stipulated in the last paragraph of Article 22 of the Directive by stating that:

84 See again: Article 4(2) TEU, Case C-252/01, *Commission* v *Belgium*, ECLI:EU:C:2003:547, para. 30 and Case C-187/16, *Commission* v *Austria*, ECLI:EU:C:2018:194, para. 75.

85 See: Directive 2004/18/EC, Article 26.

> "Member States may provide that the measures and requirements referred to in the second subparagraph have to comply with their national provisions on security clearance. Member States shall recognise the security clearances which they consider equivalent to those issued in accordance with their national law, notwithstanding the possibility to conduct and take into account further investigations of their own, if considered necessary."

Contracting authorities can require different types of commitments from the tenderers with regards to safeguarding the confidentiality of classified information and their capability to do so, which can also be applied to subcontractors. However, following the Court's jurisprudence on Article 346(1)(a), TFEU this is just one of the two dimensions of security of information.

In *Commission* v *Belgium* (2003), 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".[86] 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* (2018) that awarding the contracts for the printing of passports to a certain domestic supplier was justified by Article 346(1a) TFEU, as it needed to be able to exercise administrative supervision over the economic operator. The Court rejected the argument, because Austria failed to prove that such administrative supervision could not be exercised over other economic operators established in Austria or that such supervision could not be effectively exercised by a "contractual mechanism subject to the rules of private law".[87] Even foreign suppliers could, according to the Court, be required to accept "security controls, visits or inspections".[88] The Court did not, however, reject as such that supervision over security requirements is most effectively exercised over domestic entities.

In her opinion on the case, Advocate General 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".[89] It is certainly possible within the EU to impose inspections and security controls on foreign entities. It cannot, however, be guaranteed that these foreign entities will never be required to cooperate with and disclose information to the intelligence services of their countries of residence. The measures at issue in *Commission* v *Austria* lacked consistency, as the Austrian operator performing the contracts was privatised without any security restrictions, for instance measures to prevent foreign ownership.[90]

The effects of Article 22 of the Directive are thus limited to the first dimension of security of information, *i.e.* the commitment and ability of a tenderer to safeguard

86 Case C-252/01, *Commission* v *Belgium*, EU:C:2003:547, paras 32-34.
87 Case C-187/16, *Commission* v *Austria*, EU:C:2018:194, para. 85.
88 Case C-187/16, *Commission* v *Austria*, EU:C:2018:194, para. 86.
89 Opinion of AG Kokott in Case C-187/16, *Commission* v *Austria*, ECLI:EU:C:2017:578, para. 70.
90 Case C-187/16, *Commission* v *Austria*, EU:C:2018:194, para. 71.

confidentiality. In cases where the second dimension of security of information is concerned, *i.e.* the guarantee of effective supervision and the absolute exclusion of foreign control, there is still significant national discretion to derogate from EU law. The Directive adds substance to the proportionality test which national measures aiming to safeguard security of information by procuring domestically should endure. The result of the test depends on the consistency of the procurement activities with the generally pursued level of security of information. It does, thereby, not depend on the substance of the contract as such.

Security of supply: good-faith commitments and the role of the Intra-Community Transfers (ICT) Directive

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* (1984) 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.[91] 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.[92] Particularly in cases where "those goods are objectively suitable for military use" Member States may – regardless of EU policies – reject export licences.[93] 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".[94] Although the EU introduced harmonisation for the national export regimes (to third countries) on dual-use goods[95] 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 export regimes stayed within the CFSP's intergovernmental sphere, where the Council established some rules and guidelines in its 2008 "Common Position".[96]

91 Case C-72/83*Campus Oil*, EU:C:1984:256, para. 30.
92 Case C-367/89, *Aimé Richardt*, EU:C:1991:376, para. 22.
93 Case C-83/94, *Peter Leifer*, EU:C:1995:329, para. 35.
94 Case C-70/94, *Werner*, EU:C:1995:328, paras 25-27.
95 Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items.
96 Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment.

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.[97] It aims to replace the general practice of "individual ex-ante control by general ex-post control in the Member State of origin".[98] 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".[99] 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.[100]

Building on the regime of the Transfers Directive, Article 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 Article 23(a), regardless of their country of residence.[101] 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.[102] 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 Article 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 Article 1 Transfers Directive, 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 Article 36 TFEU and Article 346 TFEU. 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.

97 Directive 2009/43/EC, Recital 6.
98 Directive 2009/43/EC, Recital 29.
99 Directive 2009/43/EC, Article 5(1).
100 Directive 2009/43/EC, Article 4(2)a.
101 See: European Commission, Guidance note (Directive 2009/81/EC) – Security of Supply.
102 See also: Heuninckx, 'The EU Defence and Security Procurement Directive: Trick or Treat?' 2011, p. 24.

Subcontracting options
Contracting authorities may require a successful tenderer to subcontract a maximum of 30% of the contract to third parties and they may oblige tenderers to subcontract based on non-discriminatory and transparent procedures.[103] Although such a requirement can potentially bring security-gains because of increased competition and participation of national sub-contracting capabilities, these are rather indirect The subject of subcontracting options relates closely to the topic of military offsets as discussed in Chapter 2.

Concluding remarks on performance conditions
The optional performance conditions which contracting authorities may impose on tenderers based on the Directive provide some discretionary power to incorporate security concerns in their public procurement. This discretionary power is, however, limited to one of the two security dimensions. Both for security of information and security of supply it is possible to effectively require tenders to prove their ability and commitment in ensuring these. Foreign suppliers remain subject to the regulatory powers of their Member States. Particularly in times of crisis or disturbed political relationships with the contracting authority's home state, this could have the effect of the tenderer no longer being able to fulfil its commitments.

In absence of harmonisation of national security clearances, Member States remain free to apply their national legislation on security clearances based on assessment by their own intelligence services. 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.[104] The Directive can – arguably – require Member States to apply these clearance levels proportionately. Eventually however, the contracting authority needs to act in accordance with the security levels set by their ministry as assessed by its intelligence services.

Member States, moreover, have remain free to apply their export, transfer or transit licensing criteria. The Directive's regime only affects the relationship of the contracting authority with the supplier, and not the relationship with the suppliers home country. The regulation consequently enables contracting authorities to impose security of supply on suppliers, but it will not give the contracting authority the absolute guarantees that its national security policies might require.

5.4.5 Security considerations in the selection phase

As emphasised earlier, EU public procurement law is predominantly concerned with comparing bids of tenderers based on the subject-matter of the contract, instead of the person of the tenderer. There is, however, an exhaustive number of criteria relating

103 Directive 2009/81/EC, Article 21(4).
104 Ministerie van Defensie (Defence Ministry), *ABDO Algemene Beveiligingseisen voor Defensieopdrachten 2019* (General Security requirements for Defence contracts 2019, p. 12 (1.4. criteria 9-11).

to the person of the tenderer in Article 39, its suitability to pursue professional activity in Article 40, its economic and financial standing in Article 41 and its technical/professional ability in Article 42 which can be used to either exclude or select certain tenderers.

The person of the tenderer: reasons to exclude

The possible grounds for exclusion of candidates or tenderers are listed exhaustively in Article 39 of the Directive. Most of these grounds can also be applied for regular public procurement activities, as these are also listed in the PP Directive. The first paragraph of Article 39 includes compulsory grounds for exclusion because of conviction by final judgment of the candidate for participation in a criminal organisation, corruption, fraud, terrorist offences, money laundering or terrorist financing. The reasons why the legislature pursues the exclusion of such candidates are clear and the means of evidence a contracting authority should possess in the form of a final judgment is straightforward. These compulsory exclusion grounds are also in the PP Directive.

The optional exclusion grounds in the second paragraph of Article 39 are more interesting from a legal perspective, as they do require sufficient evidence, but not *per se* in the form of a conviction by final judgment. Like in the PP Directive, there is an exclusion ground for "grave professional misconduct proven by any means which the contracting authority/entity can supply" (para. 2d). For this provision, the Directive merely adds the defence-specific explanation that such professional misconduct could relate to breaches of obligations regarding security of information or security of supply during a previous contract.

There were several new optional exclusion grounds added in the 2014 PP Directive which are not (yet) present in the Directive, *e.g.* when contracting authorities have "sufficiently plausible evidence" that a candidate has been engaged in anti-competitive agreements (in violation of national competition law or the EU's cartel prohibition of Article 101 TFEU).[105] These exclusion grounds can also be applied in the context of the Directive, as it aims to provide for a more flexible regime. Member States would, however, need to add it to their implementation of the Directive. The cartel example could for instance be applied under the more general ground of 'grave professional misconduct'.

The Directive adds two defence- and security specific optional exclusion grounds to the discretionary power of contracting authorities to exclude economic operators. The first one, which bases exclusion on convictions which are not (yet) final, reads that any economic operator may be excluded where it:

> "has been convicted by a judgment which has the force of *res judicata* in accordance with the legal provisions of the country of any offence concerning its professional conduct, such as, for example, infringement of existing legislation on the export of defence and/or security equipment" (para. 2c).

105 Directive 2014/24/EU, Article 57(4)d.

The second security-specific optional ground for excluding economic operators grants the most broad discretionary power to contracting authorities.

> "on the basis of any means of evidence, including protected data sources, not to possess the reliability necessary to exclude risks to the security of the Member State" (para. 2e).

This ground for exclusion is significant, both for its broad material scope and the required evidence. The EU legislature left the involved security risks completely open, as it again is for Member States only to determine their interests of national security and subsequently set appropriate standards in their procurement procedures. It did, however, indicate that these risks could "derive from certain features of the products supplied by the candidate, or from the shareholding structure of the candidate".[106] This results in an unprecedented wide margin of appreciation for contracting authorities, if they signal a significant risk. Even if a certain economic operator obtains the necessary security clearances for performance of the contract, certain individuals of the personnel of the company could endanger the reliability of the Member State's security. Although exclusion would still be subject to the principle of proportionality, judicial review could be compromised by the secrecy of the information. It would be extraordinary complex for a court to adjudicate whether exclusion would be a disproportionate means in light of the signalled security risk.[107]

Particularly in the case of foreign security clearances which are considered equivalent by the buying Member State, Article 22 of the Directive mentions that there still is "the possibility to conduct and take into account further investigations of their own". Depending on the sensitivity of the classified information which will be shared with the contract performer, contracting authorities can request their intelligence services to conduct extra investigations, on foreign- as well as domestic operators. The results of these investigations, which are protected data sources, can then provide evidence based on which an operator might be excluded. As opposed to the other exclusion grounds and the regular PP Directive, the contracting authority would not be obliged to disclose this evidence. This lack of transparency, as mentioned by Trybus, can lead to "an impression of arbitrariness" and "danger of abuse".[108] Even in a review procedure, contracting authorities can only be required to motivate their decision in general and vague terms, as the evidence consists of protected data sources. The Directive does not indicate whether the classified sources should be disclosed to a court on the request of the excluded candidate.

106 Directive 2009/81/EC, Recital 65.

107 Although one could in some cases think of less restrictive measures, providing an economic operator the opportunity to take away the security risks.

108 Trybus, *Buying Defence and Security in Europe* 2014, p. 387.

The economic, financial, technical and professional abilities of the tenderer: reasons to select

The optional selection criteria relating to suitability to pursue the professional activity in Article 40, relating to economic and financial standing in Article 41 and relating to technical/professional ability in Article 42 are similar to their equivalents in Article 58 of the PP Directive. The Directive arguably provides some extra flexibility on the financial standing requirements and the technical ability. At least it provides some explanation on the proportionality of such requirements in the context of military contracts.

For the effective performance of military contracts, the economic and financial standing of an economic operator can be particularly important, as military contracts often consist of a long life-cycle and high production costs. The Directive, in Article 41(1)c, only refers to the possible obligation of economic operators to prove their economic and financial standing by disclosing a statement of the operator's overall turnover or turnover in the area of the contract for a maximum of the last three years. The PP Directive is a bit more specific on the extent of the requirement, as it provides the option to require a certain minimum yearly turnover, including a minimum turnover in the area of the contract. The requirement of minimum yearly turnover may not, however, exceed two times the estimated contract value.[109] There is no such limit on the turnover requirement in the Directive. The only limit the Directive imposes on the required minimum levels of (economic and financial) ability is that they "must be related and proportionate to the subject-matter of the contract".[110] Military contracts generally justify significant requirements for economic and financial standing.

The Directive's provision in Article 42 on the requirements contracting authorities may impose on economic operators relating to their technical and/or professional ability is more elaborate than its equivalent in Article 58(4) of the PP Directive and includes a security-specific requirement. This requirement relates to security of information, discussed in the previous paragraph. Contracting authorities may require evidence from economic operators of their ability to process, store and transmit classified information. This usually requires a security clearance from the competent authorities in the Member State of the contracting authority. Like in the context of performance conditions, Article 42(1)j of the Directive emphasises that Member States may require such a national security clearance based on national law, in absence of EU harmonisation of national security clearances.

Ranking of qualified tenderers

If the number of candidates which were not excluded and fulfil the other criteria for qualitative selection is above the minimum number indicated in the contract notice of candidates intended to be invited to tender (minimum of three), the contracting authority may limit the number of suitable candidates based on objective and

109 Directive 2014/24/EU, Article 58(3).
110 Directive 2009/81/EC, Article 38(2).

non-discriminatory criteria.[111] As opposed to the award criteria, discussed below, such an assessment cannot be based on criteria relating to the subject-matter of the contract, as the candidates have not yet submitted a tender. Instead, these criteria relate to the person of the tenderer. Most appropriate for this assessment are the criteria relating to economic and financial standing and technical and/or professional ability, as these criteria can easily be scaled. The exclusion grounds and suitability criteria cannot easily be used for ranking the candidates, as their assessment usually consists of a mere yes or no instead of different levels of ability.

Concluding remarks on the selection-phase

In the selection phase, which determines the candidates that will be invited to tender, there is a wide margin of appreciation to consider security of information. Particularly the option to exclude candidates based on "any means of evidence" which proves the unreliability of a candidate brings significant discretionary power to contracting authorities. However, this would normally depend on an investigation of the intelligence services of its Member State, which normally do not act transparently. Much depends on the levels of security clearance Member States have implemented and the criteria these impose on foreign suppliers for them to be considered 'reliable'. Again, the sovereignty of Member States is enshrined in determining their security interests. Intelligence services need to base their assessments on frameworks set out by those politically responsible. If these frameworks indicate that certain levels of security clearance cannot be met by suppliers from certain states, there is not much judicial scrutiny possible.[112]

5.4.6 Security considerations in the award phase: most economically advantageous in terms of security?

Like in the PP Directive, the Directive requires contracts to be awarded to the "most economically advantageous tender from the point of view of the contracting authority".[113] Although it mentions "lowest price" as a separate type of award criterion, it is clear from the context of the renewed 2014 PP Directive that this is just one of the ways to evaluate which tender is the most economically advantageous. Contracting authorities enjoy a wide margin of appreciation in evaluating tenders. They can decide to award a contract based on lowest price only, a price-quality ratio or based on quality only. The only limit to this discretion in determining the award criteria is that these must be "linked to the subject-matter of the contract". It cannot, therefore, generally be stated here which criteria are valid and which are not, as it depends on the contract. The Directive does provide some clarity on defence-specific criteria which could be valid. As examples of award criteria, it mentions security of supply and interoperability. It does not clarify how these security criteria could be competitively evaluated within the boundaries of the principles of non-discrimination and equal treatment.

111 Directive 2009/81/EC, Article 38(3).
112 *ABDO Algemene Beveiligingseisen voor Defensieopdrachten* 2019, p. 12 (1.4. criteria 9-11).
113 Directive 2014/24/EU, Article 67(1) and Directive 2009/81/EC, Article 47(1).

Evaluating security of supply beyond the minimum requirements is especially complex when the principle of non-discrimination needs to be complied with. Even if foreign suppliers fulfil all the security-of-supply requirements of Article 23 of the Directive, their supply-chains could be disrupted in times of crisis by national export restrictions. National suppliers with similar capabilities to these foreign suppliers, consequently, offer a higher *de facto* security-of-supply level. But adherence to the principle of non-discrimination requires accepting the *de jure* security-of-supply level of these foreign suppliers as equivalent to the higher *de facto* security-of-supply level of a domestic supplier. The EU's procurement regime takes the situation at the time of the procurement decision as the basis for evaluating tenders. If a tenderer then complies with the security-of-supply requirements of Article 23 of the Directive *i.e.* the tenderer is in possession of all the necessary export authorisations, this is deemed sufficient.

The Directive's rules on award criteria fit the EU's general internal market approach which presumes a stabile situation in which there is a free movement of goods. Such a system operates on the premises of mutual recognition and mutual trust. It would therefore be contrary to the function of the internal market regime if contracting authorities could generally pursue security of supply in absolute terms by buying domestically. This would hamper the functioning of the internal market drastically. However, for procurement of goods of which their prime function is to be deployed in times of crisis this could be different. In times of actual crisis such goods can be procured through either a negotiated procedure without publication of a contract notice within the Directive, based on Article 28 or exempted from EU law based on Article 346 TFEU or Article 36 TFEU. But contracts for military equipment often have a long lifecycle for which it is impossible to predict whether or not a crisis could potentially hamper the security of supply for foreign suppliers. If the security risks, in terms of probability or potential severity, are deemed significant by the contracting authority's Member State, the Directive does not seem to provide a suitable instrument for organising the procurement procedure. The question remains to what extent this impedes the general aim of the Directive to liberalise military procurement.

5.5 Towards a new regulation of 'common procurement'?

In the aftermath of Russia's 2022 invasion of Ukraine, EU institutions launched a great variety of initiatives to boost the support to Ukraine.[114] During an informal meeting in Versailles on 11 March 2022, the heads of states agreed to increase defence expenditures and to "develop further incentives to stimulate Member States" collaborative

114 These initiatives and other recent developments were also discussed by the author in: N. Meershoek, 'Militaire aankopen en EU-defensiesamenwerking in een veranderende geopolitieke context: meer miljarden, minder interne markt?', *SEW Tijdschrift voor Europees en Economisch Recht* 2023(1), pp. 17-27.

investments in joint projects and joint procurement of defence capabilities".[115] Building on this expression of political willingness, the Commission later on proposed the adoption of several short-term and long-term instruments to overcome the so-called 'Defence Investment Gaps' by incentivising joint procurement.[116] For the 2022-2024 period, the Commission proposed to allocate 500 million euros from the regular EU budget to co-finance so-called 'common procurement' – *i.e.* "cooperative procurement jointly conducted by at least three Member States" – within the *European defence industry Reinforcement through common Procurement Act*.[117] For the long-term, the Commission proposes the adoption of a *European Defence Investment Programme Regulation* (EDIP), which would regulate the conditions and criteria for Member States to form consortia that will jointly procure military equipment in order to benefit from a VAT exemption.[118]

The Commission and the High Representative observe, among other things, that buying and developing military capabilities together reduces prices and prevents competition between Member States which would drive up prices, in a similar way as the COVID vaccine situation in 2020-21.[119] For the procurement of vaccines, the Commission was mandated by the Member States to conclude so-called *Advance Purchasing Agreements* with vaccine manufacturers after which the Member States could actually acquire the vaccines based on the terms of the APA.[120] Procurement as a response to a military crisis is, however, more complex than the vaccine procurement during the COVID-crisis. Instead of a single product to combat a virus, a military crisis gives rise to the procurement of a great variety of military capabilities by Member States with a great variety of priorities. The extent to which Member States need to procure, what they want to procure as well as their preferred partnerships with other (third) countries all differ much more strongly than in the case of the vaccines.

It is thus not yet clear what the future joint procurement instruments will look like, though it seems unlikely that it will take on a truly similar shape as the vaccine procurement during the COVID-crisis. Moreover, it is not (yet) clear how these new

115 EU Heads of State or Government (Informal meeting), Versailles Declaration, Versailles: 11 March 2022, p. 4. This was formalized in the EU's Strategic Compass, 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.

116 See: JOIN(2022) 24 final, *Joint Communication: on the Defence Investment Gaps Analysis and the Way Forward*, Brussels: 18 May 2022.

117 COM(2022) 349 final, *Proposal for a Regulation of the European Parliament and of the Council on establishing the European defence industry Reinforcement through common Procurement Act*, Brussels: 19 July 2022, Article 2.

118 JOIN(2022) 24 final, p. 10.

119 *Ibid,* p. 2.

120 See: COM(2020) 4192 final, *approving the agreement with Member States on procuring Covid-19 vaccines on behalf of the Member States and related procedures*, Brussels: 18 June 2020 and (more importantly) the Annex to this decision which sets out the terms of the agreement between the Member States and the Commission. This Commission decision was derived from an amended version of Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency support within the Union, which is based on the 'solidarity clause' in Article 122(2) TFEU. See also: E. Petti, 'EU COVID-19 Purchase and Export Mechanism: A Framework for EU Operational Autonomy, *Common Market Law Review* 2022, pp. 1333-1370.

initiatives for joint procurement would relate to the existing procurement regime of the Defence Procurement Directive. The Commission observed with regards to the EDIP that cooperation based on R&D for a new product could "benefit from the flexibility provided by Article 13(c) of the Defence Procurement Directive".[121] In many cases this seems to make sense, as joint procurement often includes the development of a new product. The Commission also emphasised that the EDIP Regulation could serve "by extension of the short-term instrument, for possible associated Union Financial intervention for the reinforcement of the European defence industrial base".[122] The currently pressing problems faced by the EU Member States do, however, not relate to R&D, as the support to Ukraine triggers shortages in existing equipment and munition stockpiles. So the exemption of Article 13(c) of the Directive does not necessarily cover all procurement within the EDIP Regulation's framework.

Regardless of whether the new initiatives can completely fall under the Directive's exemption, it seems unlikely that joint procurement covered by the new legal frameworks will generally follow the Directive's approach. Like the European Defence Fund (see again Section 1.3.2), the Commission proposes to base the short-term instrument on Article 173(3) TFEU which aims to ensure the competitiveness of EU industries. Like for the EDF, there are no general safeguards to ensure non-discrimination of tenderers beyond those tenderers within the participating Member States. Article 8 of the proposal requires that the participating Member States appoint a procurement agent which carries out the procurement procedures and concludes the resulting contracts on behalf of the participating Member States. These procurement procedures should then be based on an agreement between the participating Member States and the agent under the conditions of a work programme as referred to in Article 110 of Regulation 2018/1046 (the 'EU Financial Regulation').[123]

Assuming that increased cooperation will foster the interoperability of the EU's militaries, financial incentives for joint procurement seem suitable means to achieve that purpose.[124] The legal effectiveness in terms of coherence of the proposed measures is, however, compromised by their unclear relationship with the Defence Procurement Directive. In the context of a future regulation of joint procurement there seems to be no incentives to open up the procurement to internal market-wide competition, while it is unclear to what extent such an obligation would exist in the first place as the regulation is based on the EU's Industry competence. The new initiatives also seem to create new incoherencies with the broader framework of the EU Treaties, as Article 41(2) TEU establishes that CSDP operating expenditure with "military or defence implications" cannot be charged to the general Union budget. Although the initiatives are technically not part of the CSDP, as they are proposed to be based on Article 173 TFEU, the Commission explicitly links the procurement

121 *Ibid.*
122 *Ibid.*
123 Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, Article 110.
124 As discussed in Chapter 1, joint procurement does not necessarily lead to efficiency gains, depending on political circumstances.

to CSDP instruments such as the European Peace Facility, PESCO and the EDA.[125] The question arises as to whether the Commission seeks to circumvent the special conditions under which the Union can finance military operations, including the possibility of constructive abstention, by creating instruments based on the Industry competence.[126]

In any case, the new initiatives seem to further compromise the already limited suitability of the Directive to be an effective instrument for the regulation of military procurement within the Union.

Conclusion: the security dimensions in military procurement and the limits of the Defence Procurement Directive

There are three dimensions of national security in military procurement which are set out below. Only the first dimension can generally be ensured within the legal regime of the Directive. The limits to the potential effectiveness of the EU's current military procurement regime are thus extensive. The dysfunctionality of the Directive to address second- and third dimension security concerns is primarily rooted in the non-discrimination principle of EU internal market and public procurement law. This indicates that the Directive's internal market legal base of Article 114 TFEU is obstructing the regulation from achieving its aim. The next chapter will, in that context, evaluate whether the correct legal basis was chosen by the EU legislature to regulate military procurement. The different security dimensions in military procurement are the following:

I. Ability and commitment of tenderers

The first and lightest dimension of national security in military procurement depends on the ability and commitment of tenderers to ensure the security interests of Member States in the performance of a contract. This dimension can generally be ensured within the legal framework of the Directive. Both for security of information and security of supply, contracting authorities can impose requirements on tenderers. The effectiveness of the security-of-information requirements depends on legal interpretation of the provisions. In absence of harmonisation of national security clearances, Member States may still base their requirements on national regulation.[127] When national regulation on security clearance, however, conflicts with the principle of non-discrimination, the Directive does not indicate which would prevail. On top of that, the Directive includes a ground with an unprecedented wide margin of appreciation to exclude an economic operator "on the basis of any means of evidence" showing that the economic operator does "not possess the reliability necessary

125 JOIN(2022) 24 final, p. 9-10.

126 The same could be said for the European Defence Fund, see: A Fischer-Lescano, 'Legal Issues Relating to the Establishment of a European Defence Fund (EDF)', Expert Report for the GUE/NGL Parliamentary Group in the EP, 30 November 2018, 17-25.

127 Directive 2009/81/EC, Article 22.

to exclude risks to the security of the Member State".[128] Even if a foreign supplier manages to meet the (possibly discriminatory) criteria for national security clearance, contracting authorities may require their intelligence services to further investigate the reliability of this supplier. The judicial scrutiny of such a decision would be limited. The effectiveness of security-of-supply requirements largely depends, however, on mutual trust which should be derived from the Transfers Directive that harmonises the intra-community transfers of military equipment. Mutual trust does not, however, provide guarantees, as restricting export of military equipment remained within the sovereignty of the Member States.[129]

II. Crisis-proof security of supply

Things become more difficult when seeking to ensure the second dimension of security in military procurement. In times of crisis, supply-chains may be disrupted because of export restrictions. This is not merely theoretical, as the military interests of the EU's Member States still diverge because of geographical or alliance related reasons. The 2022 war in Ukraine showed that such restrictions might be imposed between EU Member States. In the month before the start of the war, Germany was still restricting Estonia to export weapons which were produced in Germany because of its self-proclaimed 'pacifist' policies regarding the transfer of weapons to conflict regions.[130] Hungary has during the war been prohibiting the transit of weapons of NATO and EU allies for the Ukrainian Armed Forces through its territory.[131] The Directive only provides an option to use the negotiated procedure without publication for when the periods of the other procedures are "incompatible with the urgency resulting from a crisis".[132] For supplies which are because of competitive procurement no longer produced domestically, this option would come too late. Although it is not unthinkable that these supplies can still be procured somewhere else, if the export of the regular supplier has been restricted, it might come with an undesirable amount of military dependency. For the procurement of military equipment which should be immediately available in times of crisis, Member States would still need to rely on Article 36 TFEU, Article 346 TFEU or (possibly) Article 347 TFEU, as discussed in Chapter 4.[133]

128 *Ibid*, Article 39(1)e.

129 This is also exposed by the fact that the exports to third countries have not been regulated within the EU's internal market competence, but instead within the context of the CFSP.

130 See: Reuters, *Germany blocks Estonia from exporting German-origin weapons to Ukraine - WSJ*, 21 January 2022 <https://www.reuters.com/article/germany-ukraine-arms-idUSL1N2U123W>.

131 Even though Hungary supported the Council's decision to supply weapons to Ukraine based on the European Peace Facility, including a provision which explicitly obliges the Member States to allow such transits. See: Council Decision (CFSP) 2022/338 of 28 February 2022 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, Article 5. This is also pointed out in: P. Koutrakos, 'The European Peace Facility and the EU's support to the Ukrainian Armed Forces', *EU Law Live Weekend Edition* (92), 5 March 2022, p. 22.

132 *Ibid*, Article 28(1)c.

133 See again: Case 72/83, *Campus Oil*, ECLI:EU:C:1984:256. This is also observed in: Heuninckx, '346, the number of the beast?' 2018, p. 63.

III. Security in terms of sovereignty and interdependence

In the third dimension, military-power logic has completely replaced the logic of economic interdependence. As discussed in Chapter 1, war is the *ultima ratio* in international politics and military power determines the capability of states to survive in this global order and thereby the effectiveness of a state's external sovereignty. In a general sense, population and economic power are constitutive elements of the military power of a state. Military-operational capabilities depend to a large extent on industrial and technological capabilities. To operate effectively, states strategically choose between military power based on national capabilities and based on military interdependence. Hence, states pursue procurement policies aimed at the maintenance and strengthening of domestic capabilities as well as procuring within the intergovernmental structures of strategic partnerships (such as the CSDP and NATO).[134] Both procurement policies do not necessarily fit the integrated approach of the internal market.

Security in terms of industrial capabilities is in practice often pursued by directly awarding contracts to domestic suppliers or using military offsets. The Directive does not regulate offsets (nor buy-national policies), as these are considered incompatible with the non-discrimination principle, which is a cornerstone of the EU internal market. Instead, the Directive provides options for requiring subcontracts to be competitively tendered. But these 'options' are insufficient to liberalise the military supply-chains in Europe (as elaborated on in Chapter 1), as the Member States with large military industries lack incentives to make use of those.

In a legal sense, states require these capabilities to fulfil the military tasks derived from their constitutions and international treaties such as the North Atlantic Treaty and the CSDP provisions of the EU Treaties. Derogation from EU law based on Article 36 TFEU or Article 346, TFEU is therefore often possible for specific procurement decisions. Member States need to prove that such derogation *specifically* fits the security-requirements of its *general* military-industrial policy. For intergovernmental cooperation even the EU legislature apparently acknowledged the unsuitability of the Directive to regulate these, as this type of cooperation is mostly covered by the exclusions. The Directive thus leaves most of intergovernmental joint procurement unregulated.[135] More recently, the Commission therefore seeks to stimulate and regulate joint procurement through financial incentive instruments rather than market-based instruments such as the Directive. Even though the Directive is thus more realistic in its approach to intergovernmental procurement, it does not add any regulatory norms.

134 See for instance the industrial policies of the Netherlands and Germany aiming to protect certain domestic industries and to seek intergovernmental cooperation for the production of certain equipment: Ministerie van Defensie and Ministerie van Economische Zaken en Klimaat, *Nota: Defensie Industrie Strategie*, November 2018. And in the case of Germany: Die Bundesregierung, *Strategiepapier der Bundesregierung zur Stärkung der Sicherheits- und Verteidigungsindustrie*, February 2020.

135 For an exhaustive analysis of the potential legal obligations arising from EU law for joint procurement, see: Heuninckx, *The Law of Collaborative Defence Procurement in the European Union* 2017.

CHAPTER 6

Why the Internal Market is not the Correct Legal Basis for Regulating Military-Strategic Procurement – On functional division of competences

Introduction[1]

The EU's relevance as a military actor 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 military power is the possession, within one's territory, of military-industrial capabilities – whether state-owned or not. In Chapter 1, I argued why consequently the military procurement activities of the Member States can best be understood in light of the pursuit to maintain and strengthen one's military power. 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 regulating military procurement.[3]

In this Chapter I 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 Article 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 Article 3(6) TEU and Article 40 TEU. Afterwards, the Directive itself will be evaluated by considering its aim in light of its underlying logic. I will conclude that the Defence Procurement Directive – as it stands – has been adopted on the wrong legal basis and

1 This chapter is derived from an article publication by the author, see: N. Meershoek, 'Why the EU Internal Market is not the Correct Legal Basis for Regulating Military-Strategic Procurement – On functional division of competences', *European Law Review* 2022, pp. 353-375.

2 Article 4(2) TEU.

3 This question was first raised in: E. Manunza and C. Jansen, "Een interne markt voor defensieopdrachten?', *Staatscourant*, 11 June 2019.

provide some prospects for aligning regulation of military procurement with the EU Treaties.

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

If military procurement is substantively closer linked to the CFSP than to the internal market, why was the Directive then adopted on the basis of the internal market? To understand the legal status of the Directive better, it is necessary to consider the political process which preceded the Commission's 2007 legislative proposal.

The Defence Procurement Directive was adopted in 2009 by the European Parliament and the Council on the basis of Article 95 TEC (now Article 114 TFEU).[4] As prescribed, it was adopted according to the ordinary legislative procedure[5] on the basis of qualified majority voting in the Council. The Directive first reiterates Article 4(2) TEU by stating that "National security remains the sole responsibility of each Member State", after which it sets out its aim:

> "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"[6]

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.[7]

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.[8] The Commission therefore considered it necessary to introduce "mechanisms based on economic efficiency, particularly in procurement

4 The Directive also refers to the legal bases for the freedom of establishment and services. The focus will be on Article 114 TFEU because this is the legal basis as far as the Directive legislates for the procurement of military goods.

5 Article 251 TEC (now Article 294 TFEU).

6 Directive 2009/81/EC, Preamble 2 and 4.

7 See also: P. Koutrakos, 'The Application of EC Law to Defence Industries – Changing Interpretations of Article 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', *Common Market Law Review* 2002, pp. 1347-1372.

8 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.

policies" and expressed its preference for action based on the "existing Community instruments", which "could possibly be used in combination with the CFSP".[9] 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.[10] 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".[11] 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 had been 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".[12] 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 of procurement, taking current Community public procurement rules as guiding principle".[13] 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 Article 346 TFEU only deals with "exceptional and clearly defined cases".[14] 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.[15] The

9 COM(96) 10 final, pp. 3-4.

10 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", *Journal of European Public Policy* 2013, p. 1127.

11 COM(96) 10 final, p. 11.

12 Communication from the Commission, Implementing European Union Strategy on Defence-related Industries, COM(97) 583 final, p. 5.

13 COM(97) 583 final, Annex I.

14 Case C-414/97, *Commission* v *Spain*, EU:C:1999:417, para. 21.

15 Blauberger & Weiss, "If you can't beat me, join me!' How the Commission pushed and pulled Member States into legislating defence procurement' 2013, p. 1129.

Court clarified the meaning of Article 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 Article 346 TFEU is still used "quasi-systematically" and the concept of "essential interests of security" is interpreted widely in the area of public procurement.[16] 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".[17]

In September 2009, the final version of the Directive was approved by the Council, with only Portugal abstaining from the voting.[18]

6.2 Revisiting the Directive's legal and constitutional context

Until the Court's 1999 ruling in *Commission* v *Spain*, it was generally assumed by the Member States that Article 346 TFEU provided some sort of a categorical exception to 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 Article 346 TFEU, like other Treaty exceptions, it is necessary to substantiate the involved security interest.

6.2.1 The Court's contextual approach to security exceptions

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 (see more elaborately again Chapter 4).[19] This contextual approach was put forward in *Van Duyn* (1974) 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".[20] Based on this approach, the Court has, for instance, allowed Ireland in *Campus Oil* (1984) to secure its petroleum supply by protecting the viability of its state-owned oil refinery through purchasing obligations for oil importers.[21] 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 benefits are subordinate to the security

16 Commission, "Green Paper: Defence procurement" COM(2004)608 final, p. 6.
17 COM(2004)608 final, p. 9.
18 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.
19 As exceptions to the four freedoms they can currently be found in arts.36, 45, 52, 62, 65 TFEU.
20 Case 41/74, *Van Duyn* v *Home Office*, ECLI:EU:C:1974:133, para. 18.
21 Case 72/83, *Campus Oil*, ECLI: EU:C:1984:256.

interest.[22] Later, in *Commission* v *Greece* (2001), 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.[23] 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 *Alfredo Albore* (2000), the Court, for instance, rejected Italy's discriminatory authorisation scheme. The Court addressed the public security dimension of the authorisation on its own motion because the Italian government had not invoked any security justification.[24] 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" 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".[25] 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.[26]

The scope of this dissertation is limited to "military equipment" falling within the material scope of Article 346(1)b TFEU. The decisions of the Court in cases where it decided that the concerned procurement was not military will therefore not be discussed (see again Chapter 4).[27]

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.[28] The actual substance of the Court's judgment is, however, nothing more than a reiteration of its considerations in *Marguerite Johnston* (1986), where it held that all security exceptions, such as those based on Article 346 TFEU, "deal with exceptional and clearly defined cases".[29] 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 Article 346(1)b TFEU. Judicial scrutiny at the EU level is then naturally more limited.[30] The mere fact that a Member State is not

22 *Ibid*, paras 35-36.

23 Case C-398/98, *Commission* v *Greece*, ECLI:EU:C:2001:565, para. 21. See also more recently the Court's rejection of Romania's electricity export restrictions: Case C-648/18, *ANRE* v *Hidroelectrica,* ECLI:EU:C:2020:723, paras 42-43.

24 Case C-423/98, *Alfredo Albore,* ECLI:EU:C:2000:401, para. 19. Instead, Italy had unsuccessfully argued that the preliminary question was inadmissible in the absence of an exercise of free movement.

25 *Ibid*, paras 20-23.

26 The Court established this in: Case 41/74, *Van Duyn* v *Home Office*, ECLI:EU:C:1974:133, para. 18.

27 Such as: Case C-337/05, *Commission* v *Italy (Agusta)*, ECLI:EU:C:2008:203.

28 Blauberger & Weiss, "If you can't beat me, join me!' How the Commission pushed and pulled Member States into legislating defence procurement' 2013, p. 1129.

29 Case 222/84, *Marguerite Johnston*, ECLI:EU:C:1986:206, para. 26.

30 See also: Trybus, 'The EC Treaty as an Instrument of European Defence Integration' 2002, p. 1372.

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.[31]

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 Article 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 Article 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 Article 114 TFEU as long as Member States can still invoke Article 346 TFEU when justified, as the EU legislature did with the Defence Procurement Directive.[32]

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"[33] which particularly include the "aim and content of the measure".[34] In addition, the EU Treaties explicitly proclaim in Article 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 Article 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*.

6.2.2 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.[35] In a way military procurement remained in between national sovereignty, intergovernmental cooperation and the internal market because of the continuing

31 For the reasoning underlying this presupposition, see again Chapter I.
32 For this line of thought, see: Trybus, *Buying Defence and Security in Europe* 2014, pp. 61-83.
33 Case 45/86, *Commission* v *Council,* EU:C:1987:163, para. 11.
34 Case C-300/89, *Titanium Dioxide*, EU:C:1991:244, para. 10.
35 See again: the *Introduction*, referring to the 2020 Implementation Assessment.

relevance of Article 346 TFEU.[36] This is a natural outcome of the Directive's lack of functionalism. At their best, international laws, 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.[37] 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.[38] 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 Article 346 TFEU – to be based on a systemic understanding in light of the EU's overall purpose as described in Article 3(1) TEU and its constitutional limits as described in Article 4 TEU.[39]

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.[40] The EU's defence policy, in contrast, is based on the sum of national military power, exemplified by Article 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[41] requiring

36 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: Press release COM IP/18/357 of the Commission of 25 January 2018, *Defence procurement: Commission opens infringement procedures against 5 Member States*.

37 H. Morgenthau, 'Positivism, Functionalism and International Law', *American Journal of International Law* 1940, p. 274. In this context, "social forces" can refer to all non-legal forces, e.g. political, economic as well as military forces.

38 A. Slaughter, 'International Law and International Relations Theory: A Dual Agenda', *American Journal of International Law* 1993, p. 205.

39 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', *European Journal of Legal Studies* 2007, p. 140. For such an approach in the military context of EU law, see also: Manunza, Meershoek & Senden, 'Het Ecosysteem voor de militair-logistieke capaciteiten van de adaptieve Krijgsmacht' 2020, Part II.

40 On issue linkage, see Section 1.2.7, referring to: E. Haas, 'Why Collaborate? Issue-Linkage and International Regimes', *World Politics* 1980, pp. 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* (5th edn), Oxford University Press, 2016, 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 University Press 1976 (first published in 1776), Book IV.

41 Article 47(7) TEU.

states to contribute with their own military capabilities.[42] Military procurement primarily contributes to a 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,[43] and to strengthen bilateral and multilateral alliances by strategically choosing their suppliers.[44] 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.[45]

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

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

EU law comprises "an independent source of law".[46] 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 Article 50 TEU.[47] 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".[48] 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".[49] 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

42 For an opposing view, see again: D. Eisenhut, 'The special security exemption of Article 296 EC: time for a new notion of 'essential security interests'?', *European Law Review* 2008, pp. 577-585. That perspective is also visible in the Interpretative Communication of the Commission, see: COM(2006) 779 final, p. 7.

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

44 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 Navy 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', *Political Science Quarterly* 1991-92, pp. 657-675.

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

46 Case 6/64, *Costa/ENEL*, ECLI:EU:C:1964:66, p. 594.

47 The Court recognised Article 50 TEU to be an expression of a 'sovereign choice', see: Case C-621/18, *Andy Wightman*, ECLI:EU:C:2018:999, para. 50.

48 Article 5(2) TEU.

49 Opinion 2/00, *Cartagena Protocol on the Transfer of Living Modified Organisms*, ECLI:EU:C:2001:664, para. 5.

not be based on institutional preferences but instead on "objective factors which are amenable to judicial review".[50]

6.3.1 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".[51] To objectively determine which legal basis suits a measure best, one should first identify the different potential legal bases in the EU Treaties.[52] 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,[53] just as the legal basis for the CFSP excludes the adoption of "legislative acts" and jurisdiction of the Court.[54]

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".[55] 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 (1996), 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".[56] In *Linguistic Diversity* (1999) 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.[57]

According to Advocate General Fennelly in *Tobacco Advertising I* (2000), 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.[58] In this particular

50 Case 45/86, *Commission* v *Council*, ECLI:EU:C:1987:163, para. 11.
51 Case C-300/89, *Titanium Dioxide*, EU:C:1991:244, para. 10.
52 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: ECJ 14 November 1978, Délibération 1/78, *Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports*, para. 31. The concept was picked up again by AG Tesauro and the Court in Case C-300/89*Titanium Dioxide*, EU:C:1991:244.
53 Article 168(5) TFEU.
54 Article 24(1) TEU.
55 Van Ooik, *De keuze der rechtsgrondslag voor besluiten van de Europese Unie* 1999, p. 83.
56 Case C-268/94, *India development cooperation agreement*, EU:C:1996:461, para. 39.
57 Case C-42/97, *Linguistic Diversity*, EU:C:1999:81, paras 40-43.
58 Opinion of AG Fennelly in Case C-376/98, *Tobacco Advertising I*, ECLI:EU:C:2000:324, paras 67-69.

case, the internal market-based Advertising Directive[59] 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 (2007) confirmed this by establishing in Article 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 (1992), the Treaty drafters had already sought to protect the Community pillar from intrusion by CFSP policies by including the first paragraph of the current Article 40 TEU, proclaiming that the CFSP

> "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"[60]

By removing the pillar structure, the Lisbon Treaty made[61] all of the EU's policies subordinate to their common purpose as established in Article 3 TEU, i.e. to promote peace, its values and the well-being of its citizens.[62] The Lisbon Treaty therefore also reformed Article 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.[63] The choice for the "Community"

59 Directive 98/43/EC. This Directive was annulled by the Court's judgment.

60 Formerly Article 47 EU Treaty.

61 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', *European Constitutional Law Review* 2009, pp. 117-142 and D. Thym, 'The Intergovernmental Constitution of the EU's Foreign, Security & Defence Executive', *European Constitutional Law Review* 2011, pp. 453-480.

62 For this approach, see also: Manunza, Meershoek & Senden, 'Het Ecosysteem voor de militair-logistieke capaciteiten van de adaptieve Krijgsmacht' 2020.

63 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.

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.

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

In *Passenger Name Records (PNR)* (2006),[64] the Court addressed the legality of a Commission Decision[65] and a Council Decision[66] which both confirmed the "adequate level of protection" within the United States (US) with regard to data protection and the processing and transfer of PNR data by air carriers. These decisions were based on the Data Protection Directive,[67] which fell within the internal market competence of Article 95 EC (now Article 114 TFEU). According to this Directive, transferring personal data to a third country was only allowed if the third country in question ensures an adequate level of protection.[68] For that purpose, the Commission is assigned the competence to decide whether a particular country does in fact ensure an adequate level of protection.[69] The Commission's Decision therefore entailed the confirmation of "adequacy" of the US' regime, and the Council's Decision concerned the subsequent agreement with the US. 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).

The Commission Decision on adequacy itself acknowledged that the CBP would use the PNR data "strictly for purposes of preventing and combating" different sorts of crimes.[70] The scope of the Data Protection Directive, however, was limited by Article 3(2) which indicated that it did not apply:

> "in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union

64 Joined Cases C-317/04 and C-318/04, *European Parliament* v *Council (PNR)*, EU:C:2006:346.
65 Decision 2004/535/EC.
66 Decision 2004/496/EC.
67 Directive 95/46/EC. The EU's data protection regime has evolved into a Regulation. The current applicable legislation can be found in: Regulation (EU) 2016/679 (*General Data Protection Regulation*).
68 Directive 95/46/EC, Article 25(1).
69 Directive 95/46/EC (now Article 45 Regulation (EU) 2016/679), Article 25(6).
70 Decision 2004/535/EC, 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".

> and in any case to processing operations concerning public security, defence, State security […] and the activities of the State in areas of criminal law"[71]

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 Article 100a EC Treaty did not constitute an appropriate legal basis for the Council's Decision.[72] 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.[73] In addition, the Council contended that Article 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.[74]

The Commission's Decision on adequacy 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 Commission's Decision on adequacy 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.[75] Consequently, the Court annulled the Commission's Decision on adequacy, as it was in breach of Article 3(2) Data Protection Directive. Likewise, the Court simply concluded that Article 95 EC did not constitute an appropriate legal basis for the agreement with the US, as it related to the same data processing which was excluded from the scope of the Data Protection Directive.[76]

The Court's judgment was slightly nuanced by its 2009 judgment on the Data Retention Directive.[77] 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 Article 95 EC, as its centre of gravity concerned criminal law enforcement rather than the functioning of the internal market.[78] 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

71 Article 3(2) Directive 95/46/EC. The (current) scope of application of the GDPR is similar (Article 2(2) Regulation (EU) 2016/679).
72 Joined Cases C-317/04 and C-318/04, *European Parliament* v *Council (PNR)*, EU:C:2006:346, paras 51 and 63.
73 *Ibid*, para. 53.
74 *Ibid*, para. 64.
75 *Ibid*, paras 55-57.
76 *Ibid*, paras 67-70. The issue is now regulated under the legal bases for judicial cooperation in criminal matters (Article 82 TFEU) and police cooperation (Article 87 TFEU). See: Directive (EU) 2016/681.
77 Directive 2006/24/EC.
78 Case C-301/06, *Ireland* v *European Parliament and the Council*, EU:C:2009:68, paras 28 and 58.

impact on the functioning of the internal market".[79] As put forward by Ireland, the *PNR* judgment (2006) exposed the fact that the mere circumstance that something has "significant economic implications" does not always suffice to justify recourse to Article 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 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.[80] The Court therefore dismissed the action for annulment, only for it to eventually establish the invalidity of the Directive in *Digital Rights Ireland* (2014) because of infringement of fundamental rights protection.[81]

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

In *ECOWAS* (2008), the Court considered whether the Council had acted in violation of Article 40 TEU by encroaching with a CFSP Decision upon the Community competence of development cooperation.[82] 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.

According to the Commission, the aim and content of the Decision fell – at least partly – within the Community competence of development cooperation. The decision itself indicated that combating the excessive and uncontrolled accumulation and spread of small arms and light weapons" is not only a matter of "peace and security" but also concerns the aim of improving "the prospects for sustainable development", while its content is a "typical form of assistance" as often implemented in the context of development cooperation.[83] The Council argued that the fact that the measure "may incidentally affect the prospects for sustainable development does not mean that the whole of that area falls within Community competences". In other words, the Council asserted that the "principal objective" of the measure was based on the CFSP's fundamental objective of preserving peace and strengthening international security.[84]

The Court considered that, if on account of their aim and their content, provisions of a measure adopted under the CFSP have "as their main purpose" the implementation of a Community policy such as development cooperation, this would infringe Article 40 TEU.[85] However, when a measure has as its main purpose the

79 *Ibid*, paras 68-72.
80 *Ibid*, paras 80-91.
81 See: Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland*, EU:C:2014/238.
82 Article 177 EC (current Article 208 TFEU).
83 Case C-91/05, *Commission* v *Council (ECOWAS)*, ECLI:EU:C:2008:288, para. 40. Recital 1 of Council Decision 2004/833/CFSP.
84 Case C-91/05, *Commission* v *Council (ECOWAS)*, ECLI:EU:C:2008:288, paras 47, 50 and 51.
85 *Ibid*, para. 60.

implementation of a CFSP policy (i.e. peace and security), the circumstance that it "contributes to the economic and social development of the developing country" does not stand in the way of a CFSP legal basis. 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.[86]

Subsequently, the Court 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.[87] 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".[88] Similarly, the content of the measure was considered to contain two components as well. Depending on the specific aim in question, the financial contributions and technical assistance to ECOWAS could be regarded as a CFSP or a Community measure.[89] Nonetheless, the Court decided in favour of the Community legal basis by ruling that:

> "Since Article 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."[90]

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 purpose of the provision was protecting Community law from intrusion by the CFSP.[91] 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 Articles 2 and 3 TEU which emphasised that second- and third pillar actions should "maintain and build on the acquis

86 *Ibid*, paras 71-76. In terms of substance, this separation is not that strict, as a CFSP measure may rightfully pursue TFEU objectives if these are "incidental" to the CFSP objectives strict See for instance: Case C-244/17, *Commission* v *Council (EU-Kazakhstan agreement)*, ECLI:EU:C:2018:662, paras 43-74. See also: C. Hillion & R. Wessel, 'Competence Distribution in EU External Relations After *ECOWAS*: Clarification or Continued Fuzziness?', *Common Market Law Review* 2009, p. 576.

87 Case C-91/05, *Commission* v *Council (ECOWAS)*, ECLI:EU:C:2008:288, para. 85.

88 *Ibid*, para. 96.

89 *Ibid*, paras 104-108.

90 *Ibid,* para. 77. Following the AG's opinion, see: Opinion of AG Mengozzi in Case C-91/05, *ECOWAS,* ECLI:EU:C:2007:528, para. 176.

91 See: R. van Ooik, 'Cross-Pillar Litigation Before the ECJ: Demarcation of Community and Union Competences', *European Constitutional Law Review* 2008, pp. 418-419.

communautaire".[92] The Lisbon Treaty, however, removed these references and placed the CFSP on an equal footing with the TFEU competences by, instead, establishing in Article 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 Article 40 TEU by adding that TFEU competences may not encroach on CFSP competences either.[93] 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".[94] 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 (CCP).[95]

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

As first pointed out by Advocate General Tesauro in *Titanium Dioxide*, Article 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.[96] This functional nature, however, is limited by Article 40 TEU, as exemplified by the *PNR* and *ECOWAS* judgments. In addition to the requirements of Article 40 TEU, the Court has more generally explicated that application of the *lex specialis derogate legi generali* principle serves as an instrument to determine which legal basis is the most appropriate.[97] Building on the centre-of-gravity method, the legislature should generally choose the more specific legal basis when confronted with more than one option.

92 Case C-91/05, *Commission* v *Council (ECOWAS)*, ECLI:EU:C:2008:288, para. 59.

93 Also the revision of Article 40 TEU places the CFSP on an equal footing with the TFEU. See for instance: M. Maresceau & A. Dashwood, *Law and Practice of EU External Relations : Salient Features of a Changing Landscape*, Cambridge University Press 2008, Chapter 2: M. Cremona, 'Defining competence in EU external relations: lessons from the Treaty reform process', p. 44-46 and Chapter 3: A. Dashwood, 'Article 47 TEU and the relationship between first and second pillar competences', pp. 99-103.

94 Hillion & Wessel, 'Competence Distribution in EU External Relations After *ECOWAS*' 2009, p. 575 and p. 585. See also: A. Engel, *The Choice of Legal Basis for Acts of the European Union: Competence Overlaps, Institutional Preferences, and Legal Basis Litigation*, Springer 2018, p. 120.

95 See: Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment and Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast).

96 Opinion of AG Tesauro in Case 300/89, *Commission* v *Council (Titanium dioxide),* ECLI:EU:C:1991:244, p. 2887.

97 A. Engel, *The Choice of Legal Basis for Acts of the European Union* 2018, p. 19.

In *UK* v *Council* (1988), the UK contested the agricultural policy legal basis[98] of *Council Directive 85/649/EEC* 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.[99] 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 Article 38(2) EEC Treaty,[100] giving "precedence to specific provisions in the agricultural field over general provisions relating to the establishment of the common market".[101] 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.[102] 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.[103]

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/EC on certain aspects of the organisation of working time. The Directive had been based on Article 118a 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.[104] The Court confirmed the relevance of the *lex specialis* principle by rejecting the UK's arguments based on the fact that Article 118a 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 Article 100a(1) itself" – as it still is in Article 114 TFEU – by stating that its provisions are to apply "save where otherwise provided in the Treaties".[105]

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

98 Article 43 EEC Treaty (currently the common agricultural policy is to be found in Article 38-44 TFEU).
99 Case 68/86, *UK* v *Council*, ECLI:EU:C:1988:85, para. 4.
100 Which we can still find in Article 38(2) TFEU.
101 The Court had already established this precedence based on the *lex specialis* principle in two cases about substantive rules, see: Case 83/78, *Pigs Marketing Board* v *Redmond*, ECLI:EU:C:1978:214, para. 37 and Case 177/78, *Pigs and Bacon Commission* v *McCarren*, ECLI:EU:C:1979:164, para. 9.
102 Case 68/86, *UK* v *Council*, ECLI:EU:C:1988:85, paras 15-16.
103 *Ibid*, para. 22.
104 Case C-84/94, *UK* v *Council*, EU:C:1996:431, para. 10.
105 *Ibid*, para. 12. Article 100a(1) EEC Treaty did not yet refer to "Treaties" (plural) as the constitutional architecture was rooted in the pillar structure.

as development cooperation in the *ECOWAS* judgment), this is not the case for the functional competence of Article 114 TFEU.[106]

6.3.5 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* (2001), 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".[107] 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* (1991) 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.[108] The Court decided that the Directive should have been based on the internal market competence[109] instead of the environment competence.[110] 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 Article 114 TFEU requires a high level of environmental protection anyway.[111] The Court concluded that Article 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".[112]

The seminal judgment of the Court on competence and the choice of legal basis was delivered in *Tobacco Advertising I* (2000). The legal question at stake was whether the EU's regulation of the advertisement of tobacco products was rightfully adopted on the basis of its internal market competence. The Court, first, considered that the

106 This is also mentioned in: A. Engel, *The Choice of Legal Basis for Acts of the European Union* 2018, p. 122.
107 Case C-377/98, *Biotechnological Inventions*, EU:C:2001:523, paras 27-28.
108 Case C-300/89, *Titanium Dioxide*, EU:C:1991:244, paras 2 and 11.
109 Article 100a EEC Treaty (now Article 114 TFEU).
110 Article 130s EEC Treaty (now Article 192 TFEU).
111 Case C-300/89, *Titanium Dioxide*, EU:C:1991:244, paras 18-20 and 24.
112 Case C-66/04, *UK* v *European Parliament and Council*, EU:C:2005:743, para. 45 and Case C-217/04, *UK* v *European Parliament and the Council,* EU:C:2006:279, para. 43.

Directive at issue concerned the harmonisation of laws and regulations relating to advertisement and sponsorship for tobacco products. This harmonisation 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.[113] The Court emphasised, in that regard, that other legal bases should not be used to circumvent the prohibition of harmonisation in the area of public health (now Article 168(5) TFEU)[114]: Article 114 TFEU should not be understood as a "general power to regulate the internal market".[115] Likewise, the exclusion of legislative acts in the EU's CFSP should not be circumvented by internal market legislation.

The Court continued by setting out the legal test for analysing the appropriateness of using the internal market legal basis by stating that a measure adopted on that basis should "genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market".[116] The question one must ask is whether a certain measure "in fact pursues the objectives" of its legal basis.[117] If this condition is satisfied, the Court found that the mere circumstance that public health protection is a "decisive factor" in the choices to be made is not problematic.

In *Imperial Tobacco* (2002), the Court built on this by ruling that even when there already is a legal regime in force that removes all obstacles to trade, the legislature can adapt this legislation on the basis of health protection.[118] Regarding the proportionality of the legislation, the Court held that the legislature has a considerable amount of discretion to weigh political, economic and social aspects.[119] 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 Article 114 TFEU legislation, the legislature just needs to identify the present or future obstacles to trade in its Preamble.[120]

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 Article 114 TFEU ever since the Amsterdam Treaty.[121] This is not the case for issues of national security and military security as Article 4(2) TEU stresses that these are exclusively national responsibilities, while for military equipment Article 346 TFEU provides a specific exception. Unlike the internal market exceptions (public policy, public health and public security), Article 346 TFEU constitutes an exception to 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

113 Case C-376/98, *Tobacco Advertising I,* EU:C:2000:544, paras 76-77.
114 *Ibid*, paras 78-79.
115 *Ibid*, para. 83.
116 *Ibid*, para. 84.
117 *Ibid*, para. 85.
118 Case C-491/01, *Imperial Tobacco*, EU:C:2002:741, para. 78.
119 *Ibid*, para. 123.
120 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", *German Law Journal* 2011, p. 848.
121 For a similar judgment in the area of consumer protection, see: Case C-58/08, *Vodafone Ltd and others*, EU:C:2010:321, paras 32-36.

effectively include in the *content* of internal market legislation. Instead, these issues are more suitable to be excluded by safeguard clauses as Article 114(10) TFEU prescribes. In the Defence Procurement Directive, the legislature did both.

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

The relationship between the Directive's aim and content and its legal basis seems similar to some of the cases previously discussed. Like Directive 98/44/EC, the legal basis of which was evaluated by the Court in *Biotechnological inventions* (2001), it aims to promote the competitiveness of European industries by harmonising the laws of the Member States. There are, however, two important differences.

First, the hindrances to market integration in the military sector are not legal in nature, but (geo)political. Standardizing the procurement procedures does not change the military security needs of the Member States around which they structure their procurement activities (as elaborated in Chapter 1). Even the Directive itself recognizes that the regime it imposes will not always be "sufficient to safeguard Member States' essential security interests, the definition of which is the sole responsibility of Member States.".[122] As opposed to internal market integration, only deepening military cooperation in the area of CFSP is capable of (slightly) altering the military security needs of the Member States.

Secondly, the Directive does not simply seek to harmonise the legal criteria which military procurement activities should meet. Instead, it seeks the liberalisation of the military industries of the Member States, by requiring from them to designate the winning tenderer on basis of "economically most advantageous tender" or on basis of the lowest price.[123] Although there is a variety of flexible economic criteria – such as security of supply – which can be included in the determination of the economically most advantageous tender, the regime excludes all criteria which relate to nationality. The latter type of criterion can, however, be relevant for military-political interests and thus the national security of Member States (see Chapter 4).

To evaluate the legal basis of the Directive in light of the centre of gravity method and Article 40 TEU, it is now necessary to consider this aim and content as elaborated in Chapter 5 in light of its underlying market logic and the competing legal basis within the context of the European Defence Agency.

6.4.1 The flawed market logic of the Commission

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.

122 Directive 2009/81/EC, Preamble 16.
123 Directive 2009/81/EC, Article 47, para. 1.

Along with the increasing costs of weapon systems and flat or stagnating budgets,[124] the national markets were considered too small to "generate adequate economies of scale".[125] 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 Article 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.[126]

The achievement of the Directive's aim to limit the use of Article 346 TFEU by the Member States is, however, severely constrained by its own content. As elaborated in Chapter 5, these constraints are principally found in its limited scope of application and the remaining relevance of Article 346 TFEU for security of information and security of supply.[127]

It can therefore not come as a surprise that the figures of the 2015 evaluation of the Directive by the Commission do not show a complete shift towards an open and integrated military sector. From the roughly €80 billion of military procurement by the Member States, only €19.3 was procured within the regime of the Directive.[128] It seems that the exception of Article 346 TFEU is still extensively used by the Member States to procure military equipment outside of the Directive's regime.[129] The 2020 *Implementation Assessment* shows a similar situation. Within the time period 2016-2020 only 11,71% of the value of all military procurement was awarded based on

124 The budget cutting has drastically changed in recent times, in particular after Russia's 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 <https://www.sipri.org/media/press-release/2021/business-usual-arms-sales-sipri-top-100-arms-companies-continue-grow-amid-pandemic>.

125 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} {SEC(2007) 1599} /* SEC/2007/1598 final, para. 4.1.

126 *Ibid*, para. 3.3.

127 Some of these issues were also discussed by the author in: N. Meershoek, 'Nationale Veiligheid als Natuurlijke Begrenzing van EU Aanbestedingsliberalisering', *Tijdschrift Aanbestedingsrecht & Staatssteun* 2021, pp. 24-36.

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

129 While actually more than half of the value of military procurement within the regime of the Directive took place in the UK.

the procedures of the Directive, thus including application of the principle of non-discrimination. Even from the contracts awarded based on the Directive, still 82% was awarded domestically.[130]

In its 2018 impact assessment for the European Defence Fund (EDF), the Commission still considered fragmentation to be the crucial obstacle to a strong European defence industrial base.[131] The obvious economic argument against this fragmentation is again its inefficiency because potential economies of scale are not achieved.[132] "Unnecessary overlap" (as mentioned in the PESCO commitments) resulting in duplication is the consequence of a "systematic bias" for national solutions. Particularly when it comes to Research and Development (R&D) – characterised by major investments and limited public budgets – integration is considered crucial. In its impact assessment, the Commission essentially blames fragmentation on the demand side of the market. If only Member States would open up their markets the supply side would follow, which would then increase economies of scale. The optimistic free-market logic of the Commission is tempting, but as elaborated in Chapter 1 the political economy of military procurement is dominated by military power rather than economics.

6.4.2 The competing 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.[133] The envisaged provisions were eventually included in the Treaty of Lisbon's amendments to the TEU. The general CSDP provision of Article 42 TEU was supplemented in paragraph 3 which assigns several tasks to the EDA for the purpose of improving the military capabilities of the Member States. More specifically, Article 45(1) TEU sets out the constitutional tasks of the EDA which include the following:

> "a) contribute to identifying the Member States' military capability objectives and evaluating observance of the capability commitments given by the Member States;
> (b) promote harmonisation of operational needs and adoption of effective, compatible procurement methods;

130 See: European Parliament, *EU Defence Package: Defence Procurement and Intra-Community Transfers Directives European, Implementation Assessment*, European Parliamentary Research Service, October 2020, pp. 86-98.

131 See: COM IP/16/4088 (press release), *European Defence Action Plan: Towards a European Defence Fund, Brussels*: 30 November 2016.

132 This is also exemplified in the impact assessment by the Commission of the European Defence Fund, see: COM SWD(2018) 345 final, *Impact Assessment – Proposal for a regulation of the European Parliament and the Council establishing the European Defence Fund*, Brussels: 13 June 2016, pp. 14-15.

133 Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency, Preamble 6. See: Draft Treaty establishing a Constitution for Europe, Arts. I-41 & III-311.

> (c) propose multilateral projects to fulfil the objectives in terms of military capabilities, ensure coordination of the programmes implemented by the Member States and management of specific cooperation programmes;
> (d) support defence technology research, and coordinate and plan joint research activities and the study of technical solutions meeting future operational needs;
> (e) contribute to identifying and, if necessary, implementing any useful measure for strengthening the industrial and technological base of the defence sector and for improving the effectiveness of military expenditure."

As the EDA is constitutionally rooted within the CSDP, it should contribute to its implementation.[134] 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.[135] The European "industrial and technological base" should be instrumental to the national capabilities, to which it is subordinate. The supranational internal market legal basis of Article 114 TFEU, in contrast, is by its nature concerned with improving the European (industrial) capabilities and the competitiveness of the internal market by ensuring EU wide competition.

A striking example of the difference between intergovernmental and supranational regulation of military procurement can be found in the approach to offsets of the EDA. The EDA Codes of Conduct on Defence Procurement and on Offsets seek to promote transparency and objectivity in procurement procedures of military equipment and limit the use of offsets.[136] At the same time, it seems to acknowledge offsets as a legitimate instrument to ensure that military spending has a positive impact on national strategic industry or even the economy in general. *Indirect offsets* in particular, however, remain problematic in the context of the EU's rules on public procurement and the internal market because the industrial obligations which they impose on suppliers can hardly be linked to national security. According to the Commission, these even, by definition, distort a free (liberalised) and integrated market.[137] However, the EDA's Code of Conduct does not distinguish between direct and indirect offsets. Next to promoting transparency, the strongest commitment which the Code of Conduct imposes is that offsets should not exceed the value of the procurement contract.[138] The question of market distortion is omitted, leaving it as a matter of proportionality.

134 Council Decision 2015/1835 of 12 October 2015 defining the statute, seat and operational rules of the European Defence Agency (recast), Preamble 5.

135 Article 42 TEU.

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

137 See: Communication COM(2007) 764 final from the Commission to the European Parliament the Council, the European Economic and Social Committee and the Committee of the Regions of 5 December 2007 – A strategy for a stronger and more competitive European defence industry, p. 7. See also: European Commission, *Directive 2009/81/EC on the award of contracts in the fields of defence and security – Guidance Note Offsets*, Brussels 2010.

138 EDA, *The Code of Conduct on Offsets*, 24 October 2008, p. 3.

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. Looking at Article 45(1)b TEU, we can only conclude that the CSDP provides a *lex specialis* to the internal market (Article 114 TFEU) for regulating the procurement of military equipment.

Conclusion: basing the regulation on the security logic of military power

The Treaty of Lisbon reaffirmed and clarified the significance of basing EU measures on the most appropriate legal basis by establishing in Article 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" (Article 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.[139]

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 Article 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 Article 3 TEU and Article 4 TEU.

When applying Article 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 Article 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 (Article 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 (Article 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 Article 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

139 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 edition), Cambridge University Press, 2020.

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. Such cooperation mechanisms are largely excluded from the scope of application of the Directive, leaving those unregulated. 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 CCP). 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.[140] 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[141]; and thirdly, Article 346 TFEU as a last resort for contracts which are so sensitive that even the CSDP rules cannot safeguard the involved security interests.[142] 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 will be discussed in Chapter 7. The presupposition that I have defended so far 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.[143] By adding the CSDP layer, the room for Member States to invoke Article 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

140 For the idea of two separate measures for military procurement, including a mutual reference, see again: Hillion & Wessel, 'Competence Distribution in EU External Relations After *ECOWAS*' 2009, p. 575 and p. 585.

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

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

143 For the effectiveness approach of this dissertation, see again: Introduction.

discriminatory procurement policies[144] on Article 346 TFEU – rightly or not – and find themselves – at least de facto – almost unconstrained by EU law.[145] 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 closer 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 not one of efficiency or legal basis, but legitimacy.

144 Such as the use of military offsets.

145 Except for the rare cases in which the Commission starts an infringement procedure.

PART III

LOOKING FORWARD: PROSPECTS FOR EFFECTIVE REGULATION

CHAPTER 7

The Legal Foundation for a more Effective Regulation of Military Procurement within a European Security Culture

Introduction

Unlike the previous parts, this final part looks at the future rather than the past. Whereas Part I looked at the compatibility of the current regime with the dynamics of military power structures and Part II evaluated the choice for an internal market legal basis, This final part considers how a future regulation could be more effective. It primarily looks at the consistency and legal certainty (see Introduction, *Table 4*) of such a future regime. As Part I and Part II already revealed that the current regulation lacks potential effectiveness because of its incompatibility with military power structures and its incorrect legal basis, it would be useless to consider its consistency with the internal market principles or its effectiveness in terms of legal certainty. Consistency and legal certainty are therefore considered in light of a hypothetical future regulation guided by the logic of military power structures and with a CSDP legal basis.

As a more intergovernmental part of EU law, the Treaty drafters sought to limit the powers of supranational EU institutions such as the Commission, the Court and the European Parliament within the CSDP. They designed its legal frameworks in a way to facilitate intergovernmental bargaining between the national governments rather than outcomes being based on supranational intervention. Despite – or thanks to – its intergovernmental nature, the CSDP framework provides greater potential for effectively regulating military procurement than the internal market. In a context in which military security is an exclusive national competence, intergovernmental frameworks, as far as functional to a clear and shared purpose, appear more suitable to pursue military objectives than supranational frameworks. Whereas the internal market regime of the Directive tends towards an all-or-nothing approach – complete liberalisation or complete exemption – the CSDP norms are developed to create a security culture within the EU by fostering cooperation, trust and political solidarity between the Member States. By providing more flexible rules for military procurement than possible within the contours of the internal market, a CSDP regime potentially keeps a much larger share of the military procurement of the Member States within the ambits of EU law than the Defence Procurement Directive has done so far.

These findings raise more questions than they answer. How could the effectiveness of such a regime be safeguarded, given that the CFSP and CSDP are generally excluded from the jurisdiction of the EU Court of Justice? And to what extent would the substantive rules of such a regime differ from the rules established in the Defence Procurement Directive?

This chapter seeks to provide a starting point for improving the regulation. For that purpose, it is first necessary to set out the general legal context of the CFSP and CSDP. Based on the effectiveness approach of this dissertation, that is necessary in order to ensure the consistency of the regulation with the legal principles of its competence area; being part of the broader issue of coherence as a way to ensure *legal effectiveness* (see Introduction). Secondly, this chapter will set out the existing intergovernmental frameworks which already regulate some specific parts of military procurement in order to ascertain the added value of a more general intergovernmental regime and to further explore how a renewed regulation would be consistent with current law and practice. Finally, this chapter will consider the possibilities for enforcement and judicial review, as these are generally considered to be vital for the effectiveness of regulation. In addition to the general coherence and preciseness of the law as such, enforcement and judicial review based on the rule of law principles should contribute positively to legal certainty as well. As emphasised in the Introduction, these are part of the *legal effectiveness* of regulation. In my conclusion, I will distil from the previous findings five guiding principles for regulating military procurement in the future; thereby answering the third sub-question of this dissertation.

7.1 The EU's Common Security and Defence Policy as means for a European security culture

The legal basis for the EU's Common Security and Defence Policy (CSDP) was formally established with the Maastricht Treaty which came into force in 1993. As explained in Chapter 1, the legal structures of the CSDP are based on intergovernmental cooperation rather than supranational integration. The Lisbon Treaty removed the pillar structure in EU law, thereby placing the different policy areas within the same constitutional setting and subordinate to the same common purpose. Regardless, the CSDP as a part of the CFSP remained its distinctive nature.[1] Ever since 1993, significant progress has been made within these legal structures, including a variety of EU military missions (since 2003), the creation of the European Defence Agency (2004) and the creation of PESCO (2017). The latter includes a large intergovernmental project on military mobility which also third countries such as the US can participate in.[2] In 2021, the European Peace Facility was created, based on which the EU supplied arms to Ukraine after it was invaded by the Russian military. Russia's military aggression seems to have fuelled awareness amongst European states of their military interdependence, paving the way for deepening military cooperation within NATO and the CSDP.

1 P. Koutrakos, *The EU Common Security and Defence Policy*, Oxford University Press 2013, p. 29.

2 For the rules governing third country participation in PESCO projects see: Council Decision (CFSP) 2020/1639 of 5 November 2020 establishing the general conditions under which third States could exceptionally be invited to participate in individual PESCO projects.

7.1.1 The CSDP's contribution to the EU's primary aims and its position in the Treaties

The EU's aim to foster peace and welfare for its peoples, whilst promoting the values on which it is based, is intrinsically connected to maintaining European security. Without security, there can be no peace nor welfare. Values such as human rights protection, freedom, democracy, equality and the rule of law[3] are often the first to be sacrificed when security is threatened, most disastrously in the case of war. To say that the CSDP serves a crucial function for the fulfillment of the EU's aims is therefore indisputable. The question to be asked when studying the legal frameworks of the CSDP is thus not so much whether it can contribute to the fulfillment of the EU's tasks, but how this can best be done given its more intergovernmental nature.

7.1.2 The CSDP as a form of 'Intergovernmentalism'

Ever since the Maastricht Treaty the EU's activities have expanded far beyond the original economic competence areas into almost all governmental activity. Many of the EU's new competences were created without substantial transfers of sovereign rights to supranational institutions such as the Commission and the Court.[4] Deviating from the so-called 'Community-method', decision-making within such policy areas is based on intergovernmental consensus and supranational institutions are not granted significant autonomy.

The CSDP is arguably the most obvious example of such *intergovernmentalism* as it is not only intergovernmental in terms of decision-making, but also in operational terms. It does not transfer competences from the Member States to the Union but only facilitates cooperation and coordination of policies. Cooperation within the CSDP frameworks is, following Article 24(2) TEU, based on the "development of mutual political solidarity among Member States". This is not so strange when considering that national security, as confirmed by the Lisbon Treaty in Article 4(2) TEU, has remained the "sole responsibility of the Member States". Decisions relating to the CSDP can therefore, following Article 42(4) TEU, only be adopted by the Council when acting unanimously. The High Representative as well as the Member States can initiate proposals for such decisions. The operational actions taken within the ambits of EU defence policy depend, in accordance with Article 42(3) TEU, on the deployment of national military capabilities and thus on the willingness of national political leaders.

Like the North Atlantic Treaty, the EU Treaties also include a collective self-defence clause in Article 42(7) TEU. All actions taken within the CSDP should,

3 As referred to in the Preamble of the TEU.

4 For such an understanding of post-Maastricht European integration in general, see: C. Bickerton, D. Hodson and U. Puetter, 'The New Intergovernmentalism: European Integration in the Post-Maastricht Era', *Journal of Common Market Studies* 2015, pp. 703-722. The authors suggest (p. 715) that one feature of this 'new intergovernmentalism' is that the differences between high and low politics have become blurred. Although this is perhaps true to some extent within EU politics, this is not the case for the international politics of military power which should still be separated from the low politics of economic welfare (see again Chapter 1).

however, also be in accordance with obligations and commitments of NATO as expressed in Article 42 TEU as well. This is no coincidence, as for all states which are member of both alliances the commitment to the North Atlantic Treaty precedes the commitment to the CSDP. This approach is further underlined by the EU's 2022 'Strategic Compass for Security and Defence', stressing that EU defence policy should be "complementary to NATO, which remains the foundation of collective defence for its members".[5] Unlike the internal market frameworks, the CSDP aims to foster cooperation between the Member States based on their individual sovereignty and collective solidarity, rather than pursuing supranational integration based on the linkage of different sectors within a single regime (see again Chapter 1).

7.1.3 General duties of the Member States under the CFSP

The Treaty on the EU (TEU) imposes three general duties upon the Member States in the context of the CFSP and thus also the CSDP.

First, building on the principle of sincere cooperation as enshrined in Article 4(3) TEU which requires Member States to "assist each other in carrying out the tasks which flow from the Treaties", Article 24(3) imposes a loyalty obligation, requiring Member States to:

> "support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area."

In addition, the provision demands the Member States to "work together to enhance and develop their mutual political solidarity" and to "refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.". As rightly observed by Koutrakos, political solidarity is unlikely to be artificially created by legal obligations; at their best such obligations can contribute to "a culture of cooperation among Member States".[6] Nonetheless, an obligation which *prima facie* is as vague as Article 24(3) TEU can potentially result in concrete legal obligations. Over the years, the EU Court of Justice has used the duty of sincere cooperation of Article 4(3) as imposing concrete obligations to Member States by interpreting other provisions in the light thereof.[7] For Article 24(3) TEU, the Council and the High Representative are assigned the role to ensure compliance. When, for instance, there is a more specific regime in place, such as a CSDP regulation of military procurement, they can ensure compliance with Article 24(3) TEU by interpreting the more specific procurement obligations in the light of this general provision.

5 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.

6 Koutrakos, *The EU Common Security and Defence Policy* 2013, p. 61.

7 For instance in Case 22/70, *Commission* v *Council (ERTA)*, ECLI:EU:C:1971:32, paras 20-22. See also: M. Klamert, *The Principle of Loyalty in EU Law*, Oxford University Press 2014, Chapter 3 (pp. 73-75).

Secondly, in the spirit of "political solidarity", Article 32 TEU obliges Member States to:

> "consult one another within the European Council and the Council on any matter of foreign and security policy of general interest in order to determine a common approach."

This means that before Member States can take "any action on the international scene or entering into any commitment which could affect the Union's interests" they shall consult the other Member States within the European Council or the Council and ensure "through the convergence of their actions, that the Union is able to assert its interests and values on the international scene". This obligation is in Article 25(c) TEU coined as "systematic cooperation" and builds on the system of European Political Cooperation (EPC) which was in place before the Maastricht Treaty.[8] Although it seems to be left to the Member States to determine what is of "general interest",[9] procurement of military equipment with a high military-strategic value seems to be capable of affecting the Union's interests. A CSDP regime for military procurement would in that regard ensure that a procurement procedure is followed which contributes to political solidarity by – at the least – being transparent about the strategic choices which are made.

Thirdly, Article 28(2) TEU requires Member States to ensure that their actions are in conformity with Council decisions which are adopted pursuant to an "international situation" which "requires operational action by the Union" as envisioned in Article 28(1) TEU. An example of such a Council decision is the European Peace Facility (2021), under which the EU can supply weapons to third countries.[10] The use of this instrument in 2022 to supply weapons to the Ukrainian Armed Forces shows the potential difficulties in ensuring Member States to uphold this third general duty. The Council Decision to supply weapons to Ukraine was adopted unanimously, including a provision which proclaims that "The Member States shall permit the transfer of military equipment […] through their territories".[11] Yet, the Hungarian government did not allow the transit of lethal weapons through its territory to Ukraine right after the Decision was adopted.[12]

8 See for instance: Single European Act (1986), Article 30(2)a.

9 R. Wessel, 'Common, Foreign, Security and Defence Policy', in: R. Wessel and J. Larik, *EU External Relations Law: Text, Cases and Materials*, Hart Publishing 2020, p. 292.

10 Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528.

11 Council Decision (CFSP) 2022/338 of 28 February 2022 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, Article 5.

12 This is also pointed out in: P. Koutrakos, 'The European Peace Facility and the EU's support to the Ukrainian Armed Forces', *EU Law Live Weekend Edition* (92), 5 March 2022, p. 22. Under the framework of the Peace Facility, it would have been very well possible for Hungary to abstain from assistance measures including the supply of lethal weapons which it did not do.

7.1.4 The ultimate act of political solidarity as enshrined in the mutual assistance clause

Most fundamental are the obligations which can be derived from the mutual assistance clause of Article 42(7) TEU that was created with the Lisbon Treaty in 2007, requiring Member States to provide "aid and assistance by all the means in their power" to a Member State which is "the victim of armed aggression on its territory". Political solidarity, eventually, all comes down to adherence with this obligation in times of military emergency. All other obligations within the CSDP should in that regard, by creating a *culture of cooperation* contribute to the likeliness of Member States actually cooperating when it matters most. This likeliness should also be fostered by the preventive measures taken by the Member States in peacetime. It remains, however, questionable to what extent the EU mutual assistance clause creates legal obligations in peacetime. To understand these possible legal obligations better it is useful to compare the clause and its legal context to the seemingly similar mutual assistance clause in the North Atlantic Treaty.

The literal phrasing of the EU's mutual assistance provision appears similar to Article 5 North Atlantic Treaty. Where the North Atlantic Treaty speaks of an armed attack against one of the allies being considered "as an attack against them all", obliging each signatory to take "such action as it deems necessary", the EU's mutual assistance – seemingly – goes even further by requiring each signatory to provide aid and assistance "by all means in their power" (not just what the state itself considers necessary). Reading the two clauses further and appreciating their legal context, however, paints a different picture. For two reasons, collective self-defence based on the North Atlantic Treaty appears to go further than the EU collective self-defence.

First, as elaborated in Chapter 3, NATO's collective self-defence, in addition to assisting one another in times of emergency, also requires the alliance's partners in Article 3 North Atlantic Treaty to "maintain and develop their individual and collective capacity to resist armed attack", which in 2014 led to the agreement that defence expenditure should be 2% of their GNP and that 20% of this should be spend on 'major equipment'.[13] Although Article 42(3) TEU requires Member States to undertake "progressively to improve their military capabilities", more concrete commitments can only be found in the frameworks of PESCO, based on Article 46 TEU, which Member States can opt-out from. Even within PESCO, there is no concrete obligation on military expenditure.

Secondly, the EU's common defence as envisioned by the TEU is framed as being subordinate to the North Atlantic Treaty. Article 42(2) TEU stresses that:

> "the progressive framing of a common Union defence policy […] shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation".

13 NATO, *Wales Summit Declaration*, 5 September 2014, para. 14.

This principle is specifically repeated in the mutual assistance clause of Article 42(7) TEU by proclaiming that the commitments and cooperation derived from that clause shall be consistent with commitments under the North Atlantic Treaty. As elaborated in Chapter 2, this makes legal sense when considering that Article 351 TFEU establishes that "rights and obligations arising from agreements concluded before 1 January 1958 […] shall not be affected by the provisions of the Treaties" and the North Atlantic Treaty preceded the EEC Treaty by about ten years.[14] For all Member States which are part of both military alliances, the commitment to the North Atlantic Treaty precedes the commitment to the CSDP.[15]

NATO's collective self-defence clause precedes the EU's mutual assistance clause not just on paper, but also in practice. EU Member States which are not part of NATO are often still considered to be 'neutral' military actors. The nuclear deterrence provided by the United States to the NATO alliance surpasses the more limited nuclear capabilities within the EU. The superiority of NATO's security guarantees over the EU was most vividly shown by Finland and Sweden's 2022 applications for NATO membership in response to Russia's military aggression against Ukraine.[16] The EU's mutual assistance clause apparently not yet suffices as a security guarantee for its Member States.

7.1.5 Decision-making procedures for CSDP measures

Being a part of the Union's CFSP competence, CSDP decisions can, according to Article 31(1) TEU, be taken by the European Council and the Council acting unanimously except where the Treaties provide otherwise. The exceptional circumstances under which CFSP decisions can be taken by qualified majority voting in the Council are defined in paragraph 2 and 3 of the same provision. Paragraph 4, however, excludes from the possibility of qualified majority voting all decisions "having military or defence implications". For adopting decisions within the 'defence' part of the CSDP there is thus unanimity required among the Member States.

7.2 Existing and future intergovernmental instruments regulating military procurement

Shortly after the establishment of the European Defence Agency (EDA) in 2004, the participating Member States agreed on a Code of Conduct on Defence Procurement in 2005; years before the internal market-based Directive. The Code sought to establish a "voluntary, non-binding intergovernmental regime aimed at encouraging application of competition in this segment of Defence procurement, on a reciprocal

14 Based on the general principle of law that older laws override younger laws, i.e. *lex posterior derogat legi anteriori*.
15 There is even one EU Member State (Denmark) which has an opt-out for the CFSP and CSDP dimension of EU law while being a member of NATO.
16 NATO Press release, *Finland and Sweden submit applications to join NATO*, 18 May 2022.

basis".[17] Considering that most of the military procurement of the Member States takes place outside the internal market based on Article 346 TFEU, the idea behind the Code was to establish some general principles for those non-internal market procurement procedures; stimulating competition and thereby strengthening the European Defence Technological and Industrial Base (EDTIB).[18] Even though the Code was a purely intergovernmental and voluntary instrument, it generally excluded collaborative procurement from its scope of application, like the Directive would later do as well. Interestingly the Code included reference to the use of offsets as part of the award criteria without further defining what such offsets could legitimately consist of.[19]

As observed by Trybus, the Code should primarily be seen as "an instrument to address the abuse of Article 346 TFEU in a politically pragmatic way".[20] Possibly as a response to the transposition of the Defence Procurement Directive in the Member States, the Code was suspended in 2013 by the EDA "due to the changes in the European Defence Equipment Market".[21] After all, the Directive is aimed at addressing the abuse of Article 346 TFEU as well by giving a market-based alternative rather than subjecting non-internal market procurement to specific norms. Although the EDA spoke of the possible replacement in the future and the Directive has not proven to be effective in addressing abuse of Article 346 TFEU, there is no new intergovernmental procurement regime at the time of writing. As I argued in the previous chapter, a new CSDP regime, that would most logically be governed by the EDA, should, first and foremost, be based on a broad reconsideration of the demarcation of CSDP and TFEU competences.

Like the previous Code of Conduct, a new CSDP regime should primarily be aimed at addressing abuse of Article 346 TFEU based on the logic of military power and the national security responsibility, including the regulation of the use of military offsets based on the principles set out in the previous chapter. Unlike the previous CSDP regime, a new regime should be legally binding and stimulate procurement collaboration instead of largely exempting it from its scope. Even though there is no such general regulation at the moment, different intergovernmental instruments already shape parts of the military procurement activities of the Member States. The most prominent EU and non-EU instruments will be addressed in the two sections below.

17 European Defence Agency, *The Code of Conduct on Defence Procurement of the EU Member States Participating in the European Defence Agency*, Brussels: 21 November 2005, p. 1.

18 *Ibid*.

19 As discussed in Section 2.4.3, the EDA adopted a Code of Conduct on Offsets later on in 2008.

20 M. Trybus, B*uying Defence and Security in Europe: The EU Defence and Security Procurement Directive in Context*, Cambridge University Press 2014, p. 212.

21 *Ibid*, p. 214. Trybus refers to a text that was published by the EDA on its website, which is not accessible anymore.

7.2.1 EU instruments stimulating collaborative procurement

In general terms, as concluded in Chapter 4, fostering military interdependence by engaging in collaborative procurement projects can, when necessary, justify derogation from EU internal market law obligations. As described in Chapter 5, much of collaborative procurement based on intergovernmental agreements is therefore also excluded from the scope of application of the Defence Procurement Directive.[22] Collaborative procurement by at least two EU Member States for the development of a new product can, for instance, be excluded based on Article 13(c) of the Directive.

Collaborative procurement is commonly seen as one of the solutions to the competitiveness problem of European military industries, despite the fact that collaboration does not always lead to increased efficiency depending on the internal power structures of a collaboration as described in Chapter I. For small countries collaborative procurement will sometimes be the only affordable way to acquire a military product that still has to be developed. In the end, as I concluded in Chapter 1, the efficiency component of collaborative procurement is only a secondary concern, as states are primarily concerned by how engaging in a certain collaborative project would strengthen their military power and their relative positioning within structures of military interdependence. Besides efficiency, there are consequently plenty of potential reasons to engage in collaborative procurement. Different EU instruments therefore seek to stimulate collaborative procurement to prevent duplication and foster interoperability of weapon systems.

Within the CSDP frameworks, PESCO is currently the most significant instrument to stimulate procurement collaboration. In the previously mentioned 'more binding commitments'[23] of 2017 the Member States have committed to increase "joint and 'collaborative' strategic defence capabilities projects", possibly based on the European Defence Fund.[24] According to the commitments, these collaborative projects should "only benefit entities which demonstrably provide added value on EU territory" and "the acquisition strategies adopted by the participating Member States will have a positive impact on the EDTIB".[25] The commitment to increase collaborative procurement was later specified by a European collaborative equipment procurement collective benchmark of 35% of total equipment expenditure.[26] Although PESCO appears to have been quite effective in creating a platform for cooperation projects given the number of on-going projects, in which the EDA and the European External Action Service serve as secretariat, it has not led to a significant increase in collaborative procurement. According to the EDA's Defence Data, European collaborative defence

22 Based on Article 12 and Article 13 Directive 2009/81/EC.

23 See also again Section 1.1.2.

24 Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States, Annex II, nr. 3.

25 *Ibid*, nr. 20.

26 See: Council Recommendation of 16 November 2021 concerning the sequencing of the fulfilment of the more binding commitments undertaken in the framework of permanent structured cooperation (PESCO) and specifying more precise objectives, and repealing the Recommendation of 15 October 2018 (2021/C 464/01), p. 3.

procurement expenditure as a percentage of total procurement expenditure, on the contrary, dropped from about 20% to 11% in the period 2017-2020.[27]

In such a context, it is not surprising that the EU is seeking for alternative ways to foster collaborative procurement, particularly through financial incentives for cross-border cooperation. The most clear example of this policy can be found in the European Defence Fund (EDF) that was established for the EU's budget period of 2021-2027, consisting of a budget of almost 8 billion euros for subsidies to European military industries. This instrument was adopted under the legal bases for industry in Article 173 TFEU as well as the legal bases for research and technological development and space in Article 182, 183 and 188 TFEU. The aim of this instrument is similar to the other instruments such as the Directive, seeking "to foster the competitiveness, efficiency and innovation capacity of the EDTIB throughout the Union", thereby contributing to the EU's strategic autonomy.[28]

As described in Section 1.3.2, the EDF primarily fosters cooperation on the supply side of the market as subsidies are only granted to consortia within which at least three legal entities established in at least three different Member States or associated countries cooperate.[29] The EDF also seeks to foster cooperation on the demand side by requiring for development subsidies in Article 21(3) EDF Regulation that "at least two Member States or associated countries intend to procure the final product or use the technology in a coordinated manner" and "the activity is based on common technical specifications" agreed by those Member States that co-finance or intend to jointly procure the final product. In addition, subsidies can be granted to Member States as well based on Article 17 EDF Regulation when collaboratively engaging in pre-commercial procurement or when coordinating their procurement procedures. In the EU's Strategic Compass 2022, the Member States agreed to consider amending the EDF Regulation to further incentivise collaborative procurement.[30]

As explained earlier (Section 5.5), the Commission has recently proposed new initiatives for incentivising collaborative procurement to overcome the so-called 'Defence Investment Gaps' based on its industry competence.[31] For the short-term, the Commission proposed to allocate 500 million euros from the regular EU budget to co-finance so-called 'common procurement' – *i.e.* "cooperative procurement jointly conducted by at least three Member States" – within the *European defence industry Reinforcement through common Procurement Act*.[32] For the long-term, the Commission proposes the adoption of a *European Defence Investment Programme*

27 European Defence Agency, *Defence Data 2019-2020: Key findings and analysis*, Brussels: 2021, p. 11.

28 Regulation (EU) 2021/697 of the European Parliament and of the Council of 29 April 2021 establishing the European Defence Fund and repealing Regulation (EU) 2018/1092, Article 3.

29 Regulation (EU) 2021/697, Article 10(4).

30 *A Strategic Compass for Security and Defence* 2022, p. 33. Also mentioned by the Commission in: COM(2022) 60 final, Communication from the Commission: *Commission contribution to European defence*, Strasbourg: 15 February 2022, p. 5-6.

31 See: JOIN(2022) 24 final, *Joint Communication: on the Defence Investment Gaps Analysis and the Way Forward*, Brussels: 18 May 2022.

32 COM(2022) 349 final, *Proposal for a Regulation of the European Parliament and of the Council on establishing the European defence industry Reinforcement through common Procurement Act*, Brussels: 19 July 2022, Article 2.

Regulation (EDIP), which would regulate the conditions and criteria for Member States to form consortia that will jointly procure military equipment in order to benefit from a VAT exemption.[33] Although such financial incentives could help to promote collaborative procurement within the Union, they do not generally improve the EU's regulation of military procurement. Especially when considering that there are also different frameworks for collaborative procurement outside the realms of EU law which will be discussed in the next section, the regulation appears to become ever more fragmented.

7.2.2 Non-EU instruments for procurement collaboration

In addition to the EU instruments, different organisational frameworks which include third countries structure collaborative projects.[34] Military procurement within these organisational frameworks is generally excluded from the application of the Directive. Derogation from the EU Treaties based on Article 346 TFEU will often also be possible, as elaborated in Chapter 4.

Procurement of military equipment from the US is usually based on the "specific procedural rules pursuant to an international agreement or arrangement" in which the US is the lead nation and can therefore be exempted from the Directive based on Article 12(a).[35] Military imports from the US is still a major part of the overall imports of EU Member States. The Netherlands for example procured 63% of all its military imports from the US in the period 2010-2020.[36] Procurement collaboration of EU Member States also includes procurement within international organisations.

In 1998 the Joint Organisation for Armaments Cooperation (OCCAR) was founded by France, Germany, Italy and the UK in the OCCAR Convention.[37] Currently Spain and Belgium have become members as well, while different EU Member States (such as the Netherlands) and third countries (such as Turkey) participate in specific projects. Depending on the participating countries in a specific project, collaborative procurement can be excluded from the Directive based Article 12(a) on the exclusion for the specific rules pursuant to an international agreement or arrangement[38] or Article 13(c) on collaborative European R&D procurement. Like EU instruments, the objectives of OCCAR include the strengthening of the competitiveness of European defence technological and the industrial base as enshrined in Article 5 OCCAR Convention. Like the Directive, Article 24 OCCAR Convention stipulates that contracts and sub-contracts shall generally be awarded after competitive tendering.

33 JOIN(2022) 24 final, p. 10.

34 However, within the EU instruments third countries can also participate, considering the previously mentioned example of the US' involvement in PESCO's military mobility project.

35 See: B. Heuninckx, *The Law of Collaborative Defence Procurement in the European Union*, Cambridge University Press 2018, p. 175. For the F-35 example, see: L. Butler, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, Cambridge University Press 2017, pp. 129-131.

36 SIPRI Arms Transfers Database.

37 See: *Convention on the Establishment of the Organisation for Joint Armament Cooperation.*

38 Now that since Brexit OCCAR includes a 'third country'.

Several limitations to this competitive tendering, however, contravene the EU's internal market approach.

OCCAR's objectives stress in Article 5 that "the member states renounce the analytical calculation of industrial juste retour on a programme-by-programme basis". It is, however, replaced by "an overall multi-programme/multi-year balance", meaning that if over a longer period imbalances in the allocation of contracts are noticed it can be resolved by awarding contracts to companies in one of the participating member states. Such practice still falls within the definition of 'military offsets' as used before in this dissertation. In addition, competitive tendering is limited by Article 24(3) stressing that competitive tendering shall only be extended outside the Western European Armaments Group (WEAG) if unanimously agreed by participants of a programme and Article 24(4) stressing that if considered necessary competitive tendering may be limited to companies located in one of the Member States participating in the programme concerned. As observed by Heuninckx, it is not clear what the WEAG would refer to today, as this organisation which included a part of the EU's NATO Member States ceased to exist in 2005.[39] Ever since Brexit, OCCAR now also has a member state which is a 'third country' from the EU's perspective; further problematising OCCAR's compliance with internal market norms. Limiting competitive tendering to the countries participating in a programme is anyway generally preferred in collaborative projects and as stressed before inherently in conflict with the EU internal market.

Another non-EU instrument for collaborative procurement is the NATO Support and Procurement Agency (NSPA) which provides acquisition services to NATO member states as well as support for NATO operations. Depending on whether the agency procures for its own purposes or not, collaborative procurement can be excluded from the Directive based on Article 12(a) or 12(c). The agency itself is also not bounded by the EU Treaties, though it could be argued that the participating states which are also EU Member States have the obligation to ensure compliance of the agency's procurement with the basic principles of the EU Treaties in cases where derogation cannot be justified.[40] Except for cases where EU Member States manifestly seek to circumvent EU law by letting the NSPA procure non-strategic military equipment, there seems to be no significant EU law problem.

7.2.3 Added value of a general CSDP regime for military procurement

Besides the Directive, there is thus a variety of intergovernmental instruments seeking to somehow regulate parts of (collaborative) military procurement, mostly aimed at collaborative procurement. The Directive is currently, however, the only framework which has the ambition to be a generally applicable regulation. Given the incorrect legal basis of the Directive and its exclusion of collaborative procurement, the current regulation of the military procurement of the EU Member States is incoherent,

39 Heuninckx, *The Law of Collaborative Defence Procurement in the European Union* 2018, p. 185.
40 *Ibid*, p. 197.

inconsistent and incomplete. This can only be resolved by first, as proposed in the conclusion of Chapter 6, separating the broad 'defence and security procurement' from the military-strategic procurement. The latter, which is the focus of this dissertation, should then be generally regulated by a CSDP regime which includes the regulation of military offsets and collaborative procurement. As long as such a CSDP regime facilitates the function of military procurement which includes the strengthening of military interdependence between allies, it will not be in conflict with current practices of US imports and collaborative procurement through PESCO, OCCAR and the NSPA.

7.3 Judicial review and effective judicial protection in CFSP and CSDP matters

The rule of law is one of the core values on which the EU has been founded. The Court of Justice is, according to Article 19(1) TEU, assigned the role to "ensure hat in the interpretation and application of the Treaties the law is observed". Member States should, in addition, provide remedies which are sufficient to ensure effective judicial protection.

This section will show that the exclusion of jurisdiction for the Court in the legal context of the CSDP does not indicate that a military procurement regime based on this area of law would necessarily lack judicial review and effective judicial protection.

7.3.1 Jurisdiction of the Court of Justice in a CSDP regime for military procurement

The Court's general jurisdiction for matters which fall within the scope of the EU Treaties is limited in the context of the CFSP and CSDP. As stipulated by Article 24(1) TEU and Article 275 TFEU the Court has no general jurisdiction "with respect to the provisions relating to the CFSP nor with respect to acts adopted on the basis of those provisions". The same provisions also establish that two categories of cases which might arise in the context of the CFSP and CSDP are, nonetheless, within the jurisdiction of the Court. The Court has jurisdiction:

i) "to monitor compliance with Article 40 of the Treaty on European Union" (Article 40 has been extensively discussed in Chapter 6);
ii) "to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty [TFEU], reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union."

These two circumstances under which the Court has jurisdiction in CFSP and CSDP disputes are framed by Article 24(1) TEU as being 'exceptions' to the general exclusion of jurisdiction in these cases. The Court itself has, on the contrary, expressed that it is the exclusion of the Court's jurisdiction which should be considered as "a derogation from the rule of the general jurisdiction which Article 19 TEU confers on

the Court" and should – being a derogation from the general rule – be interpreted narrowly.[41] The approach of the Court adheres to the legal logic of the EU Treaties. As elaborated throughout this dissertation, since Lisbon the Treaties comprise a constitutional and more unified legal order of which the CFSP and CSDP are intrinsic parts. Simultaneously, the Charter of Fundamental Rights of the EU (CFR) became an intrinsic part of the EU's constitutional order of which the right to effective judicial protection is an intrinsic part.[42] As enshrined in Article 19(1) TEU, domestic courts play a pivotal role in ensuring effective judicial protection. The Court does not therefore need complete jurisdiction for ensuring that the fundamentals of EU law also apply in a CFSP context.[43]

Based on this approach, the Court's jurisdiction in CFSP matters generally concerns, as observed by Hillion and Wessel, cases in which general EU rules and principles need to be applied in a CFSP or CSDP situation.[44] There should, in other words, be a link with a more general area of EU law. In *Elitaliana* (2015), the Court ruled, for instance, that it has jurisdiction over matters of CFSP operational expenditure, which according to Article 41(2) TEU is charged to the general Union budget. More specifically, the Court had jurisdiction in this case to adjudicate on the compatibility of the awarding of a service contract with the EU's Financial Regulation.[45] For the military procurement context this jurisdiction is, however, of no use. First, also when there would be a CSDP regime applicable to military procurement, it would still exclusively be the Member States who actually procure military equipment. Even if a Union body, such as the European Defence Agency, would act as a procuring agency for the Member States and/or the Union Article 41(2) TEU would still exclude such expenditure from being charged to the Union budget as it would be "arising from operations having military or defence implications". Likewise, the Court does not have jurisdiction over the expenditure by the European Peace Facility, as it may not be charged to the Union budget.

41 This was first expressed in: Case C-658/11, *EP* v *Council (Mauritius)*, ECLI:EU:C:2014:2025, para. 70 and reiterated, for instance, in: Case C-439/13 P, *Elitaliana*, ECLI:EU:C:2015:753, para. 40. See for this observation also: C. Hillion and R. Wessel, "The Good, the Bad and the Ugly': three levels of judicial control over the CFSP', in: S. Blockmans and P. Koutrakos, *Research Handbook on the EU's common foreign and security policy*, Edward Elgar Publishing 2019, pp. 67-68.

42 Article 47 CFR.

43 Butler has argued, on the contrary, that the unification of the EU's institutional framework and the EU's system of judicial protection will eventually pave the way for the Court to "erode the jurisdictional derogation imposed on it" (p. 676), despite the phrasing of Article 24(1) TEU. More normatively, he claims that this is feasible as "Keeping CFSP within the ambit of a judicial check is a norm that any self-respecting entity that prides itself on certain values, be they internal or external, would respect" (p. 700). Except for the argument that the primacy of EU law cannot effectively be upheld by the national courts (p. 694), he does not, however, substantiate why the *judicial check* should necessarily be completely within the jurisdiction of the Court rather than the domestic courts which are also parts of the EU's judiciary system. See: G. Butler, 'The Coming of Age of the Court's Jurisdiction in the Common Foreign and Security Policy', *European Constitutional Law Review* 2017, pp. 673-703.

44 Hillion & Wessel "The Good, the Bad and the Ugly" 2019, p. 68.

45 Case C-439/13 P, *Elitaliana*, ECLI:EU:C:2015:753, paras 41-49. For the latest version of the EU's Financial Regulation, see: Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union.

As expressed by Article 24(1) TEU, the Court can also review the legality of CFSP "decisions providing for restrictive measures against natural or legal persons". Over the years, it has shown that this part of the Court's jurisdiction is mostly limited to reviewing the legality of CFSP sanctions targeted at individuals. As long as the applicant of the proceedings is directly and individually concerned by the decision, the Court can rule on its legality. In *Rosneft* (2017), the Court decided that when such cases are brought before a national court, the provision must – in the light of effective judicial protection – be interpreted as allowing them to refer questions to the Court in the context of a preliminary ruling procedure.[46] In the context of military procurement, there seems to be no jurisdiction of the Court based on there being "restrictive measures" in place. A CSDP regime would only provide a legal framework regulating the procurement procedures of the Member States with a strictly general application. The procurement decisions which would in fact directly and individually concern natural or legal persons will not be adopted by the Council but by the national authorities.

The general competence of the Court to monitor compliance with Article 40 TEU is highly relevant in the context of a possible CSDP regime for military procurement. The conclusion I defended in Chapter 6 is that military procurement falls partly within the internal market and partly within the CSDP. Article 40 TEU expresses the necessity of a strict demarcation of the Union's CFSP/CSDP competence and its TFEU competence, the latter including the internal market. When a CSDP regime for military-strategic procurement would be adopted by the Council, it would thus be for the Court to establish whether in a certain case a Member State has plausibly claimed a contract to be of a strategic nature and can thus fall within the CSDP regime instead of the internal market regime. The role of the Court in such cases is similar to its role in cases where it has to decide whether a certain contract can be exempted from the whole of EU law based on Article 346 TFEU.

7.3.2 Role for the national judiciaries in upholding the substantive rules

It is undisputed that the judiciaries of the Member States are integral parts of the legal order comprised by the EU Treaties. In the words of the Court of Justice, it is "evident" from Article 19(1) TEU that national courts are together with itself "guardians of that legal order and the judicial system of the European Union".[47]

Although Article 24(1) TEU and Article 275 TFEU severely limit the jurisdiction of the Court of Justice in CFSP and CSDP matters, the EU Treaties do not expressly do so for the jurisdiction of national courts. Advocate General Kokott therefore observed in her view on the EU's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) that in cases where the Court of Justice does not have jurisdiction, individuals can resort to national courts for judicial protection as far as the CFSP or CSDP-based measure is of direct and individual

46 Case C-72/15, *Rosneft*, ECLI:EU:C:2017:236, para. 76.
47 Opinion 1/09 of the Court, *Creation of a unified patent litigation system*, ECLI:EU:C:2011:123, para. 66.

concern to the person.[48] In the legal literature on judicial review in the context of the CFSP it has been stressed that where the Court itself does not have jurisdiction on CFSP and CSDP measures because of Article 24(1) TEU the domestic courts thus play a complementary role.[49]

It is, arguably, still uncertain as to how far judicial review by national courts in such cases could go. The role of the national courts generally suits the principle of conferral. According to Article 5(2) TEU "competences not conferred upon the Union in the Treaties remain with the Member States", so jurisdiction which is not with the Court of Justice remains with the national judiciaries. Even when the Union itself is a party in a dispute the jurisdiction of a national court cannot on that ground be excluded when the Court of Justice has no jurisdiction, as expressed by Article 274 TFEU. The *Foto-Frost* principle would still apply in such disputes, meaning that national courts cannot rule on the validity of EU measures as that would jeopardise the uniform application of EU law and the unity of its legal order.[50] According to Kokott, this is slightly different in CFSP disputes, as the Court cannot "claim its otherwise recognised monopoly on reviews of the legality of the activities of EU institutions, bodies, offices and agencies".[51] Instead of invalidating a CFSP measure, national courts could "disapply" or "suspend its application".[52]

As there is no final answer on the role of the national courts in adjudicating on the validity of CFSP and CSDP measures, it remains somewhat uncertain as to how far their jurisdiction goes. In the context of a possible CSDP military procurement regime, this final answer is, however, unnecessary. As rightly observed by Hillion and Wessel, national courts can surely invalidate national measures which are taken in the context of a CFSP or CSDP act.[53] Not only would the national courts have jurisdiction to scrutinise procurement decisions of contracting authorities on the basis of the regime itself, they would also be obliged to apply the Charter of Fundamental Rights of the EU (CFR) given that the procurement agency would be acting within the scope of EU law. This includes, for instance, the right to an effective remedy of Article 47 CFR.[54]

48 View of AG Kokott in Opinion procedure 2/13, *on the Accession of the European Union to the ECHR*, ECLI:EU:C:2014:2475, para. 99.

49 See for instance: P. Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy', *International and Comparative Law Quarterly* 2018, pp. 29-30 and Hillion & Wessel "The Good, the Bad and the Ugly" 2019, pp. 81-86.

50 Established by the Court in: Case 314/85, *Foto-Frost*, ECLI:EU:C:1987:452, para. 15.

51 View of AG Kokott in Opinion procedure 2/13, *on the Accession of the European Union to the ECHR*, ECLI:EU:C:2014:2475, para. 100.

52 As observed in: Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy' 2018, pp. 31-32. Kokott speaks of disapplying, whereas AG Wahl in another case speaks of suspending application, see: Opinion of AG Wahl in Case C-455/14 P, *H* v *Council and Commission*, ECLI:EU:C:2016:212, para. 103.

53 Hillion & Wessel "The Good, the Bad and the Ugly" 2019, p. 84.

54 See: Article 51(1) CFR.

7.3.3 Shared jurisdiction in a context of constitutional pluralism

Although the jurisdiction of the Court of Justice is severely limited in the context of the CSDP, a possible CSDP military procurement regime would in no way need to be without judicial review. The Court could exercise its limited jurisdiction by ruling whether, based on Article 40 TEU and Article 346 TFEU, a certain contract falls within the CSDP or the internal market. National courts could, subsequently, exercise their jurisdiction by ruling on whether for a certain contract that falls within the CSDP regime the procurement agency acted in conformity with the substantive rules and principles of that regime. As far as issues related to Article 40 TEU and Article 346 TFEU, or related to general principles of EU law such as effective judicial protection based on Article 47 CFR, would arise in such a national proceeding, the national court could refer these questions to the Court of Justice like in any other cases.

Such a system of shared jurisdiction naturally suits a constitutional pluralist approach to EU law as propagated in this dissertation. The main proposition of this approach is to understand the interaction of the EU legal order with the national legal orders of the Member States as an interaction without absolute hierarchy. Within their own constitutional scopes, these legal orders as well as their judiciaries are equally legitimate. So the Court of Justice can legitimately adjudicate on the scope of application of different military procurement regimes, while the national courts can adjudicate on their content. This is no novelty, as national courts have always been pivotal for the application of EU law and form part of the EU's system of judicial protection.[55] Military procurement regulation within the CSDP could institutionalize the national interests within a European regime, as long as the alignment of these national interests forms the theoretical basis of the rules. In the conclusion I will propose five principles on which such a regulation could be based.

Conclusion: guidance for an effective CSDP regulation

The previous chapters showed why the EU's current military procurement regime is ineffective and why the internal market is not its correct legal basis. The shortcomings of the current regime should guide the regulatory choices to be made for its replacement. Instead of liberalising the military sector like other sectors of industry, regulation should focus on facilitating the military function of military procurement within a European context; *i.e.* maintaining and increasing military power through strengthening national capabilities and fostering military interdependence. As long as European integration is derived from the sovereignty of the Member States, as elaborated in Chapter 3, European security can only be based on the sum of national security which depends both on national capabilities and military interdependence.

One could criticise the nature of the obligations that I propose below for being too 'soft', as they mostly consist of obligations to state reasons. It is, however, exactly through this type of commitments that the CFSP seeks to foster a security culture

55 Article 19(1) TEU.

within the EU. In addition, this chapter has shown that the general exclusion of jurisdiction for the Court does not need to stand in the way of judicial review and thus also of effectiveness when regulated based on shared jurisdiction. Although courts – national or EU courts – will always leave a wide margin of discretion to national authorities to determine the interests of national security, they can play an important role in adjudicating on 'how' these interests of national security are effectuated. When it comes to military procurement, the law should ensure that the procurement budgets are spent in a just and effective manner; as far as possible uncorrupted by non-military interests. Both the Court of Justice and the national courts of the Member States can contribute to this.

Based on the findings of this dissertation, I propose that the following principles should guide the norms of a future renewed regulation within the context of the CSDP.

I. Judicial review of the scope of application of a future CSDP regulation

As discussed in Section 7.3, the EU Court of Justice could exercise its limited jurisdiction in cases that concern the question as to whether a certain contract falls within the scope of application of the CSDP regime or the internal market. As this question also concerns the scope of application of the internal market, the enforcement thereof could – like in the current situation – be assigned to the Commission.

II. Transparency to underpin Union loyalty and build the groundworks for political solidarity

A CSDP regime should substantively build on the CFSP's consultation obligation by requiring Member States – similar to the Defence Procurement Directive – to publish contract notices for the procurement procedures to which the regime applies. For the Directive this transparency obligation, however, serves a different purpose. In the context of EU public procurement law, including the frameworks of the different public procurement directives, the transparency obligation specifically seeks to ensure that the principles of non-discrimination and equal treatment are complied with by the contracting authority. As emphasised in Chapter 5, the Court confirmed this in *Telaustria* (2000), by stating that the transparency obligation consists in ensuring "a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed".[56] The general function of the transparency principle is, however, much broader, as without transparency there can be no effective judicial protection for affected individuals, which is required by Article 47 CFR and Article 19(1) TEU. In addition, transparency in public procurement is generally considered to foster value for money as it facilitates as wide as possible competition between economic operators. In addition, transparency decreases the opportunities for corruption.

56 Case C-324/98, *Telaustria Verlags GmbH*, ECLI:EU:C:2000:669, paras 61-62.

As for internal market-based public procurement law, the transparency obligation would serve a *specific* as well as a *general* function in a possible CSDP regime. In the previous section we have already established that although the Court's jurisdiction in CSDP matters is severely limited, the general principles of EU law still apply in this context. Transparency is in that regard needed to ensure effective judicial protection. Specifically, a transparency obligation in a CSDP regime on military procurement would build on Article 32 TEU which requires Member States consult one another "on any matter of foreign and security policy of general interest in order to determine a common approach". Contracts with a significant military-strategic value should in that regard be considered as parts of "security policy of general interest", as the decisions which are taken in such a procurement procedure affect the military capabilities on which the CSDP is build.

The transparency obligation should thus foster the development of a military security culture within the EU. Only by developing such a security culture, mutual trust between the Member States in their military affairs could prosper and some sort of political solidarity could eventually arise. The intergovernmental nature of the CSDP would safeguard the reality that in absence of a common army divergence in strategic preferences can never be completely taken away.

III. Interoperability for effective collective self-defence

The third principle for an effective CSDP regime is that it should foster the interoperability of the weapon systems of the EU Member States, preferably also encouraging interoperability within NATO. Different EU instruments seeking to shape and regulate military industries, such as the Defence Procurement Directive and the European Defence Fund, have emphasised the problem of fragmentation in this sector. Next to insufficient economies of scale, fragmentation is considered to undermine interoperability of the weapon systems of the Member States and thereby undermine effective and cost-efficient operational cooperation. A future CSDP regime could contribute to interoperability and decrease fragmentation by requiring Member States to consult one another before procuring equipment with a new technological system. In such a consultation process, other Member States can inform the procuring state about possible technological solutions which are already present within the Union, for instance those developed in the frameworks of the European Defence Fund. If the procuring state wishes to develop a new system anyway, it would be required to motivate why this is feasible for technological or strategic reasons.

Interestingly, a focus on promoting interoperability rather than market integration appears to correspond with the Commission's current approach to defence. In its 2022 policy paper on its 'contribution to defence', the Commission emphasised the need for Member State to invest and cooperate more in the field of defence, and investments in "key strategic capabilities and critical enablers that are developed and/or procured in European Union cooperative frameworks" and to "further incentivise joint procurement

of defence capabilities".[57] No reference is made to the Defence Procurement Directive in the policy paper, except for the possibility to exclude cooperative R&D-based projects from the application of this regime. Later on in 2022, the Commission proposed a framework for incentivising joint procurement by allocating 500 million euros for the period 2022-2024 for cooperative procurement projects with at least three Member States.[58] In the Council's earlier Strategic Compass this approach was established, emphasising the need for increasing defence expenditures and stimulating "collaborative investments in joint projects and joint procurement of defence capabilities that are developed win a collaborative way".[59] Rather than market integration, joint development and procurement combined with greater investments are promoted and incentivised through financial contributions of the Union as a means to achieve greater economies of scale.

IV. The fourth principle: competitive bidding limited by the function of military procurement

Most importantly, as a fourth principle for a CSDP regime, its rules should facilitate and stimulate the function of military procurement within a European security context. As put forward in Chapter 1, the obvious purpose of military procurement is to gain military power by acquiring military equipment which is technologically superior and more effective than the equipment of (potential) adversaries. In a competitive bidding procedure this sole purpose is generally safeguarded by describing the needs of the contracting authority as good as possible in the technical specifications, performance conditions and award criteria. In addition, states pursue two additional objectives in their military procurement through which they can gain military power. These are 'additional' in the sense that they do not relate to the technical features of the equipment to be procured. These additional objectives are:

i) preserving domestic military industries through subsidies and buy-national policies, to minimise dependency on foreign entities over which a state cannot exercise control in a state of emergency;
ii) fostering military interdependence within military alliances through their procurement by integrating domestic subcontractors in the supply chains of foreign prime contractors (usually by the use of some sort of military offsets).

57 Communication from the Commission, COM(2022) 60 final, *Commission contribution to European Defence*, Strasbourg 15 February 2022, p. 21.

58 COM(2022) 349 final, *Proposal for a Regulation of the European Parliament and of the Council on establishing the European defence industry Reinforcement through common Procurement Act*, Brussels: 19 July 2022. See also more generally: JOIN(2022) 24 final, *Joint Communication: on the Defence Investment Gaps Analysis and the Way Forward*, Brussel: 18 May 2022.

59 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, pp. 30-33. Also in the Member States the need for interoperability is recognized, for instance in the Netherlands, see: Ministerie van Defensie, S*terker Nederland, Veiliger Europa: Investeren in een Krachtige NAVO en EU*, Defensienota 2022, pp. 32-35.

Including these additional objectives within a regulatory framework can be quite straightforward. Both objectives require contracting authorities to ensure domestic development, production and/or maintenance of military equipment. This can be executed by multinational operators (legally) establishing themselves in the procuring state or by domestic operators operating as prime- or subcontractor. Establishment in the procuring state, not just of the economic operator but – as far as possible – of the production process, can be required through performance conditions and should be communicated transparently in the contract notice.[60] In addition, there should be no limit on the extent to which a state can demand security clearances, also not when these clearances require parts of the shareholders, board and/or personnel to possess the nationality of the state in question.[61] As far as contracting authorities choose to include nationality requirements in their procurement, the CSDP should require them to motivate the necessity thereof. The regulation could then still prescribe competitive bidding outside the frameworks of the internal market except for cases in which there is based on the special requirements no competition possible. Competition is then based on which tenderer meets the security demands of the contracting authority best.

Limited competitive bidding would also concur with the existing intergovernmental instruments regulating military procurement within the EU, NATO and the OCCAR, discussed in Section 7.2. When it comes to collaborative procurement projects within these intergovernmental instruments, states tend to limit access to competitive bidding procedures to companies established in one of the participating states. Unlike internal market regulation, which is necessarily based on the principle of non-discrimination between EU-based companies, a CSDP regulation could allow this.

V. Allowing indirect military offsets under strict conditions

The fifth principle creates a competitive bidding procedure in which Member States can require direct military offsets by imposing suppliers to include domestic subcontractors within the production of the procured equipment. As elaborated in Chapter 2, in certain cases, where no direct military offsets are possible, Member States will seek to impose indirect military offsets.

Like the EDA's Code of Conduct on Offsets prescribes, the value of indirect offsets should not exceed the contract value of the procurement, to prevent unnecessary distortions of competition.[62] It could also be considered as to whether it would be good to limit the maximum value of indirect offsets to a lower percentage of the contract value. In addition, the rules on indirect offsets should require Member States to motivate that the indirect offsets contribute to "competent, competitive and capability driven" industrial capabilities which are deemed necessary for the strategic

60 This is also required by the EDA's Code of Conduct on Offsets.

61 The nationality requirement is, after all, also allowed for the military personnel of the Member States, based on Article 45(4) TFEU.

62 European Defence Agency, *Code of Conduct on Offsets*, Brussels: 24 October 2008, p. 3.

security interests of the involved state.[63] More concretely this means that the indirect offsets should build on a more general industrial policy which points out which specific industrial capabilities the state strives to maintain within one's borders.[64]

63 *Ibid*.

64 Such as elaborated in for instance: Ministerie van Defensie and Ministerie van Economische Zaken en Klimaat, *Nota: Defensie Industrie Strategie*, November 2018. And in the case of Germany: Die Bundesregierung, *Strategiepapier der Bundesregierung zur Stärkung der Sicherheits- und Verteidigungsindustrie*, February 2020.

Concluding Observations – Procurement for peace, in preparation of war

The 2022 invasion of Ukraine by the Russian military has confronted the EU and its Member States with the Hobbesian reality of their existence.[1] In a world where military force has factually remained a means for conflict resolution, states and their values only survive if sufficiently armed. As a result, military procurement is an existential activity for the sovereign state. After decades of exploiting a kind of 'peace dividend', Putin brutally showed Europe that economic interdependence is by no means a guarantee for non-violence in international relations. In a few weeks, Germany substituted its self-proclaimed 'pacifism' and the Nord Stream 2 pipeline to Russia for a 100 billion euros investment in its military, even including the planned procurement of F-35 fighter planes from the US, and it started supplying Ukraine with offensive military equipment. Even if war is less likely between economically interdependent states, it does not take away the risk of the power-seeking autocrat using the dependency and the wealth it creates as a means to finance its aggression.

Military procurement is in both peacetime and wartime an activity that is intrinsically connected to dealing with external threats such as the current threat to European security posed by Russia. While the function of military procurement is rooted in the striving for national military power within the sovereign state, its peace and security purpose can only be reached in a shared European security culture. To effectively regulate this distinct area of public procurement on the EU level, both its national function as well as its international purpose should be appreciated.

This research has, for that sake, been an endeavour to capture the connections between sovereignty and interdependence for effective EU regulation of military procurement. In this final part, I will first set out the main findings of the dissertation, after which I will reflect on their relevance in a broader context. First, I will discuss the relationship between military security and liberal democracy. Secondly, I will elaborate why we should not build a European supranational army as a response to emerging security threats. Thirdly, I will reflect on the relationship between peace and military procurement. Finally, I will reflect on the future of EU defence policy.

The main conclusions of this dissertation

In the first part of this research, I concluded that the constraints of global structures of military power on EU regulation of military procurement are severe and that the current regulation therefore lacks *functional effectiveness*. The constraints imposed by power structures on military-industrial integration fundamentally differ from the

1 Some of my concluding thoughts were published in a blog post contribution, see: N. Meershoek, *The EU's response to Russia's invasion of Ukraine: a new direction in EU defence policy or a reinforcement of military interdependence?*, RENFORCE Blog, Utrecht: 13 April 2022 (see: <http://blog.renforce.eu/>).

constraints on the EU's – more successful – endeavours to regulate other sectors of industry. Military-industrial integration cannot be effectively based on the economic-interdependence model of the internal market alone. In a general sense, it is difficult to precisely distinguish economic interdependence from military interdependence, as many sectors such as the energy and tech sectors influence both military- as well as economic structures of power between states. Military equipment – when following the definition of the EU Court of Justice – is an exception to this difficulty, as its procurement only serves a military function in society; creating a public demand. Without such a public demand for military security – in an ideal world perhaps – there would be no military procurement; so there would be no supply. Military power is thus the public good par excellence and for a meaningful understanding it should be distinguished from economic power. Although economic wealth might be able to buy you some peace from time to time, without military capabilities one can never be secure.

Military procurement should therefore be understood for what it is; an activity aimed at gaining military power. Concerns of economic development intervene sporadically in military procurement decision-making when there is opportunity for including domestic companies in the military supply-chains, though these concerns mostly coincide anyway with the rationales of military power.[2] Military procurement decisions have enormous economic implications and the available budgetary means for the military are always limited. In times of peace, these economic concerns, such as creating employment, could therefore even be emphasised by democratic governments as a way to gain popular support for military expenditure. In a rational procurement process, these economic concerns should, however, be subordinated to the military rationales.

The relationship between military procurement and military power is thus quite obvious. Military procurement is the activity of buying military capabilities, a crucial element of military power. When following a broad understanding of military capabilities, thus including the military-industrial capabilities within a state (so not necessarily state-owned), buying from suppliers which – at least partly – develop and produce the capabilities domestically positively affects the military power of the procuring state. Some industrial independence is gained in that case. Absolute industrial independence – also referred to as autarky – is, however, impossible for almost all states in the globalised economy. In the current state of play, it remains a utopian vision for the EU as well, regardless of its widespread policy to foster strategic autonomy.[3] To prevent excessively asymmetrical dependence on others, states therefore also seek to strengthen *inter*dependence within the structures of their military alliances. Such interdependence is an element of their power as well.

2 For instance visible in the strategy of the Dutch government for the procurement of new submarines, in which the foreign tenderers can obtain points for including Dutch companies in the development, engineering, production and maintenance of 'critical systems', see: Letter of the State Secretary of Defence to the *Tweede Kamer* (Second Chamber of Parliament), *Offerteaanvraag vervanging onderzeebootcapaciteit*, 30 September 2022, p. 6.

3 Within NATO such autarky is much more realistic; but the variety of military interests is greater as well.

Unlike European *economic* interdependence, which is institutionalised by reciprocal market access for different sectors of the economy, *military* interdependence is then based on collective self-defence. Within NATO and the EU states contribute to the collective security on which their national security is based with their own military capabilities.[4] Transnational specialisation in the military domain is neither impossible nor unfeasible, but it should take place within a framework of military interdependence rather than being integrated within the existing structures of economic interdependence. As long as we live in a European society of sovereign states, some inefficiency is inevitable as outsourcing military capabilities to other Member States is restrained by their constitutional and international tasks to which they owe their existence. A rational military procurement process is, in such a context, solely driven by the urge to gain as much as possible military power within the budgetary limits through:

i) buy technologically superior equipment;
ii) maintain and strengthen domestic industries to gain some level of industrial independence;
iii) foster military interdependence by choosing possible foreign suppliers strategically.

The EU's Defence Procurement Directive fails to sufficiently facilitate this military-power rationale because it was adopted on the legal basis of the internal market enshrined in Article 114 TFEU. The Directive provides additional options – as compared to the regular public procurement directives – to impose obligations concerning security of supply and security of information on suppliers and the possibility to exclude unreliable suppliers from procurement procedures. It allows no structural derogation from the principle of non-discrimination, even though national security screening procedures often include discriminatory conditions. In absence of EU military-operational integration, meaning a shift of the security responsibility to the European level, Member States will continue to rely on the armaments exception of Article 346 TFEU to buy from domestic suppliers or to impose offsets on foreign suppliers. Considering the Court's contextual approach to the different security exceptions in the EU Treaties, there is wide room for exception in military procurement, as long as exception is duly explained per procurement decision and coherently fits with the industrial security strategy of the concerned Member State.

As a consequence, the Directive is an ineffective instrument for regulating military procurement, both in terms of *functional effectiveness* as well as in terms of *legal effectiveness*. The regulation has been guided by the principles of non-discrimination and free movement because of its internal market legal basis. In the second part of the research I concluded that, within the constitutional setting that regulates the choice of legal basis for EU measures, this lacking potential effectiveness results in the Directive being adopted on the wrong legal basis. Article 3(6) TEU and Article 40 TEU require a strict demarcation between the Union's CSDP and TFEU competences, whereas

4 Article 47(3&7) TEU.

the Directive intentionally seeks to blur the dividing lines between military-strategic procurement which can be based on Article 346 TFEU and other procurement which falls within the sphere of the internal market. To resolve this illegality, the EU legislature should distinguish this military-strategic procurement from other procurement. The military aim of the Directive and the *lex specialis* principle as applied by the Court in legal basis disputes then require military-strategic procurement to be primarily based on the EU's CSDP competence.

In the third – and final – part of the research, I have provided guidance for resolving the effectiveness problems of the Directive. Regulation of military procurement should positively contribute to the military security of the Member States by imposing transparency obligations and stimulating interoperability. The military procurement default within the EU should be to technologically align with or further develop existing European weapon systems where this fits the national security strategy of the procuring state. Member States can deviate when necessary to maintain or stimulate essential national industry or where it is necessary to align with NATO weapon systems (mostly those produced in the US or UK) for reasons of operational effectiveness and military interdependence.

The transparency obligations will force Member States to address these issues within a framework that aims to facilitate a European security culture; ultimately ensuring military solidarity in terms of effective collective self-defence. In addition, the regulation should facilitate the *military* function of military procurement by allowing states to impose discriminatory requirements on tenderers as far as these genuinely pursue a military-industrial objective. Such regulation could also regulate collaborative procurement of the Member States, instead of exempting that from its scope of application as has been done by the Directive. Interestingly, the Commission has recently been focusing on ways to stimulate and regulate such collaborative procurement of the Member States, although within separate measures based on the EU's industrial policy competence.[5] It is not yet clear how these new initiatives would relate to the application of the Directive and whether the Directive will remain the primary regulation of military procurement under EU law.

The answer to the main research question can be derived from the sub-conclusions. The sovereign right of Member States to hold military power indeed constrains the EU's potential to regulate military procurement. It affects the choice of legal basis in favour of the CSDP instead of the internal market when applying the centre of gravity method as developed over the years by the Court of Justice. In addition, it affects the choice of substantive rules as they will only be effective when sufficiently safeguarding the military-power rationale for which it is necessary to deviate from the internal market rules. For military procurement regulation to be effective, its rules should be

5 See: JOIN(2022) 24 final, *Joint Communication: on the Defence Investment Gaps Analysis and the Way Forward*, Brussels: 18 May 2022 and COM(2022) 349 final, *Proposal for a Regulation of the European Parliament and of the Council on establishing the European defence industry Reinforcement through common Procurement Act*, Brussels: 19 July 2022.

based on sovereignty and interdependence. The last chapter has provided guidance on how to shape the substance of such effective regulation.

Based on the findings and their political context as described in this dissertation, more can be said on the interrelationships between military power and liberal democracy, sovereignty and interdependence and their relevance for EU military procurement regulation.

Military security and liberal democracy

Kant's idea of *Ewigen Frieden*, popularised as democratic peace theory, contains an existential truth.[6] Like Orwell foresaw, nationalism, autocracy and great military power is a most dangerous combination, giving rise to offensive wars, whereas the economic burden for an offensive war will often be too high for genuinely democratic governments.[7] The idea that democracies will not go to war with one another, thus that there would be eternal peace if all countries would turn into democracies, to some extent makes perfect sense.[8] Yet, the idea of democratic peace has not proven to be a useful building block for foreign policy. It is as persuasive as practically useless in terms of dealing with autocracies in a world where democracy cannot effectively or legitimately be imposed on countries by military means and only 6.4% of the world's population appears to live in 'full democracies'.[9] More problematically, such 'democratic' offensive wars will often even have the reverse effect in the country that militarises in order to impose democracy on its adversary, as militarisation generally undermines democratic processes.[10] For the sustainment of the ideals of liberal democracy through military means it appears better to focus on defending the military security of the countries in which these ideals still prosper and hope to lead by example.

The end of the Cold War led, however, to years of drastic budget cuttings in Western Europe and a decline of its militaries. Accustomed to the American security umbrella, European countries started to exploit some sort of *peace dividend*. Economic growth became the primary purpose of the Western European states in the eyes of their populations. Security was taken for granted and the military was often the first in line

6 I. Kant, 'Toward Perpetual Peace' (*Zum ewigen Friede*), in: *Toward Perpetual Peace and Other Writings on Politics, Peace and History* (translated by David L. Colclasure), Yale University Press 2006 (first published in 1795).

7 G. Orwell, *Notes on Nationalism*, Penguin Random House 2018 (first published in 1945), pp. 2-3. The economic burden for offensive wars is not always too high for democratic governments when in possession of great military power. This has been shown by the different wars initiated by the US in recent history aimed at internal regime-change (most clearly in Vietnam and Iraq). Clearly, there are much more variables which could trigger a nation into initiating an offensive war than the absence of democracy alone.

8 Even though there are (though very few) historic examples of democratic states fighting wars, as pointed out by Mearsheimer; criticizing the idea of democratic peace, see: J. Mearsheimer, *The Great Delusion: Liberal Dreams and International Realities*, Yale University Press 2018, pp. 194-204.

9 According to the most recent Democracy Index of the EUI, see: The Economist Intelligence Unit, *Democracy Index 2021: The China Challenge*, p. 4.

10 See: Mearsheimer, *The Great Delusion* 2018, pp. 179-185.

for budget cuts.[11] The expansion of NATO and the EU eastwards seemed to confirm this assumption. At the same time, this expansion was considered to be a key to an even more prosperous future as it also expanded the free trade potential. In the end, the strict distinction between the low politics of economic welfare and the high politics of military power seemed not to make sense any longer.[12] Intensifying the import of energy from Russia made perfect sense in a context in which there is no longer strict distinction between high politics and low politics. The Defence Procurement Directive is a perfect example of this belief as well, as it seeks to institutionalise an aspect of the high politics of military power within the legal architecture of the low politics of economic integration.[13]

Meanwhile, at the other side of the peace dividend, the autocrat did not intrinsically care about the fruits of this stability. Economic growth can be great for citizens, but for the autocrat it remains first and foremost an economic basis for power.[14] Per definition, the autocrat is more invested in the politics of military power than a liberal in its foreign policy, as for the autocrat power is a goal in itself. Several studies on the impact of regime type on military expenditure confirm the Kantian assumption that democracies tend to generally spend a smaller portion of their GNP as well as of their total government expenditure on the military.[15] However, these studies also suggest that the regime type of a country is neither the only nor the most influential indicator for a country's military spending. A 2021 study found that the difference between democracies and autocracies in military spending primarily depends on 'external threat'; which is defined as "the predicted probability of a fatal militarized interstate dispute". While the impact of external threat on military spending tends to be low in autocracies, in democracies it has a major impact.[16] So democracies with a low external threat tend to spend much less on the military than autocracies with a low external threat, while military expenditure is similar in democracies and autocracies when both are faced with a high external threat. This perfectly explains the reaction of the EU Member States to the 2022 war in Ukraine. Faced with great external threat,

11 This is remarkable, as Goldsmith concluded in 2003 based on military expenditure data from the time period 1886-1989 that "the competition of resources makes expansion of the military's share more likely in periods of high growth and in wealthier societies", see: B. Goldsmith, 'Bearing the Defense Burden, 1886-1989', *Journal of Conflict Resolution* 2003, p. 569. Apparently, other variables such as threat level and regime type weigh heavier.

12 The fading of this distinction was already visible in: R. Keohane and J. Nye, *Power and Interdependence* (4th edn.) Longman 2012 (first published in 1977).

13 At the same time it is an example of a broader post-Cold War trend to organise public tasks based on the principles of the free market, such as competition and economic freedoms.

14 The economic basis for military power is also based on self-sufficiency in food and raw materials such as oil (economic power), see for instance: H. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, (4th edn), New York: A. Knopf 1967 (first published in 1948) and J. Mearsheimer, *The Tragedy of Great Power Politics*, W. W. Norton & Company 2001, Chapter 3.

15 See for instance: B. Goldsmith, 'Bearing the Defense Burden' 2003, pp. 569-570, B. Fordham and T. Walker, 'Kantian Liberalism, Regime Type, and Military Resource Allocation: Do Democracies Spend Less?', *International Studies Quarterly* 2005, pp. 141-157 and J. Brauner, 'Military Spending and Democracy', *Defence and Peace Economics* 2015, pp. 409-423.

16 See: M. Hauenstein, M. Smith and M. Souva, 'Democracy, external threat, and military spending', *Research and Politics* 2021, pp. 1-13.

military expenditure is increasing tremendously, including Germany's planned 100 billion euros investment in its military, while autocratic Russia's military spending as a share of GDP had been way above those of the Member States throughout the last decades.[17]

To some extent, the autocrat is the archetype of the 'power-seeking human' at the heart of realist political theories such as those of Hobbes and Morgenthau. However, autocratic leaders are often more concerned with their individual political power than with national power. To sustain their political power autocrats per definition rely much more on violence than democrats. Increasing military expenditure can therefore serve the autocrat's individual power when it receives the support of the military in return.[18] Unlike the rational 'power-seeking human', the rational power-seeking state in international realism thus remains a theoretical assumption rather than an observable reality.[19] The assumption has great value for understanding how power structures constrain the freedom of action of states and international organisations, but it alone cannot explain why they act as they do. Different types of other preferences intervene with their strategic decisions.[20] Similarly, the state itself remains a legal and theoretical construct, while its sovereignty remains, in the words of Hobbes, its *artificial* soul.[21] Power being a goal in itself; the autocrat's use of power and military force extends far beyond Machiavelli's realism, which only presumes that there can be no effective morality without effective authority.[22] The autocrat is solely concerned with the questions of how to sustain and consolidate power, meanwhile democracies are debating its purpose.

The narrow-mindedness of being obsessed with power gives the autocrat an initial advantage when starting an offensive war. Unlike the liberals who have been cutting defence budgets in times of low external threat, war has always been in the mind of the autocrat. The paradox of democratic peace theory lies in the impossibility to effectuate it in the arena of global politics, where autocrats appear to be ever-present. Unlike almost all other policy areas, military procurement is inherently about

17 While both Russia as well as Western European states such as Germany and France went through a decrease of military spending as a share of GNP in the mid-1990s, from 1999 onwards Russia started to gradually increase its spending while France's and Germany's military spending decreased further or remained roughly the same. See SIPRI Military Expenditure Database.

18 For such a rent-seeking explanation of military expenditure of autocracies, see for instance: J. Mbaku, 'Military expenditures and bureaucratic competition for rents', *Public Choice* 1991, pp. 19-31.

19 Classical realists, such as Morgenthau, tend to project the power-seeking human on the nature of the state in international relations. The individual interests of autocratic and corrupt leaders do not, however, naturally correspond with the geopolitical interests of the state.

20 This is, for instance, also acknowledged in the liberal intergovernmentalist approach to European integration as an interaction of preferences and power, see: A. Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach', *Journal of Common Market Studies* 1993, pp. 473-524.

21 Rousseau's idea of popular sovereignty enshrined in some sort of 'general will' projects the will of the people on the formation of government, even though the sovereign rights of governments are always exercised by individuals. Unlike sovereignty itself, which remains a metaphysical construct, the exercise of sovereign rights should be constrained in a liberal democracy.

22 Consequently, "war is the sole art looked for in one who rules", see: N. Machiavelli, *The Prince* (*De Principatibus / Il Principe*), Dover Publications 1992 (first published in 1532), p. 37.

gaining as much as possible military power within the budgetary limits democratically imposed on it. For liberal democracies, it therefore presents a unique opportunity to arm oneself against the autocratic danger as far as this danger results from external threat. Regulating military procurement should then be based on international realism. At the same time, we should not ourselves become like the autocrat; obsessed with power. We should ensure that military power, in times of peace but even more so in times of war, retains a legitimate purpose.

Sovereignty and military interdependence instead of a supranational army

Sovereignty is both a legal and political source of authority. In the European legal system, the national legal orders primarily derive their authority from popular sovereignty, whereas the EU legal order derives its authority from its purpose to bring peace, values and well-being to the peoples of the Member States.[23] Within their own constitutional scope, both legal orders are equally legitimate. The difference is in their political roots. Unlike the EU's legal order, nation states are built on the idea of political self-determination. Originally quite an exclusive and inconsistently applied concept, after the decolonisation of the 20th century, political self-determination for peoples became a universal and fundamental presupposition of the international legal order. Together with sovereign equality, self-determination is at the basis of universal peace as pursued by the UN Charter.[24] At the same time, somewhat paradoxically, the international legal order is shaped and sustained by global superpowers, especially those with a permanent seat and a veto in the UN Security Council. If one of the permanent members is determined to break through the sovereignty of another state – whether for a noble or evil purpose – the idea of sovereignty as a stabilising force in international relations becomes shockingly fragile.

Living in such a world, the realist knows that without the military protection of alignment in the EU or NATO, there is no bright and independent future in Europe for the small and peaceful nation. Economic interdependence can be a building block for peace, but it is no deterrent for evil. On the contrary, it has proven to finance the autocrat in its politics of destruction. Military interdependence is neither a guarantee for peace, but at the least a more realistic instrument to achieve it. Although the military interests of the EU Member States differ extensively, even more so within NATO, faced with great external threats they will unite in a context dominated by military superpowers.[25] Only the internal politics of NATO's superpowers, the US in particular, and their commitment to balance the external threat potentially endanger the viability of the alliances.

23 Not to say that EU decision-making should not be democratic or that the European Parliament has no authority; this is just not the EU's primary source of authority as that is still derived from intergovernmental Treaties.

24 UN Charter, Article 1(2) and Article 2(1).

25 This fits the idea of Walt that alliances are generally created to balance external threats rather than balancing power alone, see: S. Walt, *The Origins of Alliances*, Cornell University Press 1987, pp. 21-26 & 148.

Observing that the military dependence on the US is the greatest potential security problem of the EU, the EU minded realist could deduce the conclusion that we should build a European *supra*-army to overcome this dependency. By replacing national sovereignty with European sovereignty,[26] shaped by a common military, our security would be guaranteed. The international realist is, however, preoccupied with external threats to military security and therefore forgets that an even greater threat to the values which military power ought to protect comes from within.[27] The European project was not just – like NATO – build to protect its members against the external Soviet threat, but first and foremost to protect its peoples from the evils of autocracy, Nazism, fascism and offensive warfare, regardless whether coming from outside or within.

It is obvious that the accumulation and centralisation of military power are no virtuous goals in themselves. Power corrupts and should as much as possible be balanced. Due to its potentially all-destructive nature, military power can only be balanced by military power. Even within a relatively liberal and democratic country such as the United States, great accumulation of military power can cause destructive wars. In the post-Cold war era, it has been shown that it is unlikely for democracy and human rights to be effectively imposed on countries through the use of force.[28]

To prevent military power from becoming a goal in itself, European security should thus be based on military interdependence and cooperation; not on a supranational army. Both authoritarianism and offensive warfare are often the result of centralisation of political and/or military power, *i.e.* a lack of checks and balances. The EU's constitutional system as enshrined in the Treaties provides external checks and balances to political power as an addition to the domestic democratic and constitutional safeguards. In the decades before the start of the European project, these domestic safeguards failed to prevent nationalist and totalitarian forces from destroying European societies. The on-going problems in certain countries with upholding EU values such as democracy and rule of law have shown that these additional safeguards are not superfluous.

Why military procurement is not just about power but also about peace

I have elaborated in Chapter 1 how the function of military procurement is rooted in the system of international politics; still largely shaped by structures of military power. By acquiring military equipment, states prepare for war as the ultimate mode

26 The idea of European sovereignty was reintroduced by French president Macron in his 2017 *Sorbonne speech*, see: E. Macron, *Initiative for Europe – Sorbonne Speech of Emmanuel Macron*, 26 September 2017.

27 Besides all practical difficulties that would arise when attempting to build a supranational army, as it would most probably require amendments in all the constitutions of the Member States as well as their military cultures.

28 To a certain extent it is a contradiction in terms to impose with the use of force democracy and human rights. This is different for preventing humanitarian disasters (the idea of humanitarian intervention), for which the use of force can potentially in the short term be an effective means, though not for structural changes to the political organization of a country.

of resolving conflict and defence against external aggression. The function of military procurement is thus the procurement of military power. The legal context of the Union is based on the preservation of peace, democracy and human rights. The way in which we regulate military procurement therefore has much greater significance than the longing for power. If gaining as much as possible military power was a self-contained goal – as it is for the autocrat – we already established that complete centralisation would be the way forward.

European integration has, over the years, created a complex system of constitutional checks and balances. Unlike other international organisations, the Treaties established an autonomous legal order, the rules of which generally override domestic law in case of conflict. The primacy of EU law and integration is, however, limited by the boundaries of the EU's purpose to promote peace, the well-being of its citizens and its values. The Member States remained the *Masters of the Treaties* and retained the sovereign right to withdraw.

Peace is the most fundamental goal of the Union, but at the same time the most problematic. When defined narrowly as peace between nations, as observed by Waltz, one could have it "at any time – simply by surrendering".[29] Defining peace merely as the absence of conflict or violence, it lacks any intrinsic values. To be meaningful peace should also provide the groundwork for individual and collective rights and freedoms. One could then expand the peace concept and include such normative values in it. This would, however, deprive the concept of its stabilising nature, as one could then legitimately start wars to impose this expanded peace concept on other nations.[30] Peace and stability within the international order depend on balance of power and adherence to international law, based on political self-determination, sovereign equality and prohibition on the use of force as an instrument of aggression. The EU Treaties have therefore rightfully separated the EU's peace purpose from the promotion of its values and the well-being of its peoples in Article 3(1) TEU. The general achievement of these aims continuously determines the legitimacy of European integration as a whole.

Military procurement of the Member States affects the structures of military power within the Union and – to a lesser extent – within the world. It also indirectly affects the only legitimate purpose of military power within international law, which is the ability of states to effectively defend themselves, other states and international peace and security through the UN Security Council. Although the UN Charter is based on the prohibition of the threat or the use of force in international relations, it also acknowledges the inherent right of individual and collective self-defence and the possibility of authorised use of force by the Security Council. States therefore have the right to produce and possess as much armaments as they deem necessary

29 K. Waltz, *Man, the State, and War: a Theoretical Analysis*, Columbia University Press 2018 (first published in 1954), p. 236.

30 This is essentially the argument of Mearsheimer against what he calls the US' policy of liberal hegemony after the end of the Cold War, see: Mearsheimer, *The Great Delusion* 2018.

for their self-defence.[31] The right to self-defence can only be effectuated through the deployment of military capabilities. The procurement of military equipment ideally also functions as a deterrent for potential adversaries. Objectively speaking, military procurement is about gaining power; legitimately speaking, it should be about peace.

The future is Europe, so is the present

The recent outbreak of war on the European continent has confronted the European states with their Hobbesian purpose. But we do not live in Hobbesian times. Globalization and nuclearization[32] of international politics drastically changed the conditions under which states can effectively defend themselves against military aggression. Military security has become a more complex exercise of capabilities, alliance and strategy. Within this exercise, the relevance of sovereignty and territorial integrity remained unchanged. In addition to strengthening national capabilities, EU Member States therefore need to cooperate more closely in the area of military defence. As the Cold War days of the bipolar world order are long gone, the EU needs to establish its role as a military alliance alongside NATO if it wants to live up to its own ambitions of Article 42 TEU.

The dramatic military challenges, which the EU is facing today undeniably require the deepening of European military cooperation. No Member State can afford – neither financially nor legitimately – to act unilaterally. Even the UK, after its long path to 'take back control', will probably participate in certain future EU PESCO projects, now that the EU has opened the way for third country participation.[33] In the increasingly multipolar world order, the EU must gain some sort of strategic autonomy if it wants to effectively promote its values and principles.[34] The EU's pursuit of strategic autonomy is, in that sense, a logical reaction to the structural changes in international relations that occurred after the end of the Cold War. It is a necessary tool for the Union to fulfil its constitutional task of protecting its interests and values

31 As "in international law there are no rules other than such rules as may be accepted by the State concerned, by treaty or otherwise. whereby the level of armaments of a sovereign State can be limited", see: ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v *USA)*, Judgment. I.C.J. Reports 1986, p. 135.

32 The introduction of nuclear weapons at the end of World War II has increased the dominance of fear as a factor in international politics, as more than ever "Neither strength nor goodwill procures immunity", see: T. Schelling, *Arms and Influence*, New Haven and London: Yale University Press 1966, pp. 33-34.

33 See for instance: C. Mills, *EU Permanent Structured Cooperation (PESCO): a future role for UK defence?*, House of Commons Library: Briefing Paper nr. 9058, 19 January 2021. For the rules governing third country participation in PESCO projects see: Council Decision (CFSP) 2020/1639 of 5 November 2020 establishing the general conditions under which third States could exceptionally be invited to participate in individual PESCO projects.

34 Though in reality the EU sometimes tragically appears willing to sacrifice its values for strategic autonomy. See for instance: A. Vroege, 'Exporting Arms over Values: The Humanitarian Cost of the European Defence Fund', *European Papers* 2021(3), pp. 1575-1601. This also seems to be the rationale behind the Commission's conditional approval of Poland's €35.4 billion recovery and resilience plan despite on-going breaches of the rule of law, see: Commission, COM(2022) 268 final, *Proposal for a Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Poland*, Brussels: 1 June 2022.

beyond its own borders.[35] One of the greatest interests of the Union is to preserve peace and security within Europe. After all, these were the necessary conditions under which European integration could prosper.

Ever since the 2014 Russian annexation of Crimea, it has become clear that economic interdependence combined with the Transatlantic military alliance is no longer sufficient. The revival of Russian military aggression on the European continent underlined the relevance of NATO in a post-Cold War world, but it also revealed that European peace and security should be based on new power structures. After the unsuccessful attempts of the US military to establish stability and security in Iraq and Afghanistan, complete reliance on the US' military force is unfeasible for both the US and its European partner states. So the NATO Member States agreed in the aftermath of this Russian aggression that defence expenditure should be 2% of their GNP and that 20% of this should be spend on 'major equipment'.[36] No single EU Member State, however, started to increase its expenditure in order to meet the new requirement, much to the dismay of the US. To the contrary, EU Member States continued with responding to the security threat with increasing economic interdependence in the form of expanding gas and oil imports. Only in 2022, when Ukraine became the victim of a complete invasion by the Russian military, did the European democracies suddenly turn into realists and started to live up to their 2014 commitment.

We should, however, never forget that military power is no goal in itself. Legitimately it can only be a means for *external* peace and security – as prescribed by the UN Charter – and *internal* sustainment of values such as democracy and human rights – on which the EU has been founded. Expansive accumulation or centralisation of military power has never been a force of good by itself; especially not within a Union that has so far been unable to effectively sustain its values – such as the rule of law – throughout all its own Member States. Military security within the EU should thus be based on the power balance provided by military interdependence between sovereign states rather than supranational integration of military capabilities.

So, to say that 'The future is Europe' is as obvious as to say that we must strive for peace. To actually achieve a peaceful and democratic European future, we must strengthen existing military interdependence, preserve balance of military power within the Union and remain open for collaboration with like-minded third countries. Military solidarity between the EU Member States should not just – like NATO – be based on a common enemy, but on a shared purpose, which we are ready and willing to fight for. Functional regulation of military procurement can legitimately only be based on such intergovernmental and intersocietal solidarity.

35 As established in Article 3(5) TEU.

36 NATO, *Wales Summit Declaration*, 5 September 2014, para. 14.

Samenvatting

Soevereiniteit en wederzijdse afhankelijkheid in de EU regulering van militaire aankopen

Dit proefschrift onderzoekt de effectiviteit[1] van Richtlijn 2009/81/EG voor overheidsopdrachten op defensie- en veiligheidsgebied die primair gericht is op het versterken van de militaire 'strategische autonomie' van de Europese Unie door het integreren en liberaliseren van militaire industrieën. Deze economische integratie wordt beoogd plaats te vinden door het creëren van aanbestedingsverplichtingen voor de militaire aankopen van de lidstaten binnen de kaders van de EU interne markt bevoegdheid.

Probleemstelling en onderzoeksvraag

Na de mislukte poging in de jaren vijftig om de Europese Defensiegemeenschap op te richten, en daarmee de krijgsmachten van de betrokken staten te samenvoegen, poogden de oprichters van de Europese Economische Gemeenschap hun militaire soevereiniteit tot uitdrukking te brengen in het huidige Artikel 346 Verdrag betreffende de Werking van de Europese Unie (VWEU). Deze bepaling voorziet in een uitzondering op het Unierecht voor wezenlijke veiligheidsbelangen in verband met de productie en handel in militair materieel. Terwijl de NAVO de grondslag voor Europese veiligheid werd, bleef supranationale Europese regulering destijds beperkt tot de economische sfeer.

Na de Koude Oorlog nam de militaire belangstelling van de Verenigde Staten (VS) voor de Europese veiligheid gestaag af. Als reactie daarop is de EU geleidelijk meer betrokken geraakt bij militaire aangelegenheden via haar *intergouvernementele* gemeenschappelijk veiligheids- en defensiebeleid (GVDB). Te midden van een wereldwijde stijging van de militaire uitgaven en hernieuwde militaire spanningen aan de oostgrenzen van de NAVO, benadrukken Europese leiders steeds vaker het belang van strategische autonomie voor de EU op militair gebied. Samen met de veranderende structuren van de militaire macht in de wereld wordt de afhankelijkheid van wapenimport uit de VS vaak beschouwd als belangrijkste obstakel hiervoor. Toch lijkt geen van de lidstaten vooralsnog bereid te zijn om nationale bevoegdheden substantieel in te perken.

Wellicht gefrustreerd door het gebrek aan vooruitgang voor een Europees beleid inzake militaire vermogens en bewapening zoals bedoeld in Artikel 42 (3) Verdrag betreffende de Europese Unie (VEU), begon de Europese Commissie al vanaf het einde van de jaren negentig *supranationale* militaire ambities na te streven via de interne markt. Dit resulteerde – naast andere initiatieven – in de totstandkoming van Richtlijn 2009/81/EG voor overheidsopdrachten op defensie- en veiligheidsgebied ("de Richtlijn") in 2009, met als doel de Europese militaire industrieën te versterken

1 Voor de definiëring en vormgeving van het begrip *effectiviteit* in dit onderzoek, zie: *Introduction*.

en zodoende de voor het GVDB vereiste militaire vermogens te ontwikkelen. De Commissie baseert haar betrokkenheid voornamelijk op haar bevoegdheid inzake de interne markt; daarbij gesteund door de jurisprudentie van het Hof van Justitie van de EU ("het Hof") over het uitzonderlijke karakter van de uitzondering in Artikel 346 VWEU.

Europeanisering van de militaire industrie op basis van de vrije markt principes wordt geacht schaalvoordelen en het concurrentievermogen van Europese militaire industrieën te bevorderen. Dit zou moeten leiden tot een grotere Europese zelfredzaamheid in de productie van militair materieel en daarmee tot meer strategische autonomie voor de EU als militaire macht. De Russische invasie van Oekraïne in 2022 heeft de druk op de EU om een sterkere militaire speler te worden verder opgevoerd. Tegelijkertijd leiden de jarenlange bezuinigingen op defensiebegrotingen en de wapensteun aan Oekraïne momenteel tot oplopende tekorten aan materieel en personeel in de lidstaten.

De relevantie van de EU als militaire speler binnen de huidige bevoegdheidsverdeling hangt daarbij uitsluitend af van de som van de nationale militaire vermogens en de bereidheid van de lidstaten om deel te nemen aan Europese projecten en missies. Zonder haar eigen militaire vermogens kan de EU niet de eindverantwoordelijkheid voor de veiligheid op zich nemen, en daarom werd in het Verdrag van Lissabon van 2007 benadrukt dat de nationale veiligheid en de territoriale integriteit nog steeds deel uitmaken van de "essentiële staatsfuncties", zoals verwoord in Artikel 4(2) VEU. Als zodanig zijn militaire macht en de bijbehorende capaciteiten constitutioneel gezien nog steeds geworteld in de soevereiniteit van de staat, terwijl militaire veiligheid in de praktijk afhangt van een strategische combinatie van nationale capaciteiten en militaire wederzijdse afhankelijkheid binnen allianties zoals de NAVO en de EU. Dit proefschrift is, in deze context, een zoektocht naar *Soevereiniteit en wederzijdse afhankelijkheid in de EU regulering van militaire aankopen*.

Deze zoektocht dient antwoord te geven op de onderstaande hoofdvraag en wordt voorts vormgegeven door de daaronder vermelde deelvragen:

Hoe worden de mogelijkheden voor een effectieve EU regulering van militaire aankopen beïnvloed door het soevereine recht van de lidstaten om over militaire macht te beschikken?

i) Hoe wordt de effectiviteit van de regulering van militaire aankopen belemmerd en gevormd door internationale structuren van militaire macht?
ii) Is Richtlijn 2009/81/EG aangenomen op grond van de juiste rechtsgrondslag in de EU Verdragen?
iii) Hoe zou de EU de militaire aankopen van de lidstaten in de toekomst moeten reguleren?

Deel I: Het Unierecht in de context van internationale politiek

In het eerste deel van het proefschrift wordt aan de hand van theorievorming uit de internationale betrekkingen onderzocht in hoeverre internationale machtsstructuren een belemmering vormen voor het integreren en reguleren van de militaire aankopen van de lidstaten. Dit is van belang nu dat uitzondering van de genoemde Richtlijn door de lidstaten kan worden gerechtvaardigd op grond van veiligheidsoverwegingen.

Er wordt geconcludeerd dat de internationale structuren van militaire macht vergaande beperkingen creëren voor EU regelgeving inzake militaire aankopen en dat de huidige regelgeving onvoldoende functioneel is in het licht van die beperkingen. Deze beperkingen verschillen fundamenteel van de beperkingen op de – meer succesvolle – pogingen van de EU om andere sectoren van de economie te reguleren. De militair-industriële integratie kan niet effectief worden gebaseerd op het interne markt model van economische wederzijdse afhankelijkheid. In algemene zin is het moeilijk om economische wederzijdse afhankelijkheid precies te onderscheiden van militaire wederzijdse afhankelijkheid, aangezien vele sectoren zoals energie en de technologiesector zowel de militaire als de economische machtsstructuren tussen staten beïnvloeden. Militair materieel vormt – volgens de definitie van het Hof van Justitie van de EU – een uitzondering op deze moeilijkheid, aangezien de aanschaf ervan enkel een militaire functie in de samenleving dient; en daarmee een publieke vraag creëert. Zonder een dergelijke publieke vraag naar militaire middelen – in een ideale wereld misschien – zouden er geen militaire aankopen zijn; en zou er dus ook geen aanbod zijn. Militaire macht is dus het publieke goed bij uitstek en voor een zinvol begrip moet het worden onderscheiden van economische macht. Hoewel je met economische welvaart misschien af en toe wat vrede kunt kopen, zijn staten zonder militaire capaciteiten nooit volkomen veilig.

Militaire aankopen moeten daarom worden begrepen voor wat ze zijn: een activiteit die gericht is op het verwerven van militaire macht. Overwegingen van economische aard spelen sporadisch een rol in de besluitvorming over militaire aankopen wanneer er mogelijkheden zijn om binnenlandse bedrijven op te nemen in de militaire bevoorradingsketens, hoewel deze overwegingen meestal toch zullen samenvallen met de logica van militaire macht. Militaire aankoopbeslissingen hebben immers enorme economische gevolgen en de beschikbare financiële middelen voor het leger zijn altijd beperkt. In tijden van vrede worden deze economische overwegingen, zoals het scheppen van werkgelegenheid, door democratische regeringen daarom vaak benadrukt om steun van de bevolking te krijgen voor defensie-uitgaven. In een rationele aankoopprocedure dienen zulke economische overwegingen echter ondergeschikt te worden gemaakt aan de militaire logica.

Het verband tussen militaire aankopen en militaire macht is dus overduidelijk. Militaire aankopen zijn gericht op het verwerven van militaire macht. Bij een ruime opvatting van militaire vermogens, dus met inbegrip van de militair-industriële vermogens binnen een staat (dus niet noodzakelijk in handen van de staat), heeft de aankoop bij leveranciers die de vermogens – ten minste gedeeltelijk – in eigen land ontwikkelen en produceren, een positief effect op de militaire macht van de

aankopende staat. In dat geval wordt enige industriële onafhankelijkheid verkregen. Absolute industriële onafhankelijkheid – ook autarkie genoemd – is echter voor bijna alle staten in de geglobaliseerde economie onmogelijk. Bij de huidige stand van zaken blijft het ook voor de EU een utopie, ongeacht haar wijdverbreide beleid om strategische autonomie te bevorderen. Om een al te asymmetrische afhankelijkheid van anderen te voorkomen, proberen staten daarom ook de onderlinge afhankelijkheid binnen de structuren van hun militaire bondgenootschappen te versterken. Die onderlinge afhankelijkheid is zodoende ook een element van hun macht.

In tegenstelling tot de Europese economische wederzijdse afhankelijkheid, die geïnstitutionaliseerd is door wederzijdse markttoegang voor verschillende sectoren van de economie, is de militaire wederzijdse afhankelijkheid gebaseerd op collectieve zelfverdediging. Binnen de NAVO en de EU dragen staten met hun eigen militaire vermogens bij aan de collectieve veiligheid waarop hun nationale veiligheid grotendeels is gebaseerd. Transnationale specialisatie op militair gebied is niet onmogelijk noch onhaalbaar, maar dient plaats te vinden binnen een eigen kader van *militaire* wederzijdse afhankelijkheid in plaats van geïntegreerd te worden in de bestaande structuren van *economische* wederzijdse afhankelijkheid. Zolang wij leven in een Europese gemeenschap van soevereine staten, is enige inefficiëntie – vanuit economisch oogpunt – daarbij onvermijdelijk. Een rationeel militair aankoopproces wordt in een dergelijke context uitsluitend gedreven door de drang om binnen de budgettaire grenzen zoveel mogelijk militaire macht te verwerven. De volgende overwegingen spelen in dit proces een doorslaggevende rol (op volgorde van relatief belang):

i) het aanschaffen van materieel en technologie dat superieur is ten opzichte van dat van potentiële geopolitieke tegenstanders;
ii) het handhaven en versterken van de binnenlandse industriële vermogens om een zekere mate van industriële onafhankelijkheid te bereiken;
iii) het bevorderen van militaire wederzijdse afhankelijkheid door buitenlandse leveranciers strategisch te kiezen.

Deel II: Voorbij machtspolitiek: de functie van het recht

De Richtlijn faciliteert deze militaire machtslogica onvoldoende, omdat zij is vastgesteld op de rechtsgrondslag van de interne markt (Artikel 114 VWEU). In vergelijking met de gewone richtlijnen inzake overheidsopdrachten biedt de Richtlijn extra mogelijkheden om leveranciers verplichtingen inzake bevoorradingszekerheid en gegevensbeveiliging op te leggen en de mogelijkheid om onbetrouwbare leveranciers uit te sluiten van aanbestedingsprocedures. De Richtlijn staat echter geen structurele afwijking van het non-discriminatiebeginsel toe, ook al bevatten nationale procedures voor veiligheidsonderzoeken vaak discriminerende voorwaarden. Bij gebreke van een Europese integratie op militair-operationeel gebied, dat wil zeggen een verschuiving van de veiligheidsverantwoordelijkheid naar het Europese niveau, zullen de lidstaten zich blijven beroepen op de uitzondering van Artikel 346 VWEU

om bij binnenlandse leveranciers te kopen of buitenlandse leveranciers zogenoemde *militaire offsets* (compensatieorders) op te leggen. Gelet op de contextuele benadering van het Hof ten aanzien van de verschillende veiligheidsuitzonderingen in de EU Verdragen, is er veel ruimte voor uitzonderingen bij militaire aankopen, zolang de uitzondering per aankoopbeslissing voldoende wordt gemotiveerd en coherent is met de industriële veiligheidsstrategie van de betrokken lidstaat.

De Richtlijn is zodoende geen effectief instrument om militaire aankopen te regelen, zowel wat de *functionele* als wat de *juridische effectiviteit* betreft. Vanwege de rechtsgrondslag van de interne markt is de regelgeving gebaseerd op de beginselen van non-discriminatie en vrij verkeer. In het tweede deel van het onderzoek wordt in dat licht geconcludeerd dat, binnen het constitutionele kader dat de keuze van de rechtsgrondslag voor EU maatregelen reguleert, dit gebrek aan potentiële effectiviteit ertoe leidt dat de Richtlijn op de verkeerde rechtsgrondslag is vastgesteld. Artikel 3(6) VEU en Artikel 40 VEU vereisen een strikte afbakening tussen de GVDB- en VWEU-bevoegdheden van de Unie, terwijl de Richtlijn opzettelijk de scheidslijnen tussen militair-strategische aanbestedingen die kunnen worden gebaseerd op Artikel 346 VWEU en andere aanbestedingen die binnen de sfeer van de interne markt vallen poogt te vervagen. Om deze onrechtmatigheid op te heffen, dient de EU wetgever deze militair-strategische aankopen te onderscheiden van andere aankopen. Het militaire doel van de Richtlijn en het *lex specialis*-beginsel zoals toegepast door het Hof in rechtsgrondslaggeschillen vereisen dan dat militair-strategische aankopen primair worden gebaseerd op de GVDB bevoegdheid van de EU.

Deel III: Een blik vooruit: mogelijkheden voor effectieve regulering

Het derde – en laatste – deel van het onderzoek biedt een oplossingsrichting voor het effectiviteitsprobleem van de Richtlijn. Een verbeterde regulering van militaire aankopen zou een positieve bijdrage moeten leveren aan de militaire veiligheid van de lidstaten door transparantieverplichtingen op te leggen en interoperabiliteit te stimuleren. Het uitgangspunt bij militaire aankopen in de EU zou moeten zijn dat de technologie wordt afgestemd op bestaande Europese wapensystemen of dat deze verder worden ontwikkeld wanneer dit past in de nationale veiligheidsstrategie van de aankopende staat. De lidstaten kunnen hiervan afwijken wanneer dat nodig is om essentiële nationaal-industriële capaciteiten in stand te houden of te stimuleren, of wanneer het om redenen van operationele functionaliteit en militaire wederzijdse afhankelijkheid noodzakelijk is om aansluiting bij NAVO-wapensystemen te zoeken (meestal die welke in de VS of het VK worden geproduceerd).

De transparantieverplichtingen zullen de lidstaten dwingen deze kwesties te benaderen binnen een kader dat gericht is op het versterken van een Europese veiligheidscultuur; wat uiteindelijk dient bij te dragen aan onderlinge militaire solidariteit in termen van effectieve collectieve zelfverdediging. De regulering zou de militaire functie van militaire aankopen kunnen waarborgen door staten toe te staan discriminerende eisen te stellen aan inschrijvers, maar enkel voor zover deze daadwerkelijk een militair belang dienen. Een dergelijke regulering zou ook de

gezamenlijke aankopen van de lidstaten kunnen reguleren, in plaats van deze uit te sluiten van het toepassingsgebied zoals in de Richtlijn is gedaan. Interessant is dat de Commissie zich recentelijk vooral lijkt te richten op manieren om dergelijke gezamenlijke aankopen van de lidstaten te stimuleren en te reguleren, met name via de EU bevoegdheid inzake industriebeleid. Het is vooralsnog onduidelijk hoe deze nieuwe initiatieven zich zouden verhouden tot de toepassing van de Richtlijn en of de Richtlijn de primaire regeling van militaire aanbestedingen in het kader van het EU recht zal blijven.

Conclusie

Het antwoord op de onderzoeksvraag kan worden afgeleid uit de antwoorden op de deelvragen. Het soevereine recht van lidstaten om over militaire macht te beschikken beperkt inderdaad de mogelijkheden voor de EU om militaire aankopen te reguleren. Het beïnvloedt de keuze van de rechtsgrondslag ten gunste van het GVDB in plaats van de interne markt. Bovendien beïnvloedt dit de keuze van de materiële regels, aangezien deze alleen effectief zullen zijn wanneer de militaire machtslogica voldoende wordt gewaarborgd. Dit is in algemene zin onmogelijk binnen de kaders van de interne markt. Effectieve regulering van militaire aankopen vergt regels die gebaseerd zijn op soevereiniteit en wederzijdse afhankelijkheid.

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In zijn afrekening met de verlichting en de 'rationele mens' definieerde Fjodor Dostojevski in 1864, vanuit het *ondergrondse*, de mens als "een wezen dat op twee benen loopt en ondankbaar is".[1] Over de wereldgeschiedenis, daarentegen, schreef hij dat je eigenlijk alles er wel over kan zeggen, behalve één ding: "dat de rede er heerst".[2] In de wereld, en des te meer in de politiek van zijn land van herkomst, lijkt er soms weinig te zijn veranderd. In de internationale politiek lijkt zijn "twee-maal-twee-is-vijf" soms net zo waar te zijn als "twee-maal-twee-is-vier".[3] In mijn onderzoek heb ik een poging gedaan om, zover de wereld en het recht wel op verklaarbare wijze op elkaar inspelen, enkele inzichten te verschaffen over hoe effectieve – en daarmee 'goede' – regulering van militaire aankopen binnen de Europese Unie eruit zou moeten zien.

Alhoewel goede rechtssystemen orde en redelijkheid toevoegen aan de wereld, zullen Dostojevski's waarheden, zo vermoed ik, ook voortduren. Om dan maar wat persoonlijk tegenwicht aan de sombere mensdefinitie te bieden zou ik hier graag mijn dankbaarheid uiten aan de mensen die een belangrijke rol hebben gespeeld in de totstandkoming van mijn proefschrift.

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1 F. Dostojevski, *Aantekeningen uit het ondergrondse* (vertaald door Monse Weijers), Amsterdam: Atheneaum – Polak & van Gennep 2006, p. 45.
2 *Ibid*, p. 46.
3 *Ibid*, p. 51.

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Curriculum Vitae

Nathan Meershoek is a researcher and lecturer at the law department of Utrecht University, where he previously also enjoyed his education. As a researcher, he is affiliated with the Utrecht University Centre for Public Procurement (UUCePP) and the Centre for Regulation and Enforcement in Europe (RENFORCE). In his research, he specializes in EU & public procurement law, with a focus on military procurement and more broadly issues relating to trade and security. In earlier research he studied the legal tensions between EU public procurement law and the EU's aim of establishing a social market economy and excessive prices of medicines in the context of EU competition law.

Before and during his PhD research, he published articles in international academic journals, including *European Law Review*, *European Papers* and *Public Procurement Law Review*, and Dutch law journals, including *SEW Tijdschrift voor Europees en Economisch Recht* and *Tijdschrift Aanbestedingsrecht en Staatssteun*. He also contributed to several advisory research reports that were commissioned by Dutch governmental organizations, including the Ministry of Economic Affairs and Climate, the Ministry of Defence and the National Police.

Contact: N.A.Meershoek@uu.nl