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**Citation:** Koutrakos, P. (2011). The role of law in Common Security and Defence Policy: functions, limitations and perceptions'. In: Koutrakos, P. (Ed.), European Foreign Policy - Legal and Political Perspectives. (pp. 235-258). Cheltenham: Edward Elgar Publishing. ISBN 9781849804097

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# European Foreign Policy

Legal and Political Perspectives

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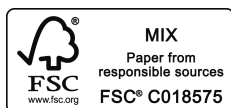
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Published by  
Edward Elgar Publishing Limited  
The Lypiatts  
15 Lansdown Road  
Cheltenham  
Glos GL50 2JA  
UK

Edward Elgar Publishing, Inc.  
William Pratt House  
9 Dewey Court  
Northampton  
Massachusetts 01060  
USA

A catalogue record for this book is available from the British Library

Library of Congress Control Number: 2010930122



ISBN 978 1 84980 409 7

Typeset by Cambrian Typesetters, Camberley, Surrey  
Printed and bound by MPG Books Group, UK

## 8. The role of law in Common Security and Defence Policy: functions, limitations and perceptions

**Panos Koutrakos**

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### INTRODUCTION

In an essay originally written in the early 1990s, Weiler wrote that, '[i]n some ways, Community law and the European Court were everything an international lawyer could dream about: the Court was creating a new order of international law in which norms were norms, sanctions were sanctions, courts were central and frequently used, and lawyers were important'.<sup>1</sup>

This emphasis on law as a motor for integration has been apparent in the extraordinary process of group therapy which the European Union has undergone in the last nine years: the Laeken Declaration of the European Council in December 2001, the establishment of the European Convention, the process of the drafting of the Treaty Establishing a Constitution for Europe, the fateful story of its ratification, the Intergovernmental Conference which led to the signing of the Lisbon Treaty in December 2007, the tumultuous process of its ratification and its entry into force on 1 December 2009, all brought the law to the very centre of the debate about the Union's direction. And as the process got longer and the road to the entry into force of the relevant legal arrangements revealed more roadblocks and turns than their drafters had envisaged, the debate became more heated and its subject-matter wider and more profound. The fate of the legal rules agreed upon first in the Constitutional Treaty and then in the Lisbon Treaty was associated with the very identity of the Union: law was seen as guaranteeing the effectiveness of the Union's stature on the world scene. It is interesting in this context that, during the Russia–Georgia crisis in 2008, President Sarkozy of France, then holder of the rotating EU Presidency, wrote that, had the Lisbon Treaty entered into force,

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<sup>1</sup> J. H. H. Weiler, *The Constitution of Europe* (Cambridge: CUP 1999) pp205–6 where he goes on: 'Community law as transformed by the European Court was an antidote to the international legal malaise.'

the Union would have had the appropriate institutions to deal with international crises.<sup>2</sup>

The Lisbon Treaty introduced a number of institutional innovations which provided a focal point for this debate about the role of legal rules in the EU's foreign affairs. The appointment of the President of the European Council under Article 15(6) TEU, and the High Representative of the Union for Foreign Affairs and Security Policy under Article 18 TEU had been anticipated eagerly as boosting the ability of the Union to act on the international scene. Similarly, the establishment of the European External Action Service (EEAS) under Article 27(3) TEU had been viewed as enhancing the coherence of the EU's foreign policies. The appointment of Herman van Rompuy, who had been the Prime Minister of Belgium for nine months, as the first President of the European Council, and Baroness Ashton, the Trade Commissioner for a year and a former head of a regional health authority in the United Kingdom, were subsequently viewed as distinctly underwhelming. As for the inter-institutional squabbles which marred the process of setting up the EEAS, they were not only unhelpful but also entirely typical of the internal conflicts which underpin the shaping of the Union's external posture.

The analysis of the institutional innovations introduced by the Lisbon Treaty is beyond the scope of this chapter.<sup>3</sup> Instead, the aim of this chapter is to focus on legal rules which govern the Common Security and Defence Policy, and examine the different functions which they may assume in areas which are at the core of national sovereignty. Therefore, the point of reference for this analysis is distinct from that of the quote which began this chapter: by focusing on the CSDP, one moves away from the tighter legal system set out in what used to be the Community legal order. However, it will become apparent that, whilst further away, the subject matter of this chapter is not entirely distinct from that legal order. The choice of topics it will discuss is highly selective, the aim being to highlight different functions that legal rules assume in the CSDP context. The analysis is structured as follows. First, the chapter will examine the mutual assistance clause introduced at Lisbon and will assess its limitations in terms of the legal duties it imposes on Member States. Second, it will outline the provisions on permanent structured cooperation and will comment on the issues which its application raises. Third, it will analyse the only provision of primary law on defence products, namely Article 346 of the Treaty on the Functioning of the European Union (TFEU), explain its evolving interpretation and set it out within the broader legal and political CSDP context.

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<sup>2</sup> *Le Figaro*, 18 August 2008.

<sup>3</sup> See the chapters by Cremona, and Duke.

## MUTUAL ASSISTANCE CLAUSE: RULES ON THE LIMITS OF LAW

For the first time in the Union's constitutional history, the Lisbon Treaty introduced a mutual assistance clause. This is laid down in Article 42(7) TEU which reads as follows:

If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.

Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation.

This clause imposes on Member States a duty the scope of which appears to be very broad: 'by all the means in their power'. The caveats which are set out are broad too, as they relate to compliance with international law,<sup>4</sup> the neutrality of certain Member States and the fundamental choices about security and defence made by Member States in relation to NATO. This formulation of the solidarity clause is entirely consistent with the tenor of CSDP and the balance which it seeks to strike between the security and defence choices made by the Member States and the common policy which it envisages for the Union. It is recalled that, under Article 42(2) subparagraph 2 TEU, the CSDP

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 realized in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.

However, the questions which Article 42(7) TEU raises are how far are Member States required to go in order to comply with their duty and how

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<sup>4</sup> According to Art. 51 UN Charter, '[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.'

rigorous can the enforcement of this duty be. Its wording suggests that, rather than a mutual defence clause, the duty this provision sets out is one of mutual assistance. This is a significant distinction because, quite apart from the semantics of the clause, it suggests two points: on the one hand, military means constitute merely one option open to a Member State when it examines how best to comply with its duty; on the other hand, it suggests that there is a broader set of parameters within which national authorities are expected to make this assessment. Even with due regard to the States to which the above caveats refer, compliance with the mutual assistance clause cannot but depend on the subjective assessment of a Member State as to how best it may assist a State which is a victim of armed aggression on its territory. This assessment is subject to multifarious considerations, not least of a political and economic nature. Such inherently indeterminate criteria do not lend themselves to a rigorous mechanism of verification or control. It is interesting that, in their Decision on the Concerns of the Irish People on the Treaty of Lisbon, the Heads of State or Government Meeting within the European Council state that the CSDP 'does not prejudice the security and defence policy of each Member State, including Ireland, or the obligations of any Member State'.<sup>5</sup>

Furthermore, in a case of armed aggression on the territory of a Member State, time would be of the essence, and protracted negotiations between Member States would merely reduce the relevance of the assistance which the State under attack would require. In other words, it is for each Member State to ascertain which means it is prepared to utilise and in which manner in order to assist another State under attack. There can be no common assessment of whether, for instance, military means should be relied upon by all Member States. After all, the EU is not a military alliance,<sup>6</sup> and the mutual assistance clause may not render it into one. Therefore, the similarity of their wording notwithstanding, comparisons between Article 42(7) TEU and the mutual

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<sup>5</sup> Brussels European Council, 18–19 June 2009, Presidency Conclusions, 1225/2/09 REV 2, Annex 1, p18.

<sup>6</sup> See, for instance, Declaration 13 concerning the Common Foreign and Security Policy which is annexed to the Lisbon Treaty: 'The Conference underlines that the provisions in the Treaty on European Union covering the Common Foreign and Security Policy, including the creation of the office of High Representative of the Union for Foreign Affairs and Security Policy and the establishment of an External Action Service, do not affect the responsibilities of the Member States, as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organisations.

The Conference also recalls that the provisions governing the Common Security and Defence Policy do not prejudice the specific character of the security and defence policy of the Member States'.



defence clauses laid down in Article V of the Brussels Treaty<sup>7</sup> or Article 5 of the NATO Charter<sup>8</sup> are misplaced.<sup>9</sup>

The above does not mean to suggest that the provision of Article 42(7) TEU is not significant. On the one hand, it is a specific illustration of political solidarity, one of the main pillars of CFSP as laid down in Article 24(3) TEU. As such, it may appear to merely state the obvious. However, when it comes to the Union's foreign policy, the obvious often needs to be stated. It is recalled that, when Greece claimed that its territorial integrity was undermined by Turkey in the Imia incident in December 1995, and Spain made a similar claim regarding Morocco in the Leila incident in July 2002, their fellow Member States failed woefully to provide any substantial support in terms of political solidarity, let alone even assurances about military assistance.<sup>10</sup> It is against this background that the mutual assistance clause must be understood. On the other hand, as the principle of political solidarity, the interpretation of the mutual assistance clause is subject to continuous redefinition: the development of CSDP and political solidarity in general, and of common structures of military capabilities in particular, is bound to have an impact on how close to the military end of the scale Member States would be prepared to go in order to assist a Member State under attack.

There is another function of the mutual assistance clause which is noteworthy: against the various CSDP missions which are carried out in far-flung places and export EU values to third parties, it renders the CSDP relevant to

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<sup>7</sup> This provides that, '[i]f any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked all the military and other aid and assistance in their power.'

<sup>8</sup> This reads as follows: 'The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.'

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.'

<sup>9</sup> See the statement to the contrary by Open Europe in House of Lords Select Committee Twelfth Report *The Treaty of Lisbon: An Impact Assessment* (HL 62-II) C35.

<sup>10</sup> See J. Monar, 'The CFSP and the Leila/Perejil Island Incident: The Nemesis of Solidarity and Leadership', (2002) 7 EFA Rev 251.

the Union's citizens in a much more direct and concrete manner. By suggesting a tangible benefit to the security of each Member State at a time of crisis, it brings the Union closer to its citizens, hence meeting one of the main objectives of the reform of the EU constitutional order which started with the European Convention and led to the entry into force of the Lisbon Treaty.<sup>11</sup>

In addition to the mutual assistance clause set out in Article 42(7) TEU, there is a solidarity clause which is laid down in Article 222 TFEU. Its first paragraph reads as follows:

The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:

- (a) – prevent the terrorist threat in the territory of the Member States;
  - protect democratic institutions and the civilian population from any terrorist attack;
  - assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;
- (b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.

In addition to the Union, the other Member States are also to assist a Member State under a terrorist attack or a victim of a natural or man-made disaster at the request of its political authorities.<sup>12</sup> The threats facing the Union are assessed regularly by the European Council in order to ensure that both the Union and its Member States can take effective action.<sup>13</sup>

The solidarity clause has a clear security and defence dimension. This is illustrated by the reference to the military resources of the Member States, and is acknowledged by its procedural provisions: according to Article 222(3) TFEU, the Council decides on the arrangements for the implementation of the clause following a joint proposal by both the Commission and the High Representative; where this decision has defence implications, it will be adopted by unanimity in accordance with Article 31(1) TEU, with the European Parliament being kept informed;<sup>14</sup> furthermore, the Council is assisted by the Political and Security Committee, along with the CSDP structures (such as the EU Military Committee and the EU Military Staff).<sup>15</sup>

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<sup>11</sup> This features prominently in the Laeken Declaration of the European Council (December 2001).

<sup>12</sup> Art. 222(2) TFEU.

<sup>13</sup> Art. 222(4) TFEU.

<sup>14</sup> This implies that, in the absence of defence implications, decisions are adopted by a qualified majority.

<sup>15</sup> A standing committee provided for in Art. 71 TFEU will also participate, if

The core of the solidarity clause could well have been placed in Title V TEU. In fact, it is striking that there is no reference to terrorism in the mutual assistance clause in Article 42(7) TEU. After all, it is recalled that terrorism features prominently in the European Security Strategy<sup>16</sup> as well as the 2008 Report on its implementation.<sup>17</sup> On the other hand, the reference to Article 222 TFEU illustrates the broader understanding of security which now informs the Union's activities and establishes a link with the European Security Strategy as the latter, even when the Union was based on the tripartite pillar structure, puts forward the need for a combination of a broad range of instruments.<sup>18</sup> The significance of the reference to terrorism, as well as the solidarity clause itself, is illustrated by the European Council's Declaration on Combating Terrorism. Adopted in response to the terrorist attack in Madrid in March 2004, the Declaration refers expressly to the precursor to Article 222 TFEU in the Constitutional Treaty:<sup>19</sup> it refers to the spirit of that provision and sets out the commitment of the Member States, as well as the acceding States, to act jointly in case one of them becomes the victim of a terrorist attack.<sup>20</sup>

In terms of its CSDP links, another noteworthy feature of the solidarity clause is its broad scope. The action it envisages is not confined to response to terrorist attacks. Instead, it is about prevention and protection, as well as assistance. The temptation for testing the outer limits of the Union's competence might end up being too great in the light of the increasing securitisation of its policies.

Finally, it is worth noting that, in their Decision on the Concerns of the Irish People on the Lisbon Treaty, the Heads of State or Government of the European Union state that it 'will be for Member States – including Ireland, acting in a spirit of solidarity and without prejudice to its traditional policy of

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necessary by submitting joint proposals with the Political and Security Committee. The former aims 'to ensure that operational cooperation on internal security is promoted and strengthened within the Union' and to 'facilitate coordination of the action of the Member States' competent authorities'. Its proceedings may involve representatives of the Union bodies, offices and agencies, and the Parliament and national Parliaments must be kept informed of them.

<sup>16</sup> *A Secure Europe in a Better World: European Security Strategy* (Brussels, 12 December 2003).

<sup>17</sup> *Report on the Implementation of the European Security Strategy: Providing Security in a Changing World* (S407/08, Brussels, 11 December 2008).

<sup>18</sup> The ESS points out that, 'in contrast to the massive visible threat in the Cold War, none of the new threats is purely military, nor can any be tackled by purely military means. Each requires a mixture of instruments' (at 7).

<sup>19</sup> Namely Art. 42 of the Constitutional Treaty.

<sup>20</sup> There is also the following clarification: 'It shall be for each Member State or acceding State to the Union to choose the most appropriate means to comply with this solidarity commitment towards the affected State.'

military neutrality – to determine the nature of aid or assistance to be provided to a Member State which is the object of a terrorist attack or the victim of armed aggression on its territory'.<sup>21</sup>

## PERMANENT STRUCTURED COOPERATION: RULES SETTING OUT A BROAD FRAMEWORK FOR ACTION

The Treaty provides a mechanism for permanent structured cooperation. In accordance with Article 42(6) TEU, this is open to Member States 'whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions'. However, rather than merely outlining the relevant criteria, the drafters of the Treaty defined them further. In a Protocol attached to the Lisbon Treaty, the commitments on military capabilities are set out in detail. In Article 1, a Member State wishing to participate in a structured cooperation mechanism is required to

- (a) proceed more intensively to develop its defence capacities through the development of its national contributions and participation, where appropriate, in multinational forces, in the main European equipment programmes, and in the activity of the Agency in the field of defence capabilities development, research, acquisition and armaments (European Defence Agency), and
- (b) have the capacity to supply by 2010 at the latest, either at national level or as a component of multinational force groups, targeted combat units for the missions planned, structured at a tactical level as a battle group, with support elements including transport and logistics, capable of carrying out the tasks referred to in Article 28 B of the Treaty on European Union, within a period of 5 to 30 days, in particular in response to requests from the United Nations Organisation, and which can be sustained for an initial period of 30 days and be extended up to at least 120 days.

These are further defined in Article 2 of the Protocol, according to which the participating Member States undertake to

- (a) cooperate, as from the entry into force of the Treaty of Lisbon, with a view to achieving approved objectives concerning the level of investment expenditure on defence equipment, and regularly review these objectives, in the light of the security environment and of the Union's international responsibilities;
- (b) bring their defence apparatus into line with each other as far as possible, particularly by harmonising the identification of their military needs, by pooling and, where appropriate, specialising their defence means and capabilities, and by encouraging cooperation in the fields of training and logistics;
- (c) take concrete measures to enhance the availability, interoperability, flexibility

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<sup>21</sup> n5 above.

and deployability of their forces, in particular by identifying common objectives regarding the commitment of forces, including possibly reviewing their national decision-making procedures;

(d) work together to ensure that they take the necessary measures to make good, including through multinational approaches, and without prejudice to undertakings in this regard within the North Atlantic Treaty Organisation, the shortfalls perceived in the framework of the 'Capability Development Mechanism';

(e) take part, where appropriate, in the development of major joint or European equipment programmes in the framework of the European Defence Agency.

Member States fulfilling the criteria and having made the above commitments may notify their intention to engage in permanent structured cooperation to the Council and the High Representative. In accordance with Article 46(2) TEU, the decision to establish such cooperation rests with the Council which is expected to take it within three months following notification by a qualified majority and following consultation with the High Representative. In terms of its management, any decision and recommendation by the Council within the context of permanent structured cooperation is taken unanimously on the basis of the votes of the representatives of the participating Member States under Article 46(6) TEU, unless otherwise provided for in Article 46 TEU.

There are certain principles which appear to govern the permanent structured cooperation mechanism. First, the principle of openness: provided that the criteria and requirements set out in Article 46(1) TEU and Articles 1 and 2 of the Protocol are met, any Member State may participate in the mechanism, either *ab initio* or at a later stage. In the latter case, following a notification from the relevant State to the Council and the High Representative, the Council will adopt the decision confirming the participation of the Member State by a qualified majority of the participating Member States and after consulting the latter.<sup>22</sup>

The second principle is that of continuity: every participating Member State must fulfil the criteria and make the necessary commitments throughout their participation. According to Article 46(4) TEU, if at any point they cease to do so, the Council may suspend the participation of the Member State concerned by a qualified majority of the members representing the participating Member States, with the exception of the Member State in question. In this respect, Article 3 of the Protocol on Permanent Structured Cooperation provides for the involvement of the European Defence Agency (EDA). In accordance with this provision, the role of the EDA is broad: it contributes to the regular assessment of participating Member States' contributions regarding capabilities in general, and in particular those made in accordance with the criteria to be established on the basis of, amongst others, Article 2 of the

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<sup>22</sup> Art. 46(3) subpara. 2 TEU.

Protocol. However, its impact is limited, at least as a matter of law: whilst it is entrusted with reporting at least once a year, its assessment 'may serve as a basis for Council recommendations and decisions adopted in accordance with Article 46 of the Treaty on European Union'.<sup>23</sup>

Third, the free will of the Member States is an essential precondition for their participation: any participating Member State may withdraw by notifying its intention to do so to the Council. The latter has neither the power to veto this nor the right to approve it. In accordance with Article 46(5) TEU, it will merely 'take note that the Member State in question has ceased to participate'.

Fourth, the definition of the capabilities criteria mentioned in Article 46(1) TEU and set out in Article 2 of the Protocol on Permanent Structured Cooperation is subject to a dynamic, incrementally evolving process. Both Articles 2 and 3 of the Protocol suggest that they need to be further elaborated on and defined in greater detail. On the one hand, it would be odd if things were otherwise: requirements related to military capabilities may vary depending on factors as diverse as technical and operational needs, geopolitical environment, activities of international security organisations, financial conditions, political commitment. After all, primary law is inherently unsuitable to define with any degree of precision such requirements. On the other hand, the vagueness of the relevant provisions is such as to render their application entirely a matter to be determined on the basis of factors as inherently indeterminate as political will, and as constantly evolving as economic realities.

The vagueness of the legal rules on permanent structured cooperation reminds one of the vagueness of the Lisbon Treaty in general and Article 18 TEU in particular in relation to the function of the High Representative. It is recalled that, from a legal point of view, these provisions are strikingly vague as to the precise functions of the new post, and leave considerable scope for overlaps and inter-institutional skirmishes. This is all the more so as the provisions about the function of the President of the European Council, that is, another actor involved in the representation of the Union, are similarly opaque.<sup>24</sup> It may appear curious that the post of High Representative, which purported to bring clarity and coherence in the EU's external policies, should be defined in such unclear terms as to further feed the inter-institutional tensions which have marred these policies. This also became apparent from the tensions and inter-institutional haggling which characterised the establishment of the European External Action Service, as well as the complex arrange-

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<sup>23</sup> Art. 3 of Protocol on Permanent Structured Cooperation.

<sup>24</sup> See Editorial, 'New Links in the Union's Institutional Chain', (2009) 35 *ELRev* 1, and Editorial, 'Mind the gap!', (2008) 45 *CMLRev* 317.

ments finally agreed upon.<sup>25</sup> Similarly, viewed as a way of enabling the Union to shape its security and defence identity more efficiently, one may have hoped that the mechanism of permanent structured cooperation would have provided a clearer yardstick as to quite how the Member States may rely upon it. In both cases, the relevant legal provisions appear to acknowledge that their contribution to the Union's foreign affairs is merely to set out the broad parameters within which the Member States and the Union's institutional actors may determine how to proceed, at what pace and in which direction.

## DEFENCE INDUSTRIES AND THE EVOLVING UNDERSTANDINGS OF LAW

The application of the mechanism for permanent structured cooperation outlined above relies upon the work of the European Defence Agency (EDA). Originating in the identical provisions of the Constitutional Treaty, the Lisbon Treaty is the first set of primary rules which provides for this organisation. Article 42(3) subparagraph 2 TEU provides that EDA

shall identify operational requirements, shall promote measures to satisfy those requirements, shall contribute to identifying and, where appropriate, implementing any measure needed to strengthen the industrial and technological base of the defence sector, shall participate in defining a European capabilities and armaments policy, and shall assist the Council in evaluating the improvement of military capabilities.

However, in yet another illustration of how the law may follow and merely formalise existing practice, the EDA had been established before the Constitutional Treaty was even signed, in July 2004.<sup>26</sup> The objective of the Agency is 'to support the Council and the Member States in their effort to improve the EU's defence capabilities in the field of crisis management and to sustain the ESDP as it stands now and develops in the future' without prejudice to either the competences of the EC or those of the Member States in defence matters.<sup>27</sup> The tasks carried out by EDA are in the areas of defence capabilities development, armaments cooperation, European Defence

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<sup>25</sup> See Council Decision 2010/427/EU [2010] OJ L 201/30 which is accompanied by The Declaration by the High Representative on political accountability ([2010] OJ C 210/1, and [2010] OJ C 217/12) setting out the practicalities of the interactions between the High Representative and the European Parliament.

<sup>26</sup> Joint Action 2004/551/CFSP [2004] OJ L245/17.

<sup>27</sup> *Ibid*, Articles 2(1), 1(2) and 2(2).

Technological and Industrial Base and defence equipment market, and research and technology.<sup>28</sup>

Whilst limited in scope, the work of EDA has not been without controversy. The determination of its budget has been a constant source of disagreement: the United Kingdom has refused to agree on a three-year budget, the absence of which, according to other Member States, hampers EDA's work. In terms of specific outcomes, it is worth referring to the adoption of a voluntary code on defence procurement in November 2005. Having entered into force on 1 July 2006, this applies to contracts worth more than 1m which are subject to the special clause of Article 346 TFEU.<sup>29</sup> It sets out to establish a single online portal, provided by the EDA, which would publicise procurement opportunities. It is based on objective award criteria based on the most economically advantageous solution for the particular requirement. Furthermore, it provides for debriefing, whereby all unsuccessful bidders who so request will be given feedback after the contract is awarded. The regime provides for exceptions for reasons of pressing operational urgency, follow-on work or supplementary goods and services, and extraordinary and compelling reasons of national security. This development brings focus on defence industries and the extent to which their regulation may contribute to the CSDP. From a legal point of view this is a most interesting issue, as it straddles law and politics, and has been at the outer margins of European integration since the establishment of the European Communities. It is this story that the remaining part of this chapter will tell.<sup>30</sup>

### Primary Law and Defence Industries: Lingering Misconceptions

There is only one provision in the primary law of the EU which refers

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<sup>28</sup> For early assessments, see: A. Georgopoulos, 'The New European Defence Agency: Major Development or Fig Leaf?' (2005) 14 *Public Procurement Law Review* 103; P. Koutrakos, *EU International Relations* (Oxford: Hart Publishing 2006) pp473–5; M. Trybus, 'The New European Defence Agency: A Contribution to a Common European Security and Defence Policy or a Challenge to the Community *acquis*?' (2006) 43 *CMLRev* 667.

<sup>29</sup> Contracts which fall beyond the scope of Art 346 TFEU are covered by the EC public procurement secondary legislation. According to Art 10 of Dir 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114, '[t]his Directive shall apply to public contracts awarded by contracting authorities in the field of defence, subject to Article [346 TFEU]'.

<sup>30</sup> This section draws upon P. Koutrakos, 'The Application of EC Law to Defence-related 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) 307.



expressly to the defence industries, namely Article 346 TFEU (ex Article 296 EC). It reads as follows:

1. The provisions of the Treaties shall not preclude the application of the following rules:

(a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;

(b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.

2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.

For a long time, this rather obscure provision of the Treaty was viewed as rendering defence industries beyond the reach of EU law entirely. A broad interpretation of its wording was used to substantiate this: on the one hand, the scope of products which fell within the scope of Article 346 TFEU was viewed as potentially unlimited; on the other hand, the circumstances under which Member States could deviate from EU law were ignored or viewed as merely indicative of the general status of the defence industries as directly linked to national sovereignty. Therefore, the Member States were only too keen to presume that measures regulating their defence industries would be beyond the scope of EU law.<sup>31</sup> This approach was tolerated by the EU institutions.<sup>32</sup> It is interesting that the European Parliament confined itself to arguing regularly for the deletion of Article 346 TFEU,<sup>33</sup> as if that would have been the only way of preventing the erroneous and misguided interpretation of its provision. The elusive character of the list mentioned in Article 346(2) TFEU did not help either: it was only published in the *Official Journal of the European Union* forty three years following its adoption in a response by the Commission to a question by the European Parliament.<sup>34</sup>

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<sup>31</sup> In relation to public procurement, see COM (2004) 608 final *Green Paper on Defence Procurement*, p6.

<sup>32</sup> See P. Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law* (Oxford: Hart Publishing 2001), 175–82.

<sup>33</sup> See, for instance, Resolution A3–0260/92 on the Community's role in the supervision of arms exports and the armaments industry [1992] OJ C/284/138 at 142 and Resolution on the need for European controls on the export or transfer of arms [1995] OJ C/43/89 at 90, Resolution A3–0260/92 [1992] OJ C/284/138 at 142.

<sup>34</sup> Written Question E-1324/01 [2001] OJ C/364E/85. In the meantime, it had only been published in academic analyses: see H. Wulf (ed), *Arms Industry Limited* (Oxford, Oxford University Press, 1993) at 214.

However, a careful reading of Article 346 TFEU suggests that this approach is misconceived. First, it is confined to the products which are described in the list mentioned in Article 346(2) TFEU. Therefore, the reference to 'the production of or trade in arms, munitions and war material' was not envisaged as an open-ended category of products. This suggests that at no point was it envisaged that dual-use goods, that is products which may be of both civil and military application, should be regulated by national measures deviating from the entire body of EU law. Such an argument is supported by both the content of the list mentioned in Article 346(2) TFEU and the reference to the effects that such measures should not have on 'products which are not intended for specifically military purposes' in Article 346(1)(b) TFEU.

Second, measures adopted by a Member State under Article 346 TFEU are not *ipso facto* justified; instead, the deviation from EU law which they entail must be 'necessary for the protection of the essential interests of [national] security'. This is quite an emphatic statement that, rather than being merely a public security clause, Article 346(1)(b) TFEU should be invoked only when the protection of the core of national sovereignty is at stake.

Third, any reliance upon Article 346 TFEU should take into account the effects which its deviation from EU law may have on the status and movement of other products which fall beyond its rather narrow scope. In effect, this provision suggests that national measures deviating from EU law as a whole should not be adopted in a legal vacuum. Instead, Member States are under a duty to consider the implications that such measures may have for the common market.

Fourth, Article 348(1) TFEU provides for the involvement of the Commission in cases where reliance upon Article 346 TFEU by a Member State would lead to distortions of competition. This provision should be interpreted in the light of the duty of loyal cooperation enshrined in Article 4(3) TEU (ex Article 10 EC). In other words, a Member State invoking Article 346 TFEU is under a legal duty to cooperate with the Commission in order to adjust any ensuing distortions of competition to the EU law.

Finally, any deviation from EU law under Article 346 TFEU is subject to the jurisdiction of the Court of Justice. The reference to the 'improper use of the powers provided for in Article ... 346' in Article 348 second subparagraph TFEU refers both to the substantive conditions which need to be met by a Member State invoking Article 346 TFEU (namely those regarding its scope of application, the assessment of 'essential interests of security') and to the procedural ones (that is the duty to cooperate with the Commission provided for in Article 348 first subparagraph TFEU).

It follows from the above that, according to a strict reading of Articles 346 TFEU and 348 TFEU, Member States may regulate their defence industries by deviating from EU law only in so far as such a deviation is confined to a

specific class of products, is exercised in accordance with certain principles and is subject to the jurisdiction of the Court of Justice to ascertain whether it amounts to an abuse of power. This interpretation has gradually been accepted as a matter of EU law. This has been due to a variety of factors, three of which are particularly significant, namely the case-law of the Court of Justice, the considerable structural and financial difficulties of the defence industries since the 1990s and the emerging political climate in the EU which is marked by the development of the Common Security and Defence Policy.

### The Role of Europe's Judges

In its first judgment on the applicability of ex Article 296 EC (new Article 346 TFEU), the Court of Justice left no doubt as to the strict interpretation of this provision. In Case C-414/97 *Commission v Spain*,<sup>35</sup> the Court dealt with Spanish legislation exempting from VAT intra-Community imports and acquisitions of arms, munitions and equipment exclusively for military use. The Sixth VAT Directive excluded aircraft and warships. The action against Spain was brought because the relevant Spanish rules also covered an additional range of defence products. The Spanish Government argued that a VAT exemption for armaments constituted a necessary measure for the purposes of guaranteeing the achievement of the essential objectives of its overall strategic plan and, in particular, to ensure the effectiveness of the Spanish armed forces both in national defence and as part of NATO. In its judgment, the Court ruled as follows:

Spain has not demonstrated that the exemptions provided for by the Spanish Law are necessary for the protection of the essential interests of its security. It is clear from the preamble to [the relevant national] Law that its principal objective is to determine and allocate the financial resources for the reinforcement and modernization of the Spanish armed forces by laying the economic and financial basis for its overall strategic plan. It follows that the VAT exemptions are not necessary in order to achieve the objective of protecting the essential interests of the security of the Kingdom of Spain.<sup>36</sup>

It then concluded that:

the imposition of VAT on imports and acquisitions of armaments would not compromise that objective since the income from payment of VAT on the transactions in question would flow into the State's coffers apart from a small percentage which would be diverted to the Community as own resources.<sup>37</sup>

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<sup>35</sup> Case C-414/97 *Commission v Spain* [1999] ECR I-5585.

<sup>36</sup> *Ibid.*, para. 22.

<sup>37</sup> *Ibid.*, para. 23.

This suggests a robust approach which, rather than viewing Article 346 TFEU as a *carte blanche* for Member States in the area of defence industries, requires that the Member States substantiate how the deviation from EU law they deem necessary meets the substantive conditions set out in primary law. This approach was adopted four years later by the Court of First Instance<sup>38</sup> and was reaffirmed by the Court of Justice more recently in Case C-337/05 *Commission v Italy*<sup>39</sup> and Case C-157/06 *Commission v Italy*.<sup>40</sup> These cases were about the purchase of Agusta helicopters for the use of police forces and the national fire service by a negotiated procedure in contravention of EC public procurement legislation which provided for a competitive tendering procedure.<sup>41</sup> This was a long-standing practice in Italy, and the Government did not contest that the helicopters in question were clearly for civilian use, and that their military use was only potential. Both cases are about the same practice and raise the same issues. This analysis will focus on Case C-337/05 where the judgment was rendered by the Grand Chamber. The Court first reaffirmed the strict interpretation of the exceptional clauses set out in the Treaties:

It cannot be inferred from those articles that the Treaty contains an inherent general exception excluding all measures taken for reasons of public security from the scope of Community law. The recognition of the existence of such an exception, regardless of the specific requirements laid down by the Treaty, would be liable to impair the binding nature of Community law and its uniform application.<sup>42</sup>

It then pointed out that

It is clear from the wording of that provision that the products in question must be intended for specifically military purposes. It follows that the purchase of equipment, the use of which for military purposes is hardly certain, must necessarily comply with the rules governing the award of public contracts. The supply of helicopters to military corps for the purpose of civilian use must comply with those same rules.<sup>43</sup>

The argument of the Italian Government that a deviation from the EC public procurement rules was necessary in order to protect the confidentiality of

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<sup>38</sup> Case T-26/01 *Fiocchi* [2003] ECR II-3951.

<sup>39</sup> [2008] ECR I-2173.

<sup>40</sup> [2008] ECR I-7313. This, along with Case C-337/05, are annotated in M. Trybus, (2009) 46 CMLRev 973.

<sup>41</sup> In particular, Articles 2(1)(b), 6 and 9 of Council Directive 93/36/EEC coordinating procedures for the award of public supply contracts [1993] OJ L 199/1.

<sup>42</sup> n39 above, para. 43.

<sup>43</sup> Ibid, para. 47.

information about the production of the purchased helicopters was dismissed by the Court as disproportionate. It was pointed out that no reasons were presented to justify why the confidentiality of the information communicated for the production of the helicopters manufactured by Agusta would be less well guaranteed were such production entrusted to other companies, in Italy or in other Member States.<sup>44</sup>

The Court was no more sympathetic to the final arguments by the Italian Government that, because of their technical specificity, the manufacture of the helicopters in question could be entrusted only to Agusta and that this was necessary to ensure the interoperability of its fleet of helicopters, in order, particularly, to reduce the logistic, operational and pilot-training costs. It responded as follows:

In this case, the Italian Republic has not discharged the burden of proof as regards the reason for which only helicopters produced by Agusta would be endowed with the requisite technical specificities. In addition, that Member State has confined itself to pointing out the advantages of the interoperability of the helicopters used by its various corps. It has not however demonstrated in what respect a change of supplier would have constrained it to acquire material manufactured according to a different technique likely to result in incompatibility or disproportionate technical difficulties in operation and maintenance.<sup>45</sup>

The recent case-law of the Court of Justice makes it clear that reliance upon the notion of necessity may not justify *ipso facto* any deviation from EU rules. It is not only the subject-matter of these cases, which is an area long viewed as within the twilight zone between EU law and national sovereignty, that makes the above rulings noteworthy. It is also the rigour with which the Court responded to the vague arguments put forward by the national governments. Member States are required to explain what it is precisely which necessitates a deviation from an EU rule.

However, it would be wrong to assume that the Court has expressed its willingness to meddle with the substantive policy choices made by the Member States in areas which are close to the core of national sovereignty. Indeed, the above rulings should be viewed in their context. In the actions against Italy, for instance, the defences put forward by the Italian Government

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<sup>44</sup> In Case C-157/06 *Commission v Italy*, the Court concluded that 'the mere fact of stating that the supplies at issue are declared secret, that they are accompanied by special security measures or that it is necessary to exclude them from the Community rules in order to protect the essential interests of State security cannot suffice to prove that the exceptional circumstances justifying the derogations provided for in Article 2(1)(b) of Directive 93/36 actually exist' (para. 32).

<sup>45</sup> n39 above, para. 59.

were staggering in their generality and the absence of any specific argument whatever which would substantiate, even remotely, their decision. Furthermore, the remoteness between the subject-matter of the action and the scope of Article 346 TFEU was not contested even by the Italian Government. After all, the helicopters were envisaged for the use of forces such as the Corps of Fire Brigades, the Carabinieri, the Coastguard, the Guardia di Finanza Revenue Guard Corps, the State Police and the Department of Civil Protection in the Presidency of the Council of Ministers. Put differently, the cases on which the Court has rendered the above rulings were about egregious violations of both the wording and spirit of Article 346 TFEU, violations which exemplified the presumption, widely held by Member States, that primary law granted them a *carte blanche* in the area. It by no means follows that the Court would adopt an intrusive and activist approach once substantive policy choices are explained properly in relation to the requirements set out in Article 346 TFEU.

### Emerging Re-interpretations

In this context of gradual realisation of the constraints attached to primary law, and the willingness of the EU's judiciary to enforce them, two factors raised further interest in the status of defence industries. The first has been the development of the CSDP on which considerable time and energy has been spent since 1998.<sup>46</sup> For the purpose of this chapter, suffice it to recall the statement in the European Security Strategy about the European Union's ambition for '[a]n active and capable European Union [which] would make an impact on a global scale'<sup>47</sup> in terms of 'shar[ing] in the responsibility for global security'.<sup>48</sup> The second factor is the perilous state of the defence industries in the Member States. Following the end of the Cold War they have been suffering from considerable financial and structural problems, such as fragmentation and divergence of capabilities, excess production capability in certain areas and shortages in others, duplication, short production runs, reduced budgetary resources, and failure to engage in increasingly costly research.<sup>49</sup> This highly

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<sup>46</sup> See the chapter in this book by Webber.

<sup>47</sup> *A Secure Europe in a Better World: European Security Strategy* (Brussels, December 12, 2003), p14. See also *Report on the Implementation of the European Security Strategy* (Brussels, 11 December 2008).

<sup>48</sup> *Ibid.*, 2.

<sup>49</sup> See, amongst others, A. Georgopoulos, 'The European Armaments Policy: A *conditio sine qua non* for the European Security and Defence Policy?' in M. Trybus and N. White (eds), *European Security Law* (Oxford, Oxford University Press, 2007) 198 at 203–5.

fragmented state has been exacerbated by the financial crisis which has made the most important military powers in the Union, namely the United Kingdom and France, cut back on their military spending,<sup>50</sup> and has forced the former to focus almost exclusively on its needs in the war in Afghanistan.

In the light of the above legal, political and economic developments, defence industries have been gradually brought to the centre of the attention of both the Union and its Member States. It is in this context that considerable developments have taken place under EU law. Two specific initiatives illustrate this: first, the Commission's statement that it intends strictly to enforce the proper interpretation of ex Article 296 EC (Article 346 TFEU); second, a host of legislative initiatives aiming to extend the application of EU law to defence industries.

In December 2006, the European Commission put forward its view as to the proper interpretation of ex Article 296 EC (Article 346 TFEU), and expressed its intention to apply it rigorously by enforcement proceedings before the Court of Justice.<sup>51</sup> The aim of the document was 'to prevent possible misinterpretation and misuse of Article 296 EC in the field of defence procurement' and 'give contract awarding authorities some guidance for their assessment whether the use of the exemption is justified'.<sup>52</sup> The Commission draws upon the wording of what is now Article 346 TFEU<sup>53</sup> and the case-law of the EU courts and states that 'both the field of and the conditions of application of Article [346 TFEU] must be interpreted in a restrictive way'. It acknowledges the wide discretion granted to a Member State in order to determine whether its essential security interests ought to be protected by deviating from EC law. However, this discretion is not unfettered. To that effect, it is argued that any interests other than security ones, such as industrial or economic, cannot justify recourse to Article 346 TFEU even if they are connected with the production of and trade in arms, munitions and war material. In relation to the role of the Member States, the Commission states that

It is the Member States' prerogative to define their essential security interests and their duty to protect them. The concept of essential security interests gives them flexibility in the choice of measure to protect those interests, but also a special responsibility to respect their Treaty obligations and not to abuse this flexibility.<sup>54</sup>

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<sup>50</sup> See *Financial Times*, 15 March 2010, p7.

<sup>51</sup> COM(2006) 779 fin *Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement* (adopted on 7 December 2006).

<sup>52</sup> Ibid, p3.

<sup>53</sup> For instance, it points out that the reference to 'essential security interests' 'limits possible exemptions to procurements which are of the highest importance for Member States' military capabilities' (ibid, p7).

<sup>54</sup> Ibid.

What are the implications of this approach in the area which has given rise to most of the cases before the Court, namely public procurement? According to the Commission,

the only way for Member States to reconcile their prerogatives in the field of security with their Treaty obligations is to assess with great care for each procurement contract whether an exemption from Community rules is justified or not. Such *case-by-case assessment* must be particularly rigorous at the borderline of Article 296 EC where the use of the exemption may be controversial.<sup>55</sup>

In its initiative, the Commission makes a declaration of intent: national measures governing the defence industries would no longer be viewed as inherently above EU law, and any deviations from the Treaties would be pursued before the Court of Justice. In terms of the substance of its construction of Article 346 TFEU, there is nothing in the Communication which is revolutionary or which does not originate in the previous, albeit limited, case-law or the wording of the Article. In declaring its intention to no longer tolerate violations of EU law based on an expansive interpretation of Article 346 TFEU, the Commission seeks to strike a balance between the leeway with which national authorities are endowed when dealing with matters close to the core of national sovereignty, and the requirements set out by EU law in order to ensure that no abuse of this leeway occurs. In this context, it is interesting that the Commission should also engage in adjusting the list mentioned in Article 346(2) TFEU in a rather creative manner.<sup>56</sup> More importantly, one of the main tenets of the Communication is the acknowledgement by the Commission of the prerogative of the Member States to define their essential security interests. It is interesting, however, that it should shy away from developing this point further and elaborating on its implications for judicial review. Is the control which the Court may exercise on the substance of the national policy choices not inherently limited (provided, that is, that such choices do not constitute an abuse of the rights which are acknowledged in Article 346 TFEU)?<sup>57</sup> This is what Advocate General Jacobs had suggested in another related context, that is the adoption of national measures deviating

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<sup>55</sup> Ibid, p8 (the emphasis in the original).

<sup>56</sup> It is stated in the Communication that the list should be interpreted in a way which recognises developments in technology since the list was drawn up and the different practices now employed to procure such items, such as 'modern, capability-focused acquisition methods' and the inclusion of contracts for related services and works (ibid, p5).

<sup>57</sup> See, for instance, the principles set out by the case-law on exports of dual-use goods outlined above.



from EU law when purporting to protect the essential interests of a Member State under Article 347 TFEU.<sup>58</sup>

Both the tenor and the substance of the Commission's document suggest the proceduralisation of the ways in which Member States may exercise the leeway granted under primary law in the area of defence industries. In terms of the interpretation it sets out, it rather states what had clearly been the case since the entry into force of the original Treaty. Therefore, the significance of the document is that it reads like a declaration of intent, a statement of the Commission's willingness to step into areas of high political sensitivity.<sup>59</sup>

The willingness of the Commission to enforce the proper interpretation of Article 346 TFEU, thus bringing the defence industries closer to the scope of the application of EU law, should be assessed in the light of the considerable policy activity which the EU institutions have shown in the area. The European Commission had advocated the use of EU law, along with other instruments, for the regulation of the defence industries since the mid-1990s. After a series of initiatives assessing the serious economic problems facing such industries,<sup>60</sup> and advocating the adoption of a wide range of measures,<sup>61</sup> the Commission put forward its so-called 'defence package' in December 2007,<sup>62</sup> following which two specific measures have been adopted by the Council, namely Directive 2009/43 on intra-EU transfers of defence products<sup>63</sup> and Directive 2009/81 on public procurement in the fields of defence and security.<sup>64</sup> The main rationale of these measures is twofold: on the one

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<sup>58</sup> See Case C-120/96 *Commission v Greece (re FYROM)* where he argues that '[t]here is a paucity of judicially applicable criteria that would permit this Court, or any other court, to determine whether serious international tension exists and whether such tension constitutes a threat of war' (para 50), and then he goes on to argue that '[b]ecause of differences of geography and history each of the Member States has its own specific problems and preoccupations in the field of foreign and security policy. Each Member State is better placed than the Community institutions or the other Member States when it is a question of weighing up the dangers posed for it by the conduct of a third State. Security is, moreover, a matter of perception rather than hard fact. What one Member State perceives as an immediate threat to its external security may strike another Member State as relatively harmless' (para. 54).

<sup>59</sup> It is also stated that 'in evaluating possible infringements, the Commission will take into account the specific sensitivity of the defence sector' (p9).

<sup>60</sup> COM(96) 10 final *The Challenges facing the European Defence-Related Industry: A Contribution for Action at European Level* (adopted on 24 January 1996).

<sup>61</sup> COM(97) 583 fin *Implementing European Union Strategy on Defence Related Industries* (adopted on 12 December 1987). See also COM(2003) 113 final *European Defence: Industrial and Market Issues. Towards an EU Defence Equipment Policy* (adopted on 11 March 2003).

<sup>62</sup> See Editorial, 'The Commission's "Defence Package"', (2008) 33 ELRev 1.

<sup>63</sup> [2009] OJ L 146/1.

<sup>64</sup> [2009] OJ L 216/76.

hand, it is economic, that is to bring the benefits of the internal market to this area which has been untouched by EU law; on the other hand, it is pragmatic, in so far as it recognises the special features of the defence industries. The latter are not only political, as they relate to the duty and the ability of a State to protect its realm, but also economic, in so far as they relate to the special conditions which prevail in the manufacture of and trade in defence-related products. This is what Directive 2009/81 refers to as ‘the specificity of the defence and security sector’.<sup>65</sup>

## CONCLUSION

This chapter has focused on the multifarious functions of legal rules in the area of the Union’s security and defence policy. They may set out a political aspiration, as the mutual assistance clause does; they may set out a broad framework within which the Member States may decide how to act, as the provisions on the permanent structured cooperation do; and even in cases where they are clear as to their application, they may be ignored for a long time until a combination of political, economic and legal developments accepts their proper interpretation, as is the case with Article 346 TFEU.

For all their differing implications, these functions have something in common: they illustrate the limits of legal rules in this area.<sup>66</sup> In a Report by the International Institute for Strategic Studies drawn up in 2008, it is pointed out that ‘almost everything about defence in Europe remains resolutely national’.<sup>67</sup> This conclusion suggests not only the link between this area and the core of national sovereignty, but also the practical and economic realities of defence. For instance, as the United Kingdom is one of the few major EU military powers, if the current Coalition Government followed up on the Conservative Party’s earlier pledge and withdrew the UK from the EDA,<sup>68</sup> the significance of the work of that organisation would inevitably be reduced. Similar considerations apply to the usefulness of the provisions on the permanent structured cooperation.

The inherently limited function of legal rules in the area of security and defence policy is illustrated not only in the context of specific institutional

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<sup>65</sup> Ibid, para. 40 of the preamble.

<sup>66</sup> See, more generally, P. Koutrakos, ‘Primary Law and Policy in EU External Relations: Moving Away from the Big Picture?’, (2008) 33 *ELRev* 666.

<sup>67</sup> ‘European Military Capabilities: Building Armed Forces for Modern Operations’ (London: IISS, 2008) 149.

<sup>68</sup> Shadow Foreign Secretary of the Conservative Party, William Hague, made this pledge in an interview with the *Financial Times* (9 March 2010).

innovations and mechanisms. Take, for instance, the general duty imposed on Member States under Article 24(3) TEU. This reads as follows: 'The Member States shall 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.' This provision suggests a twofold obligation: a positive duty to take action which would be in accordance with the Union's policy, and a negative duty not to engage in a behaviour which would run counter to the Union's action. In its second subparagraph, Article 24(3) TEU deals not with the definition of the term 'solidarity', but rather its development: 'The Member States shall work together to enhance and develop their mutual political solidarity. They shall 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.'

The reference to 'political solidarity' is noteworthy, for it raises the question whether its definition is as inherently indeterminate as it may appear at first sight. Compliance with the above principles is to be ensured by the High Representative and the Council. It is difficult to envisage how political solidarity may be developed pursuant to a legally binding obligation imposed by primary law. Involving a community of states each of which may have differing foreign policy interests but all of which are committed to respecting these interests and finding common ground, political solidarity may not emerge from the application of legal obligations. Instead, it is the outcome of a constantly evolving process of understanding and osmosis which is brought about gradually, incrementally and often subconsciously. What legal rules and procedures, such as those set out in Title V TEU, may do is to contribute to a culture of cooperation amongst Member States which is central to the development of political solidarity. However, they may not give rise to it on the basis of legal duties imposed on Member States.

The above is by no means to suggest the irrelevance of legal rules in this area. Instead, it is to acknowledge that they constitute a living phenomenon which should be understood as part of a gradually shifting, constantly evolving, multi-faceted legal and political space. This understanding of their function is particularly relevant in the light of the current existential crisis which the Union faces. In the wake of the international financial crisis, the Union has been going through its very own economic crisis in which it grapples with the distinct possibility of sovereign default, and the threat this poses for the euro. Having been forced to take extraordinary measures aiming to sustain its economic position and to rethink the model of its economic governance, the Union's leaders focus on what they consider the very identity and future of Europe. The German Chancellor, Angela Merkel, for instance, convinced the Bundestag to approve German financial aid to Greece arguing that that was

necessary for the future of Europe,<sup>69</sup> the same argument used by the Portuguese Prime Minister, José Sócrates, to justify the introduction of austerity measures by his government;<sup>70</sup> and the Commission President, José Barroso made the same point when he implored Chancellor Merkel to agree to the extraordinary process of setting up a permanent protective financial mechanism.

In this vein, it is noteworthy that the economic might of the Union was the starting point for the development of its international ambitions.<sup>71</sup> Therefore, not only is it not surprising that the financial crisis has taken existential dimensions, but it is also bound to have serious repercussions for the Union's posture in the world. As the Union's success depends on various diverse factors – political will and ingenuity, economic developments and the markets' response, to name but a few – its management is bound to test the limits and effectiveness of legal rules and procedures. The area of security and defence would not be immune from these developments, as its effectiveness presupposes political will, economic investment, and outward-looking ambition stemming from internal stability – and no legal rules may substitute for these.

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<sup>69</sup> *Financial Times*, 14 May 2010, p9.

<sup>70</sup> *Financial Times*, 13 May 2010, p8.

<sup>71</sup> For instance, the very first sentence of the European Security Strategy reads as follows: 'Europe has never been so prosperous, so secure nor so free.'