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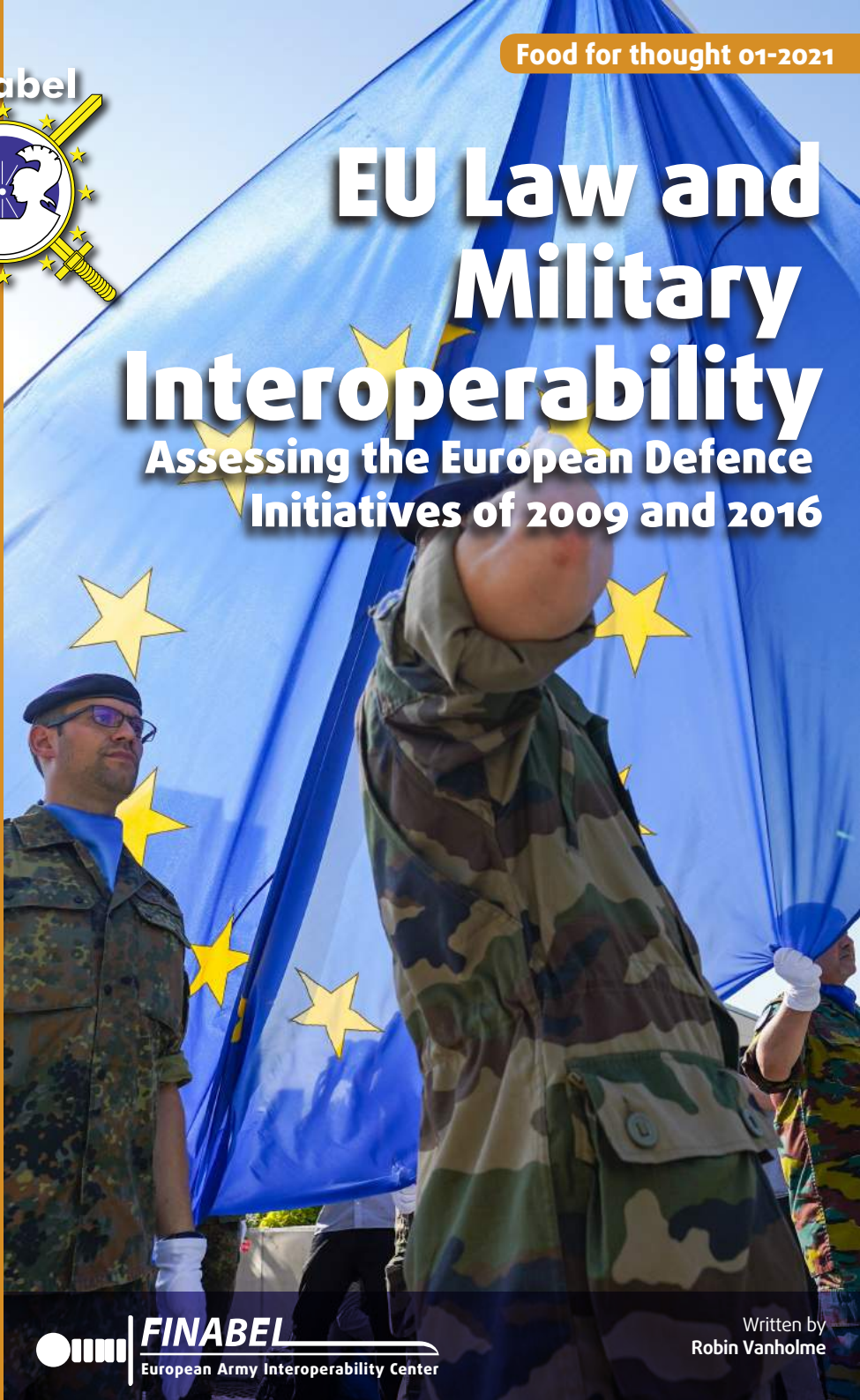
EU Law and Military Interoperability

Assessing the European Defence Initiatives of 2009 and 2016



AN EXPERTISE FORUM CONTRIBUTING TO EUROPEAN ARMIES INTEROPERABILITY SINCE 1953

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This paper was drawn up Robin Vanholme under the supervision and guidance of Mr Mario Blokken, Director of the Permanent Secretariat.

This Food for Thought paper is a document that gives an initial reflection on the theme. The content is not reflecting the positions of the member states but consists of elements that can initiate and feed the discussions and analyses in the domain of the theme. All our studies are available on www.finabel.org

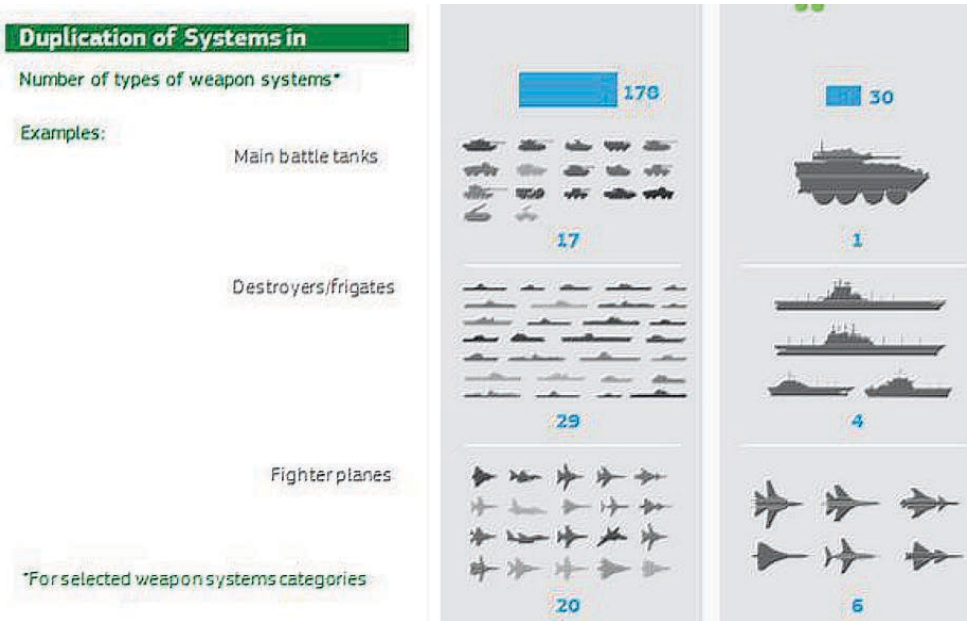
TABLE OF CONTENTS

INTRODUCTION

Military interoperability in Europe is essential to ensure greater effectiveness and independence of European armed forces. Furthermore, it can strengthen the external policies of the European Union and its Member States. In practice, interoperability requires the standardisation and harmonisation of military equipment and standards between EU Member States (MS). The joint procurement of equipment by several MSs is one way of promoting interoperability, while at the same time reducing national expenditure.

Economists argue that greater integration in European military procurement brings benefits through economies of scale resulting in the purchase of cheaper, more advanced, more competitive and more widely available equipment (Trybus, 2014: 2). Joint developments also allow MSs to avoid unnecessary duplication of similar devices and ensure the well-being, or even the survival, of European defence industries, and thus of the European Defence Technological and Industrial Base (EDTIB) (Hartley, 2003: 107–115). Indeed, as we can see on this infographic, compared to the US, duplication of similar military equipment is quite real in Europe, meaning that with a smaller Defence budget, we build several unnecessary similar devices, for a fewer number of them.

The EU consistently advances these arguments, and more specifically by its European Defence Agency (EDA). The former Chief Executive of the EDA, Javier Solana, said as early as 2007 that "*None of us can afford*



any longer to support a strong and comprehensive EDTIB on a national basis. [...] European defence industry requires a European approach and a European strategy." (Solana, 2007) It should be noted that these arguments to fund big European defence projects originate from the profits-driven private sector of the major European armaments companies and of their interest representatives (Vanholme, 2019). In any case, many independent experts and scholars also argue that more defence cooperation between MSs and less national fragmentation in military procurement would lead to a decrease in military spending, whilst maintaining the same results in terms of quality and quantity of equipment (Schmitt, 2000: 79–83; Georgopoulos, 2005: 567; Dufour et al., 2005: § 6.7; Kirat and Bayon, 2006: 111). Why are there gaps in European law to ensure European defence interoperability? This question will lead us to understand what interoperability is and analyse the relevant legislation at the EU level.

The rules governing defence procurement in the European Union relate to different legal spheres: European law, domestic law, public international law and international institutional law. In this study, we shall focus on the "European law" aspect, and more specifically on legislative exemptions from European competition and free-market law in the defence sector. In practice, such exemptions often lead to the protection of national defence industries. They, therefore, can hinder the manufacturing and procurement capabilities of common military equipment, thus undermining European military interoperability.

Since 2016, European legislation promoting interoperability has undergone major changes as a result of new European initiatives. A legal perspective on these initiatives is, therefore warranted. This study is structured in two parts. The first chapter deals with the relevant legal norms. The second chapter is more analytical: it provides a synthesis and identifies European legislation issues against optimising defence interoperability. Legal exemptions, as well as some political aspects that have an impact on the law, will be analysed.

PART I: MILITARY INTEROPERABILITY AND EU LAW

The concept of interoperability

Interoperability in defence is understood as the compatibility and harmonisation of military equipment, doctrines and training among different national armed forces. The concept is also often taken to cover the sharing of sensitive information and interconnectivity between armies (Pascal, 2020).

These days, most MS or EU military operations (the latter under the Common Security and Defence Policy (CSDP)) are conducted on a multilateral basis, with various nations working together. It is, therefore, necessary to have armies that can work together quickly and effectively. When levels of interoperability are low, joint operations can suffer from incompatible communication networks, impractical supply arrangements, unclear mission planning and other issues. Hence, MS

naturally benefit from armaments, but also training and communication, collaboration (DeVore, 2014: 419).

In practice, European defence remains fragmented into 27 national markets, often with non-interoperable equipment purchases from national companies. This situation undermines European armed forces' interoperability, effectiveness, national security, and European security. A practical example: a NATO Commander in Afghanistan complained that he had to use nine different telecommunications systems to call his multinational units on the ground, because of the lack of a common system between the different countries (Menon, 2011: 138). A fully harmonised internal defence market and legally binding European incentives would contribute to European defence's interoperability.

Relevant EU law

The free movement of goods, workers, services and capital is ensured in the EU with several articles in the Treaty on the EU's Functioning (TFEU). However, there are also exceptions limiting the free movement and free market, referring directly and strictly to the military aspect of national security. These are Articles 346, 347 and 348 TFEU, the first being the most relevant and the only one we shall examine in this study. Article 346 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 act unanimously on a proposal from the Commission, make chang-

es to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply."

Consequently, European laws on competition and the free movement of goods in the EU do not apply to most military equipment, allowing unfair practices of procurement from MS towards their national industries to favour their national economies, even if doing so can translate into paying more for less advanced and less effective equipment.

Certain pieces of EU legislation have been put in place to regulate public procurements of military products to limit Article 346 TFEU's scope to ensure more competitiveness (and less national protectionism) in the private defence sector (Walter, 2012). These legislations' goal is to ease public procurement rules and adapt them to defence matters to encourage MS to follow the rules of the common market instead of trying to circumvent them with Article 346 TFEU. The most relevant piece of EU legislation for military procurement and military interoperability is 'Directive 2009/81/EC on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security' (hereinafter "Defence Directive"). The Directive refers to the importance of military interoperability several times in its recitals (recitals 38, 51, 52.), and its Article 18(3) protects interoperability in public procurement agreements.

The Defence Directive's purpose is to open up defence markets in the EU by establishing common rules and common standards on the modalities of acquisition, negotiations and contracts between MS and the European defence industries. The goal is to increase competition in this sector and hence open up the national borders of this highly sensitive

market historically protected by MS, thus promoting cooperation in defence and greater military interoperability. This directive exists because at the time MS almost automatically exempted military equipment purchases from public procurement rules, in particular under Article 346 TFEU, as "the EU rules on public procurement did not meet the specific needs of defence and security markets for sensitive purchases" (European Commission, 2016: 2). The Defence Directive is complemented by 'Directive 2009/43/EC simplifying terms and conditions of transfers of defence-related products within the Community' (hereinafter "ICT Directive"). The next chapter will discuss the impacts of this directive on military interoperability and the directive's weaknesses. Taken together, these two directives make up the Commission's 2009 "defence package". Directive 2014/24/EU on public procurement is only relevant for military forces in the procurement of items such as food or uniforms. However, this paper focuses on hard defence equipment, where questions of interoperability are more important. We will therefore not analyse this directive, and instead refer to other writings on civilian public procurement (for example, Arrowsmith, 2011; Heuninckx, 2017*)*.

The new initiatives from 2016

In 2016, the EU launched several initiatives to improve and promote European defence by releasing funds for joint research between MS to develop interoperable military equipment; some initiatives are already active, while others are not operational. The initiatives from 2016 are a new kind of 'defence package' which reinforces the two 2009 directives. This paper will only focus on initiatives that directly impact military interoperability and a more assessable one: PESCO, EDF, EDIDP and PADR.

The European Defence Fund (EDF) is a multi-billion-euro fund, proposed in November 2016 by the European Commission, within the 2021–2027 budgetary framework, to provide financial support for common defence projects at an EU level. According to Denis Roger, Director of Research at the EDA, the decision to create this research fund is partly due to the decline in national funding for military Research & Development (R&D), which fell by 18% (€1.9 billion) between 2006 and 2014 (Gibney, 2016: 491). For instance, this fund will be able to release subsidies for R&D in metamaterials, a very expensive component that makes it possible – in theory – to conceal certain objects from radar; the component is of interest to Dassault and Airbus, which are developing a European stealth fighter (Marrone and Nones, 2019). Thus, the EDF constitutes a practical fund to support industries during the costly R&D phase (Arteaga, 2016: 3), a crucial phase that falls outside the scope of the defence directive. Before establishing the EDF in 2021, the EU launched transitional test initiatives similar to the EDF: the European Defence Industrial Development Programme (EDIDP) and the Preparatory Action on Defence Research (PADR). We will return to these initiatives in the next chapter, where we will also discuss how the EDF aims to promote military interoperability.

The Permanent Structured Cooperation (PESCO) is an EU provision enabling the MS to develop further collaboration in defence, ranging from collaborative armaments projects to a European army. The legal basis for PESCO is found in Articles 42 and 46 of the Treaty on European Union. For each project, there is one coordinating State. PES-

CO seeks to avoid unnecessary duplication of similar military initiatives launched by different Member States, effectively promoting interoperability with common defence programmes between several MS (Novaky, 2018: 97–104). As such, PESCO aims to increase the competitiveness of the European defence sector and to avoid unnecessary technological overlap (Biscop, 2018: 162, 177). Moreover, its programmes can be co-financed by the EDF to ensure that MSS can more easily embark on transnational military programmes. PESCO brings together 25 out of the EU's 27 Member States, with Denmark and Malta being the only non-participating Member States.

PART II: STRENGTHS AND WEAKNESSES OF EU DEFENCE LAW

Limits of Article 346 TFEU

For a long time, Article 346 TFEU was difficult to interpret correctly. The Court of Justice of the European Union (CJEU) avoided directly confronting this article (Trybus, 2014: 132), with the consequence of restricting free movement in the case law. Article 346 TFEU was very often successfully used by Member States in actions for annulment of Commission decisions, with the Court ruling in their favour (Bonnici and Ciantar, 2013: 585). It was not until 2009 and the case Commission v. Spain (concerning an infringement action where Spain used Article 346 TFEU in a case of import of military equipment) that the CJEU explicitly interpreted the meaning of this article.

In this judgment, the Court restricted the use of Article 346 TFEU. As per the judgment, the article only applies on a case-by-case basis; it must necessarily be invoked and proven by the Member States, the burden of proof being on them. There is, therefore, no automatic exception from the EU common market's rules. This is positive, as exemptions from European law must be interpreted strictly to ensure the uniform application of law and to avoid abuse of exemptions.

In addition to Commission v Spain, we must address the case of Commission v Italy (also known as 'the Agusta case') of 2008. This infringement procedure concerned the acquisition of Agusta helicopters by Italy. In the Commission's view, Italy did not respect European competition law because the country always used the Italian manufacturer Agusta for its entire fleet of helicopters (Agusta case, para. 10). Instead, Italy should have followed a fair and public contract award procedure under Article 6 Directive 93/36/EC in force at the time. Again, Italy used Article 346 TFEU as a justification for exemption. This case is special because the Agusta helicopters ordered had a dual purpose: they were used by the armed forces and used by the civil sector such as the fire brigade and the forest protection service (Trybus, 2014: 96). Could Article 346 TFEU, therefore, be used for equipment whose purpose was not solely military? The Court held that, because of the "hardly certain" military use (i.e. the possible non-military use) of the helicopters purchased, the acquisition could not alter the conditions of competition in the common market concerning products not intended for specifically mil-

itary purposes (Agusta case, para. 47). Article 346(1)(b) TFEU could therefore not be invoked. The Court reconfirmed that the Treaty should not be seen as containing "an inherent general exception excluding all measures taken for reasons of public security from the scope of Community law" (Agusta case, para. 43). The ECJ also held in the Fiocchi case that the list of armaments that may be exempted by Article 346 (mentioned in point (b)) is entirely exhaustive (for a deeper analysis of the EU defence case law, including the most recent developments, see Vanholme, 2020).

All in all, in light of the abovementioned judgements as well as a few more recent judgements (see C-615/10, T-391/08, C-474/12, C-93/17), we can argue that Article 346 TFEU cannot be automatically and easily used by EU Member States, which is ultimately good news for military interoperability. Having established how Article 346 TFEU currently works in practice, we now focus on secondary EU legislation.

The numerous exemptions to EU defence legislation

a. Defence Directive

The Defence Directive aims to provide a tailor-made framework for defence and security procurement, thus considerably limiting the use of Article 346 TFEU in practice (Trybus, 2014: 361). The scope of this Directive is broad: it covers military and sensitive equipment including their spare parts and components and works and services directly related to such equipment or for other specifically military and sensitive purposes (Article 2). Thus, the Defence Directive applies to a considerable proportion of MS defence procurement, extending to both goods and services. Similarly to Article 346 TFEU, exemptions from the Defence Directive are threats to military interoperability. We focus here on the Directive exemptions, and more particularly on those that disadvantage military interoperability.

In Article 12(a) of the Directive, the first exemption concerns international agreements or arrangements concluded between one or more Member States and one or more third countries. It should be recalled that the United Kingdom will be included in the 'third countries' category once the Brexit transition period finishes after which agreements with the UK will be covered by this exemption. Consequently, if the Organisation for Joint Armament Cooperation (hereafter OCCAR, a European intergovernmental organisation that facilitates and manages collaborative armament programmes) enters into a new military procurement agreement for all its members, it is no longer bound by the Defence Directive because the UK is a member. The same logic prevails in the case of the NATO Support and Procurement Organisation (NSPO) which makes joint purchases with non-European states such as the United States or Turkey; the NSPO is a NATO service that can carry out military procurement for the EU Member States. However, this first exception does not seriously affect European interoperability even if these organisations do not follow the Defence Directive. Their intrinsic objective is to promote collaboration and interoperability between the armed forces of the participating nations, so the risk of negative effects is low.

The second relevant exception is more serious as it concerns the "specific procedural rules of an international organisation purchasing for its purposes, or to contracts which must be awarded by a Member State following those rules" (Article 12(c)). The definition of this

exemption seems somewhat vague, giving rise to legal uncertainty – which is never a good thing. Does the Directive exclude only goods and services acquired by a MS used within the framework of an international organisation, such as the AWACS aircraft pooled through NATO (NATO, 2006)? Or does the exception also apply to contracts awarded by the organisation on behalf of its Member States (Heuninckx, 2017: 167)? The European Commission, in a guidance note, clearly favours the first, less broad interpretation (European Commission, 2010: §2.4). However, since the Commission's guidance notes are not legally binding, and due to the lack of case law on this article (and on this Directive in general), we can only speculate on this exemption's interpretation.

Our third exception comes from Article 13 of the Directive, which deals with specific exclusions. Some of these are problematic for interoperability. For example, R&D programmes carried out by at least two Member States to develop a new product are excluded from the scope of the Directive. This exception is detrimental because, over time, the largest cooperative programmes have always involved R&D, such as the Jaguar aircraft, the Meteor missile, and the F-16 and F-35 fighter aircraft. Examples at the heart of current events are the Franco-German-Spanish project for a FCAS stealth fighter aircraft programme (Airbus, 2020), and the Eurodrone project (European MALE RPAS, see picture) consisting of an interoperable long-endurance surveillance and attack drone between Germany, Italy, Spain and France (OCCAR, 2015; EDA, 2019c). Most collaborative military procurement programmes are thus excluded from the scope of the Directive (Heuninckx, 2017: 133). According to the Commission, it was the MS that "strongly insisted" on the

inclusion of such an exemption (Schmitt and Spiegel, 2010).

As a result, since OCCAR and EDA mainly deal with R&D, these two organisations are mostly outside the Directive scope. As the scope of Article 13 is broad, such an exclusion seems to extend to an agreement between both one or more MS and a purchasing entity as well. Regrettably, EU law can be set aside for so many agreements. OCCAR and the EDA indeed have the intrinsic objective of promoting European military interoperability, thereby limiting the consequences of this exclusion for interoperability. However, if the MS do not have to follow the rules of the Directive and can invoke Article 346 TFEU, they can demand that collaboration agreements be made subject to national industrial compensation for their national industry, which has the consequence of making the R&D agreements less competitive, less efficient, slower and more costly (Heuninckx, 2017: 5, 27–28). Moreover, many collaborative R&D programmes – particularly the most ambitious ones – are carried out outside the EDA or OCCAR on a government-to-government basis, where national industrial favouritism risks are greater. Including collaborative projects involving R&D in the scope of the Directive may not be possible in the near future because of the Member States' reluctance. Instead, the EDA could draft a new Code of Conduct on R&D to introduce a procedure that reconciles competition and fair returns (Trybus, 2014: 356).

As the fourth relevant exclusion, we have Article 13(a) of the Directive, which excludes contracts for which the application of the directive rules would oblige a Member State to supply information that it considers contrary to its security interests. Given that the Member State itself estimates what information might be too sensitive to share with other MS in the context of a public procurement call, this strengthens the possibility for MS

to protect their national needs and industries. This exemption poses a problem when government-to-government agreements deal with cooperation in procurement. There are several examples of such agreements, including the agreement between Germany and France on the joint purchase of C-160 transport aircraft (Hamel, 2007: 88–90), the IRIS-T missile (see picture below) produced by Diehl for six European countries (Diehl, 2011), and the CaMo armoured vehicle procurement programme between France and Belgium. All these programmes are positive for European military interoperability. Still, it is regrettable that the common public procurement procedures set out in the Directive, ensuring free competition and transparency, need not be followed in these cases. The issue that should be kept in mind here is that the structure of these agreements is consequently always different (Heuninckx, 2017: 115). Because these agreements have been negotiated on a case-by-case basis, clauses such as those on the scope, financial contribution, sharing of costs and resources, and rules governing cooperation and transparency vary each time. As a result of European law exemption, there is no single commonly used outline for an agreement, making it more complex and time-consuming to conclude such agreements that increase European interoperability.

Finally, the fifth major exclusion concerns the exemption of contracts awarded by one government to another government. This exemption relates to the supply of military equipment or sensitive equipment, works and services directly related to such equipment, or works and services intended for specifically military purposes or sensitive works and services (article 13(f)(i)(ii)(iii) of the directive). We may note that this scope is narrower than that of the Directive itself (see above). Indeed, here spare parts and components of military aircraft are not mentioned. Does this mean, then, that sub-assembly is exempt from this exemption? We could argue that work intended for specifically military purposes includes the assembly of spare parts and components. Facilitating the free movement of spare parts at a European level would promote the interoperability of armed forces, and help forces avoid shortages of components. It would therefore serve the overall purpose of the directive if this exemption did not apply to sub-assembly. Without the interpretation of the ECJ on this point, we can only speculate.

In addition to these five exemptions, there are thresholds of amounts for the procurement that must be met for the Directive to apply; the thresholds are reviewed every two years. According to the 2019 consolidated version of the Directive, the thresholds for 2019 and 2020 are €443,000 for supply and service contracts, and €5,548,000 for works contracts. Although the amounts have increased slightly since 2009, the major procurement and collaboration programmes in the field of defence equipment are well above these thresholds, as the price of military equipment is constantly rising (Lake, 2012: 71, 74; Fontanel and Ward, 1993: 70–71). Nevertheless, these large acquisitions often include R&D work, which is, as we have seen, outside the directive's scope. We can note, however, that a few large tenders have recently been launched under the Directive for complex defence systems (for example, warships for Germany – see European Commission, 2016: 5).

On the other hand, there are also many more contracts for the procurement of spare parts, repairs, accessories, components, small arms systems and ammunition, which are often below these thresholds (Trybus, 2014: 270), and therefore outside the scope of the Directive.

Suppose the MS do not have to follow the Defence Directive for these less high-profile products, which are nevertheless crucial for keeping their military equipment operational in the long term. In that case, they will find it easier to undermine the EU principles of competition and free movement. In consequence, there is the risk that MS would stockpile ammunition, accessories or spare parts that are not exchangeable between countries. This situation could reduce interoperability and the effectiveness of European armed forces when they have to act in concert, such as joint training, CSDP or military missions.

b. ICT Directive

As with the Defence Directive, the ICT Directive's main objective is to create an internal market with common defence rules. While the Defence Directive is concerned with defining the rules for European public procurement of military equipment, the ICT Directive simplifies the conditions for transferring such equipment within the EU.

For the transfer of military equipment across the EU, each MS used to apply for different import/export licences beforehand, with different procedures. According to Article 4 of the ICT Directive, MS no longer has to apply individually for authorisations for the transfer of defence-related products. Instead, a single licensing regime applies to all Member States. These common rules on the transfer of military products promote military interoperability, while the past situation made the transfer of military equipment harder and therefore created national barriers in the defence sector (European Commission, 2007: 1). Each MS, faced with the uncertainty of obtaining a licence, was indirectly incentivised to turn to a national arms producer, rather than to a European – potentially more efficient – producer (ibid, p. 4). By looking inwards, the MS would not have developed intra-European defence collaboration and would have unnecessarily duplicated non-interoperable military systems.

This is no longer the case. Thanks to the ICT Directive, the internal defence market is being strengthened. According to the Commission, this homogeneous strengthening of the European defence sector makes it possible to increase intra-European cooperation in the armaments sector (European Commission, 2007: 4), thereby improving its interoperability. No longer having to worry about whether other MS will let military products transit on their territory increases the level of mutual confidence, which is a necessary precondition for good intergovernmental cooperation in this sensitive sector (ibid, p. 7).

Finally, contrary to the Defence Directive, there is no exemption allowing Member States to return to the previous uncertain and heterogeneous licensing regime. The ICT Directive even provides certain cases where it is not necessary to present a licence: for example, in the event of a humanitarian emergency (article 4(2) of the directive), or if it is necessary to ensure the timely operation of a collaborative programme (article 4(2)(c)). The freedom of movement of military equipment thus encouraged facilitates the possibilities for cooperation and interoperability between MS.

To sum up, these two directives are positive for the interoperability of products in the defence sector. Nevertheless, the Defence Directive, with all its exemptions, only applies in about 38% of government military contracts (not including Denmark, which has an opt-out from the Common Security and Defence Policy) (European Commission, 2016: 2–3). Its use also remains very uneven between

Member States, with some almost never using it (ibid, pp. 4–5) and many contracts keep being awarded outside the procedures provided for by the Directive (European Commission, 2013). The ICT Directive positively promotes the free movement of military equipment and, ultimately, their interoperability by reducing administrative red tape and uncertainty in the MS. However, this red tape was not very problematic in practice because, even if the licensing regimes were heterogeneous and complex, the MS almost always granted their authorisation for the passage of military equipment even before the directive was adopted (European Commission, 2007: 4). These two directives are therefore not optimal for ensuring strong interoperability at a European level. This lack of interoperability and the general lack of strong collaboration in European defence prompted the Commission to take new initiatives as part of the second kind of defence package in 2016.

Critical analysis of the new EU defence initiatives from 2016

As Permanent Structured Cooperation (PESCO) only started in 2017, and the European Defence Fund (EDF) is not due to launch until next year, it is difficult to make a detailed critical analysis of their impact. Nevertheless, we can examine the related legal rules that may affect military interoperability in Europe.

a. PESCO

Let us look first at PESCO, which can influence the use of the EDF. As we have seen, PESCO is an EU provision that allows MS to develop further collaboration in defence. PESCO was launched in 2017. Each year in November, the participating Member States meet to agree on the launch of new collaborative programmes. It is still too early to know if in practice, these defence programmes will be respected and if interoperability will be significantly increased. However, to promote interoperability among other goals, small but also major joint defence programmes have been launched, such as European frigates, missiles, helicopters and electronic warfare equipment, all intended to be interoperable between the participating MS (Novaky, 2018: 97–104). The Council launched 17 programmes in 2017, another 17 in 2018, and 13 in 2019 (Council, 2019). Those projects focus on collaboration in creating new military systems and training, such as radiological, biological, nuclear, tactical, nautical and cyber defence manoeuvres. Such joint training, taking place in so many different areas, enables the national armed forces of the MSs

to operate in the same way. Even if they do not share the same equipment it increases their practical interoperability on the ground in case of joint missions (for instance in the framework of the CSDP).

Besides, the direct objective of PESCO is to increase military interoperability. Commitment 13 of the PESCO legal framework – which is legally binding to all participating MS – calls for the development of interoperability of European armed forces (Council, 2017: 4–5). Binding Commitment 16, on the other hand, aims to simplify and standardise cross-border military transport. PESCO programmes often call for establishing common technical and operational standards among the Member States to increase military interoperability (Fiott, 2018: 36). Finally, Commitment 11(c) reads as follows: « [participating MS] *take concrete measures to enhance the availability,* ***interoperability****, flexibility and deployability of their forces, in particular by identifying common objectives regarding the commitment of forces, including possibly reviewing their national decision-making procedures* » (author's emphasis).

It now remains to be seen whether, in practice, PESCO will bear fruit in the long term. PESCO's legally binding commitments are very good news for military interoperability. In theory, it will be more complicated for MS to participate in PESCO projects to turn exclusively to their national industries. Moreover, to encourage Member States to embark on and complete PESCO projects, they will count on possible EU financial support from the European Defence Fund (EDF).

b. European Defence Fund

We shall focus here only on the impact that the EDF can have on military interoperability, focusing on the functioning of the EDF legislation (Fiott, 2020). According to the Commission, the EDF would "avoid duplication, make more efficient use of taxpayers' money, improve the interoperability of defence equipment, minimise fragmentation and boost competitiveness and innovation in the European defence technological industrial base" (European Commission, 2018: 6). The EDF can be used to promote the military interoperability of certain programmes outside the Defence Directive.

The need to promote interoperability is also mentioned several times in the Regulation establishing the EDF. According to Article 3(2) (b), the Fund's objective is to enhance greater interoperability between Member States' military capabilities. Moreover, according to Article 11, for a programme to be eligible for EDF funding, it must meet several criteria, including carrying out activities to increase interoperability. However, interoperability is not mandatory, as only one of the requirements mentioned in Article 11 must be met to be eligible. Nevertheless, other funding conditions, such as the non-duplication of equipment and the need for common standardisation, are closely related and conducive to the objective of interoperability. Also, to receive financial support from the EDF, defence programmes must be carried out by at least two MS and three companies, and system requirements must be harmonised between the Member States (article 11(4) of the regulation establishing the EDF). The need to improve and increase military interoperability through this fund is also mentioned in recitals 8 and 9 of the Regulation establishing the EDF. Furthermore, the Commission's 2017 'Communication on Launching the European Defence Fund' states that the Commission intends to use this fund to "foster interoperability between armed forces" (European Commission, 2017: 3).

The Next Generation Fighter, co-developed by France, Germany and Spain, could, in theory, get funding by the EDF

All in all, only R&D is covered by the EDF: the funds can only finance research, development, validation and demonstration of technology (Fiott, 2018: 35). Serial production of military equipment is therefore excluded. It is positive that the EDF concentrates on R&D, given that this field was excluded from the scope of the Defence Directive (with, as a consequence, an increased risk of R&D not following European rules of free movement and competition). Moreover, given that the production of similar and interoperable devices is often a practical consequence of R&D (Heuninckx, 2008: 125), it is encouraging that R&D is financially supported.

The European Defence Fund's size was originally proposed to be €13 billion under the EU 2021-2027 Multiannual Financial Framework, but the post-COVID budget proposal by the European Commission has reduced it to €8 billion. However, the coronavirus crisis is likely to negatively impact the EDF budget; negotiations are still ongoing at the time of writing. Even though the EDF is rather small, European defence industries are happy to see the EU using its budget for defence (Airbus, 2018). For European firms, the fund has the potential to unblock or encourage the launch of major European collaborative programmes worth billions of euros (Fiott, 2019: 2). This would promote increased interoperability among Member States. It would also allow MSs to adopt more flexibility in taking part in joint projects. Even though certain American programmes programmes allow European NATO members to own interoperable systems, such as the American F-35 fighter aircraft, a state may want to distance itself from projects that are less favourable to their national industries. The European Defence Fund and PESCO promote Europe's strategic autonomy and irritate the United States. The US government is threatening the EU with sanctions, for example in the event that the

Member States use the EDF to finance European programmes to the detriment of US companies (Chazan and Peel, 2019). The US has called for its industries to also be eligible for EDF funding, calling the eligibility criteria for the fund for non-EU companies unacceptable (Santopinto, 2020).

c. EDIDP and PADR

As the EDF has not yet started, it is difficult to analyse its impact. However, we can already discuss the EDIDP (European Defence Industrial Development Programme) and PADR (Preparatory Action on Defence Research). EDIDP and PADR are the two EDF test programmes. PADR focuses solely on research, while EDIDP focuses on development [149].

EDIDP is a prequel to the EDF, with a budget of €500 million for 2019–2020. Similarly to the EDF, Article 6(5) of the regulation establishing EDIDP stipulates that the fund can support common armament projects, provided that they adopt common specifications or standards. In other words, actions eligible for EDIDP must increase military systems' standardisation, which makes measures promoting interoperability a legally binding prerequisite. This is stated even more clearly and directly than in the Regulation establishing the EDF; in the interest of interoperability, it would have been preferable for the latter to use the same terms as the regulation establishing EDIDP. There are 20 transnational projects currently funded under EDIDP (EDA, 2019a), and new calls for funding by EDIDP (and PADR) were launched in March 2020. The European Defence Agency (EDA) is in charge of the calls for tenders and funding. As this programme is currently being tested, there is not yet a public report on the implementation of EDIDP.

The logic of PADR is similar to that of the EDIDP: testing how to foster closer integration in defence and a commitment to build the European Defence Technological and Industrial Base. The PADR has received €90 million in funding: €25 million in 2017, €40 million in 2018, and €25 million in 2019 (European Parliament, 2020: 9). The tactical aim of the initiative is "to test funding and oversight mechanisms and establish which challenge areas the funding should be directed towards to ensure positive capability outcomes" (ibid.). Meanwhile, the strategic aim of PADR is to demonstrate the added value of defence research at an EU level between Member States, thus incentivising pan-European defence collaboration and improving the chance of European industries working together. The funding requirements of the initiative set a condition of three or more partners from different Member States, and "a focus on the priorities identified in the Capability Development Plan" produced by EDA (ibid.).

Moreover, projects can get funding only if the Member States involved agree to purchase the final product (ibid.). This is a harsh condition because sometimes MS just wants to research something without committing on the longer term and because often basic research leads to things that will never be constructed. Nonetheless, the overall objective of this initiative appears beneficial for European interoperability in the field of defence.

An example of basic research funded by PADR is "Ocean 2020", intending to improve situational awareness in maritime environments, which can be done by developing and using manned and unmanned systems. 35 million euros were awarded to the project, conducted by a consortium led by the Italian defence industry Leonardo (European Parliament,

2020: 9). As of January 2020, five projects have been funded by this financial instrument (ibid.). Since PADR is similar to EDIDP, a more detailed analysis is not required here whilst having a smaller budget and fewer examples of projects.

As the amounts allocated by EDIDP and EDF remain objectively low compared to the costs by the lack of cooperation – and even lower when compared to US R&D spending –, the EDA has signed a cooperation agreement with the European Investment Bank (EIB) to co-finance programmes under the EDF and EDIDP, using grants, loans and equity (EDA, 2019b). EIB funding will only be available when the volume requested exceeds 7.5 million euros. Loans to public and private bodies can cover up to 50% of the total cost of the defence project (EDA, 2019b). This opportunity can only incentivise Member States to work together in the defence sector and, as a result, improve interoperability.

In the end, as was argued at a February 2020 seminar by EDA and the Croatian EU presidency, the new tools such as the EDF and PESCO, but also the Coordinated Annual Review on Defence and the Capability Development Plan, will only significantly improve interoperability if the Member States make frequent and full use of them, and integrate the tools into their national defence planning (EDA, 2020). The financial, technological and security incentives are present. The industries are ready. The ball is now in the Member States' court.

CONCLUSION AND RECOMMENDATIONS

As the Lisbon Treaty did not abolish article 346 TFEU, and as the CJEU had constrained the use of this Treaty exemption, the Commission and the Member States agreed in 2009 to pass two directives on defence procurement: the Defence Directive and the ICT Directive. The Defence Directive sought to reduce the use of Article 346 TFEU by Member States. To do so, the legislation took into account as many national security problems as possible, which explains why the directive has made various adaptations compared to the general rules found in the Directive on public procurement (Trybus, 2014: 135). The aim was to practically apply the internal market rules to the defence sector, whilst taking into account the sector's specificities. As a result of these developments, it is only in exceptional circumstances that Article 346 TFEU can now be invoked to limit the principles of free movement and free market in the defence sector. This decision seems to be bearing fruit, as the frequency of use of Article 346 TFEU has slightly decreased since the entry into force of the Defence Directive (European Commission, 2019: 6).

Nevertheless, as we have seen, there are a large number of exemptions to the Defence Directive. The most important are those on international organisations with a third country, those on international organisations purchasing for the fulfilment of their missions, those for R&D, and those on a government purchasing from another government. However, these exemptions do not automatically imply the end of collaboration between MS in the

defence sector.

We can see a recent improvement in the use of the Defence Directive: today, 38% of defence spendings in the EU are concerned (which is still low) and, according to the Commission, greater use of the Directive could save 770 million euros per year (European Commission, 2016: 8–9). This argument promotes more collaboration between the Member States in the military sector, which would lead to more interoperability. It is true that in its early years, the Directive applied more often to the security market than to purely defence procurement programmes (Trybus, 2014: 308–309). However, this is no longer the case: Recent developments show that 93% of contracts under the Directive were used for defence procurement in 2016 (European Commission, 2016: 4) – up from less than 50% in 2009 (European Commission, 2016: 4). Still, in 2016 the Commission (p. 6) judged that "the objectives of the Directive have been only partially achieved: while the Directive has led to an initial increase in competition, transparency and non-discrimination in the European defence market, Member States need to apply it more consistently if these objectives are to be fully achieved". The flexibility provided by the numerous exemptions for the directive does not seem optimal for this objective of consistent application.

On the other hand, the ICT Directive reduces unnecessary red tape for the free movement of armaments. It provides a positive incentive for Member States to embark on intra-European armament programmes. Although satisfactory and positive, this directive did not bring about a revolution in the field of military interoperability. The main reason for this is that even though the directive simplified the licensing regime for transfers of equipment, already before the directive, the member states routinely granted authorisation for such transfers.

All in all, as the European Commission (2016) confirms in its report, these two directives are still insufficient to liberalise the defence procurement market sufficiently, and consequently to bring about greater interoperability. Governments must realise that the national economic and security interests they protect by using Article 346 TFEU must be weighed against the savings that joint collaborations could bring in terms of interoperability. In the long term, if armies work together at ease and with efficiency, the smooth cooperation will have positive economic, political and geostrategic effects.

A second "defence package", which seems much more ambitious, was decided in 2016. While it is still too early to analyse their impacts, we can appreciate the legally binding importance given to interoperability in PESCO and the EDF's functioning. Due to the lack of impact studies, our analysis focused on the legal clauses. PESCO is very ambitious and will allow more interoperability, with the launch of major joint European projects. Indeed, PESCO's legally binding commitments explicitly mention the importance of military interoperability. For its part, the regulation establishing the EDF sets as a condition that programmes seeking funding must promote military interoperability, or at least an objective close to it. In the end, it remains to be seen whether the Member States use these tools often and seriously in the long term. However, the relatively small budget of the EDF tends to diminish its potential.

Several improvements can be suggested to promote interoperability. For example, the Defence Directive could be amended to clarify certain exemptions or to remove the exemption concerning R&D. A definition

of a European public body is necessary: this clarification would make clear whether the Defence Directive still applies to OCCAR when post-Brexit UK will be involved after the transition period. A new Code of Conduct on Offsets should also be put in place by the EDA. Indeed, offsets – that is, compensations to national companies to protect their interests – not only make collaborative programmes more complicated, they also reduce the level of technological and economic efficiency of such programmes (Heuninckx, ibid, p. 13). This desire to protect its less competitive domestic industries, with a financial return for these industries, is by definition discriminatory and contrary to the tenets of the internal market (Heuninckx, ibid, p. 142). A Code of Conduct on R&D, an extremely important defence procurement sector but not covered by the Defence Directive, should also be drawn up. Finally, to align the planning of national defence budgets, the EU could create a common European budget for defence procurement tenders, with a mandatory minimum contribution for each Member State. This would enhance the decision-making concerning potential collaborative procurement, thus increasing military interoperability.

In conclusion, European law is not optimal for military interoperability, but this paper has shown that European law has improved in this regard in recent years through case law, new legislation and the development of new initiatives. Therefore, we can increase interoperability in the future. However, this is not only because of new European initiatives but above all because collaboration is becoming the only way for Member States to participate in the development and acquisition of new cutting-edge defence systems, due to the increasing costs of armaments. As joint tenders have the greatest potential for increasing military interoperability, they should be promoted by the armed forces, rather than being prevented because of certain legislative exemptions.

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