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The notion of necessity in the law of the European Union

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1. Introduction

There are various aspects of the notion of necessity and its implications for the multilayered and idiosyncratic constitutional order of the European Union which are worthy of analysis. For instance, the Lisbon Treaty, which entered into force on 1 December 2009, envisages the emergence of a collective sense of belonging by imposing duties on Member States in extraordinary circumstances. To that effect, it introduces two novel provisions. The first is the solidarity clause in Article 222 of the Treaty on the Functioning of the European Union (TFEU). This provides for the joint action by the Union and its Member States 'if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster' and requires that the Union 'shall mobilise all the instruments at its disposal, including the military resources made available by the Member States'. The second provision is the mutual assistance clause in Article 42(7) of the Treaty on the European Union (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.

Both clauses raise a host of questions about the nature of the duty they impose on Member States, the conditions under which the latter are expected to comply with it, and the specific ways in which their compliance is envisaged to manifest itself.

Another aspect of the status of necessity under EU law is how it affects the position of Member States as fully sovereign subjects of international law when they act in areas of EU competence, or in ways which may affect EU law. It is this aspect which will be the subject matter of this article, as it relates to the balance of power between Member States and the Union within the Union legal order, itself an issue of fundamental significance. The Union, as the Community in the pre-Lisbon days, is founded on the principle of limited competence. In accordance with Article 5(1) TEU, '[t]he limits of Union competences are governed by the principle of conferral' which is defined in Article 5(2) TEU:¹

... the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

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¹ In the pre-Lisbon constitutional arrangements, the principle of conferral which governed the European Community was set out in Article EC. On the principle of limited competence, see A. Dashwood, 'The Limits of European Community Powers', (1996) 21 ELRev 113.

Therefore, any analysis of the notion of necessity within the Union legal order is centered on the locus of power within its constitutional architecture. In terms of the semiotics of this architecture, it is noteworthy that, in the Lisbon Treaty, that is the most recent expression of the Union's primary charter, provisions on competence start off with a reference to the limits of the Union's competences.

This analysis focuses on the effects of the Union legal order on the right of the Member to rely upon the concept of necessity, and focuses on the ways in which EU law accommodates this right in cases where its exercise deviates from EU law. It is structured as follows. First, it examines the provisions set out in the EU Treaties which enable Member States to deviate from the four freedoms. Second, it examines clauses laid down in secondary measures adopted by the EU institutions which justify deviations from their provisions. Third, it analyses the provisions set out in primary law which recognise the right of Member States to deviate from the entire corpus of EU law under certain extraordinary circumstances.

2. Exceptional clauses in primary law

The Union legal order acknowledges the right of Member States to deal with exceptional circumstances by deviating from EU law. It does so by setting out exceptional clauses in both primary and secondary legislation. In the context of the foundational substantive principles of EU law, that is the four freedoms, such exceptions are laid down in Article 36 TFEU regarding free movement of goods,² Articles 45(3) TFEU and 52 TFEU regarding free movement of persons,³ and Article 65 TFEU regarding free movement of capital.⁴

These provisions enable a Member States to impose restrictions in order to protect certain interests which may be in conflict with free movement and which are deemed worthy of such exceptional protection. These interests are set out in primary law and include, invariably, public policy, public security and public health. They also include certain other interests a reference to which may vary in different TFEU provisions.⁵

In terms of the philosophy of these exceptions, it would be wrong to assume that the relevant provisions grant the Member States the right to protect the social interests to which they refer by deviating from EU law. Instead, they acknowledge the right which each Member State has as a fully sovereign subject of international law to protect the social interests deemed more important, in a case of conflict, than the economic freedoms set out in the EU Treaties.

On the other hand, it would also be wrong to assume that the Member States enjoy complete discretion as to whether and, if so, how to protect these interests. In fact, there are certain parameters within which the Member States must act. This may be recognized in primary law. Article 36 TFEU, for instance, provides that prohibitions or restrictions on the free movement of goods 'shall not ... constitute a means of

² ex Art 30 EC.

³ ex Articles 39(3) EC and 46 EC.

⁴ ex Article 58 EC.

⁵ For instance, Art. 36 TFEU also refers to public morality, the protection of health and life of animals or plants; the protection of national treasures possessing artistic, historic or archaeological value, and the protection of industrial and commercial property.

arbitrary discrimination or a disguised restriction on trade between Member States'. Early attempts of Member States to instrumentalise such exceptions in order to escape EU law controls were rebuffed by the European Court of Justice (ECJ). In *Simmenthal*, it was made clear that 'Article [36 TFEU, ex Article 30 EC] is not designed to reserve certain matters to the exclusive jurisdiction of Member States but permits national laws to derogate from the principle of the free movement of goods to the extent to which such derogation is and continues to be justified for the attainment of the objectives referred to in that article'.⁶

Therefore, the interpretation of the exceptional clauses laid down in the EU Treaties has been based on the premise that they 'deal with exceptional cases which are clearly defined and which do not lend themselves to any wide interpretation'.⁷ This tenet applies both to principles set out in the EU Treaties⁸ as well as secondary legislation.⁹ In particular, the requirement of compliance with the principles of necessity and proportionality has been a constant in the ways in which necessity requires that national authorities deviate from EU law provisions.¹⁰ Within this context, one of the parameters which the Court examines is the existence of secondary legislation and the extent to which this protects the interest which a Member State seeks to protect: if the answer to this question is affirmative, then the deviation from EU law is not justified as, by purporting to protect an interest already protected at EU level, such a deviation is no longer necessary. Therefore, not only is the exercise of the right of the Member States to act when they deem that necessity so requires assessed *in concreto* by Europe's judges, but the latter assessment is also carried out in the light of EU law and the activities of the EU legislature.

In relation to the public security proviso, in particular, the Court of Justice has traditionally afforded some leeway to the Member States. This is exemplified in the *Campus Oil* judgment.¹¹ This preliminary reference was about an Irish rule that importers of petroleum products should purchase a certain proportion of their requirements from the only State refinery at a fixed price. The Irish Government argued that the restriction on free movement of goods which that requirement entailed was justified on public security grounds: it was essential that the State should be able

⁶ Case 35/76 [1976] ECR 1871, para. 14. See also Case 153/78 *Commission v Germany* [1979] ECR 2555, para. 5

⁷ Case 13/68 *Salgoil Salgoil SpA v Italian Ministry for Foreign Trade* [1968] ECR 453, 463, Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para 26.

⁸ Case 36/75 *Rutili v Minister for the Interior* [1975] ECR 1219, paragraphs 27 and 27, Case 46/76 *Bauhuis* [1977] ECR 5, paragraph 12, Case C-30/77 *R v Boucheraeu* [1979] ECR 1999, paragraph 33, Case 72/83 *Campus Oil v Minister for Industry and Energy* [1984] ECR 2727, Case C-54/99 *Association Église de Scientologie de Paris v The Prime Minister* [2000] ECR I-1335, paragraphs 17-18.

⁹ Case 222/84 *Johnston*, n7 above, paragraph 36, Case C-116/91 *Licensing Authority South Eastern Traffic Area v British Gas* [1992] ECR I-4071, paragraph 12, Case C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* [1995] ECR 3051, paragraph 21, Case C-335/94 *Hans Walter Mrozek and Bernhard Jäger* [1996] ECR I-1573, para. 9, Case C-321/96 *Wilhelm Mecklenburg v Kreis Pinneberg - Der Landrat* [1998] ECR I-3809, para. 25, Case C-273/97 *Angela Maria Sirdar v The Army Board and Secretary of State for Defence* [1999] ECR I-7403, paragraph 23, Case C-285/98 *Tanja Kreil v Bundesrepublik Deutschland* [2000] ECR I-69, paragraph 22.

¹⁰ For the application of the principle of proportionality in this context, see T. Tridimas, *The General Principles of EU Law* (Oxford: OUP, 2007, 2nd ed.), Ch. 5.

¹¹ Case 72/83 *Campus Oil*, n8 above.

to rely upon crude oil at all times, and, to that effect, it ought to ensure the viability of the only Irish refinery.

This case illustrates clearly the different interests which underpin the application of EU law once a Member States seeks to rely upon the notion of necessity. On the one hand, the Court delineates in its judgment the authority of the Member State to act in broad terms, so much so that it is prepared to approach the prior intervention by the Union legislature in a more flexible manner than its previous case-law might have tolerated. It pointed out that the Community had adopted secondary legislation dealing with difficulties in supplies of crude oil and petroleum products. However, it held that, such measures notwithstanding, the Member States do not have 'an unconditional guarantee that supplies will in any event be maintained at least at a level sufficient to meets its minimum needs'.¹²

It, then, held that an interruption of supply of petroleum products was justifiable under the public security exception as such products, 'because of their exceptional importance as an energy source in the modern economy, are of fundamental importance for a country's existence since not only its services but above all its institutions, its essential public services and even the survival of its inhabitants depend upon them'.¹³ This approach suggests that, once necessity touches upon the most vital interests of the State, and therefore, gives rise to the core of the functions which a State carries out in order to protect its citizens, there is more leeway for autonomous action, the presence of EU secondary legislation in the area notwithstanding.

However, to tolerate and sanction the choices made by the Member States is not tantamount to rendering them beyond the Union legal framework altogether. In *Campus Oil*, the Court went on to determine whether the Irish restriction was proportionate. It pointed out that the quantities of petroleum products to which the purchasing obligation referred should not exceed the minimum supply requirements of the State 'without which the operation of essential public services and the survival of its inhabitants would be affected'.¹⁴ It is interesting that the Court should engage in quite a detailed examination of what the proportionality test would entail: 'the quantities of petroleum products whose marketing can be ensured under such a system must not exceed the quantities which are necessary, so far as production is concerned, on the one hand, for technical reasons in order that the refinery may operate currently art a sufficient level of its production capacity to ensure that its plant will be available in the event of a crisis and, on the other hand, in order to that it may continue to refine at all times the crude oil covered by the long-term contracts which the State concerned has entered into so that it may be assured of regular supplies'.¹⁵

¹² Ibid, para. 31.

¹³ Ibid para 34. See also Case C-503/99 *Commission v Belgium (re: golden shares)* [2002] ECR I-4809, para. 46.

¹⁴ Ibid, para. 47.

¹⁵ Ibid, para. 48. On the different approaches to the construction of the principle of proportionality by the Court in the context of primary free movement exceptional provisions, see C Barnard, 'Derogations, Justifications and the Four Freedoms: Is State Interest Really Protected?' in C Barnard and O Odudu (eds), *The Outer Limits of European Union Law* (Oxford: Hart Publishing 2009) 273.

The Court is seen to have taken a ‘pro-state’ approach in *Campus Oil*.¹⁶ However, it is not only the detailed analysis and strict application of the principle of proportionality¹⁷ which may question this view. It is also the clearly narrow terms in which the notion of public security was defined. Indeed, the circumstances in which the notion of public security as construed by the Court would apply would be truly quite exceptional.¹⁸ In a subsequent action against Greece,¹⁹ the Court was asked to deal again with a system of ensuring minimum stock of petroleum products and the Community measure already mentioned in *Campus Oil* which imposed such a requirement on Member States.²⁰ The Greek authorities, however, had enabled the companies bound to store petroleum products to transfer that obligation to refineries based in Greece provided that they had purchased such products from these refineries during the previous year. The Court found this provision contrary to the principle of free movement of goods: it aimed to protect an interest of an economic nature and, in any case, ‘the objective of public security could have been achieved by less restrictive measures without it being necessary to make the transfer of the storage obligation to refineries established in Greece conditional upon the obligation to obtain supplies of petroleum products from those refineries’.²¹

The judgment in *Commission v Greece* clearly suggests that the *Campus Oil* principle by no means provides Member States with a *carte blanche* when they claim that necessity related to public security entails a deviation from EU law. In its rather short judgment, the Court merely referred to the arguments made by the late Advocate General Colomer in his Opinion, without even repeating them. It is interesting that the latter had expressed deep skepticism about the Greek arguments, and required a detailed and specific explanation of how public security entailed the adoption of the illegal measure.²²

Viewed along a strict and elaborate approach to the application of the principle of proportionality, the judgment in *Campus Oil* acknowledges the duty of the Member States to protect their citizens, whilst subjecting its exercise to Union law control. It is noteworthy that the latter is mediated through national courts. In *Campus Oil*, the Court follows a constant theme of its case-law and leaves the application of the principle of proportionality to national courts.²³ All in all, the judgment is not couched in language of deference, but one of balanced coexistence of the rights of Member

¹⁶ C. Barnard, *The Substantive Law of the EU – The Four Freedoms* (Oxford: OUP, 2007, 2nd ed.) at 82.

¹⁷ See T Tridimas, *The General Principles of EC Law* (Oxford: OUP 2007, 2nd ed.) at 226.

¹⁸ See also P Craig and G de Búrca, *EU Law* (Oxford: OUP 2008, 4th ed.) at 700.

¹⁹ Case C-398/98 *Commission v Greece* [2001] ECR I-7915.

²⁰ Council Directive 68/414/EEC of 20 December 1968 imposing an obligation on Member States of the EEC to maintain minimum stocks of crude oil and/or petroleum products (OJ, English Special Edition 1968 (II), p. 586.

²¹ n8 above, para. 31.

²² See, for instance, para. 44 of his Opinion, to which the judgment referred, which reads as follows: ‘As regards the risk for the distribution system of an industrial unit which is vital for national security, I am of the view that the defendant Government has not shown that, in order to protect national security, it is essential to link the transfer of the storage to the obligation to acquire the products. I myself see no reason why, if under the present system the refineries can store their own products, they cannot, under a system governed by the laws of the market and of free competition, store the products which the marketing undertakings acquire from other Member States’.

²³ In the area of free movement of goods, see M Jarvis, *The Application of EC Law by National Courts* (Oxford: OUP, 1998) Chs 6 and 7.

States as fully sovereign subjects of international law and the obligations imposed under the Community legal order.

So far, this analysis has focused on the interpretation of public security in the context of deviations from EU law in cases where Member States deem these necessary. The starting point for the tensions described above is the assumption by the Member States that there is an area reserved to their sovereign powers the exercise of which should be immune from the disciplines imposed by the EU's rules. This assumption has manifested itself in different contexts over the years. A striking example was provided in the area of sanctions against third countries. In *Centro-Com*, the British Government argued that it reserved the power to deviate from EC rules imposing economic sanctions against Serbia in order to ensure their effective application, because such a deviation constituted a foreign policy choice which was beyond the scope of the Community legal order.²⁴

The Court of Justice accepted that foreign policy was not covered by EC law. However, it added that 'while it is for Member States to adopt measures of foreign and security policy in the exercise of their national competence, those measures must nevertheless respect the provisions adopted by the Community in the field of the common commercial policy provided for by Article [207 TFEU, ex Article 133] of the Treaty'.²⁵ The same conclusion was reached in relation to similar claims for reserved powers in the areas of monetary powers,²⁶ registration of vessels,²⁷ social policy,²⁸ taxation,²⁹ health care,³⁰ and services liberalisation.³¹ This case-law, and the need for Member States to take into account the law of the European Union when the policy choices which they deem necessary deviate from EU law have prompted a sitting Judge at the Court of Justice, writing in an extra-judicial capacity, to argue that '[t]here is no nucleus of sovereignty that Member States can invoke as such against the Community'.³²

3. Exceptional clauses in secondary law

Provisions similar to the primary exceptional clauses mentioned above are also laid down in secondary EU legislation. For instance, Council Regulation 3285/94 on

²⁴ Case C-124/95 *Centro-Com* [1997] ECR I-81.

²⁵ *Ibid*, paragraph 27.

²⁶ See Joined Cases 6/69 and 11/69 *Commission v France* [1969] ECR 523, paragraph 17, Case 57/86 *Greece v Commission* [1988] ECR 2855, paragraph 9, Case 127/87 *Commission v Greece* [1988] ECR 3333, paragraph 7.

²⁷ Case C-221/89 *Factortame and Others* [1991] ECR I-3905, paragraph 14.

²⁸ C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union* [2007] ECR I-10779, paragraph 40.

²⁹ Case C-264/96 *ICI v Colmer* [1998] ECR I-4695, paragraph 19, Case C-334/02 *Commission v France* [2004] ECR I-2229, paragraph 21, Case C 446/03 *Marks & Spencer* [2005] ECR I 10837, paragraph 29, and Case C 524/04 *Test Claimants in the Thin Cap Group litigation* [2007] ECR I 2107, paragraph 25.

³⁰ Case C-120/95 *Decker* [1998] ECR I-1831, paragraphs 22 and 23, Case C-158/96 *Kohll* [1998] ECR I-1931, paragraphs 18 and 19, Case C-157/99 *B.S.M. Geraets-Smits and H.T.M. Peerbooms v Stichting Ziekenfonds VGZ and Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473, paragraph 46.

³¹ Case C-475/98 *Commission v Austria* [2002] ECR I-9797, paragraph 132.

³² K Lenaerts, 'Constitutionalism and the many faces of federalism', 38 *American Journal of Comparative law* (1990) 205 at p 220.

imports from third countries enable Member States to deviate from its provisions and impose prohibitions, quantitative restrictions or surveillance measures on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property.³³ Similar provisions are set out in other EU instruments, and they refer to such non-economic interests either expressly,³⁴ or by reference to the exceptional clauses set out in the E Treaties.³⁵ Furthermore, there may be special exclusions depending on the subject-matter of the set of rules in question.³⁶

In its interpretation of such clauses, the Court has adopted the balanced approach which underpins its judgment in *Campus Oil*. This has become apparent in the area of export controls, and in particular their application to dual-use goods, that is goods of both civil and military application. This area provided scope for considerable debate between the Commission and the Member States. The former argued that, as exports are trade measures, exports of dual-use goods fell within the scope of Community law pursuant to ex Article 133 EC (now Article 207 TFEU). The implications of this position would be considerable: this central provision of the Common Commercial Policy (CCP) had long been held by the Court to confer upon the Community (now the Union) exclusive competence, hence allowing Member States to act on their own only on the basis of a specific EU law authorization.³⁷ On the other hand, the Member States argued that, because of their nature, exports of dual-use goods fell within the sphere of foreign and security policy and, as such, could not be subject to the principles of EU law in general and CCP in particular.³⁸

In its case law, the Court of Justice struck the balance between these differing approaches. On the one hand, it made it clear that the foreign implications of the national measures would not render them immune to EC law control. In *Leifer*, it held as follows:³⁹

³³ Council Regulation 3285/94 [1994] OJ L 275/1, Art. 24(2)(a)(i).

³⁴ For instance, Council Regulation 2603/69 on common rules on exports [1969] OJ L 324/25, amended by Regulation 3918/91, [1991] OJ L 372/31 (Art. 11).

³⁵ See, for instance, Council Regulation 227/77 on Community transit [1977] OJ L 38/1, Art. 10 as interpreted by the Court in Case C-367/89 *Criminal Proceedings against Aimé Richardt and Les Accessoires Scientifiques SNC* [1991] ECR I-4621, paras 17-18.

³⁶ See, for instance, Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L 134/114, Art. 14 on secret contracts and contracts requiring special security measures/ However, there is also a provision in the preamble (para. 6) according to which '[n]othing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality, public security, health, human and animal life or the preservation of plant life, in particular with a view to sustainable development, provided that these measures are in conformity with the Treaty'.

³⁷ For the early authorities, see *Opinion 1/75 (re: OECD Local Cost Standard)* [1975] ECR 1355, Case 41/76 *Donckerwolke* [1976] ECR 1921, *Opinion 1/78 (re: International Agreement on Natural Rubber)* [1979] ECR 2781, Case 174/84 *Bulk Oil* [1986] ECR 559. For an analysis, and references to more recent case law, see P Eeckhout, *External Relations of the European Union* (Oxford: OUP, 2004) pp 9 *et seq*, and P Koutrakos, *EU International Relations Law* (Oxford: Hart Publishing 2006) pp1 *et seq*

³⁸ For an analysis of this debate, see P Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law* (Oxford: Hart Publishing, 2001)

³⁹ Case C-83/94 *Criminal Proceedings against Peter Leifer and Others* [1995] ECR I-3231, paras 10-11. See also Case C-70/94 *Fritz Werner Industrie-Ausrüstungen GmbH v Federal Republic of Germany* [1995] ECR I-3189, paras 10-11.

... national rules whose effect is to prevent or restrict the export of certain products fall within the scope of the common commercial policy within the meaning of Article [133] of the Treaty.

The fact that the restriction concerns dual-use goods does not affect that conclusion. The nature of those products cannot take them outside the scope of the common commercial policy.

Therefore, the Court refuses to delineate an area where reliance upon necessity would enable Member States to act wholly independently from EU law. As national action is viewed as within the scope of EU law, the Court, then, deals with the question whether a national restriction on exports may be justified as necessary to protect public security. It answers in the affirmative, and construes the latter concept widely, encompassing both internal and external security.⁴⁰ In doing so, the Court construes the scope for Member States to act in wide terms too. In *Leifer* it accepts that,⁴¹

... depending on the circumstances, the competent national authorities have a certain degree of discretion when adopting measures which they consider to be necessary in order to guarantee public security in a Member State within the meaning indicated above. When the export of dual-use goods involves a threat to the public security of a Member State, those measures may include a requirement that an applicant for an export licence show that the goods are for civil use and also, having regard to specific circumstances such as inter alia the political situation in the country of destination, that a licence be refused if those goods are objectively suitable for military use.

Consistently with settled case-law, it is for national courts to ascertain whether the national measures are necessary and proportionate. In doing so, they must take into account the discretion which the Court of Justice acknowledges that national authorities enjoy.

This balance between what the Member States may do when they deem it necessary, and what EU law requires them to do in order to comply with its principles is not always easy to strike. In the area of exports of dual-use goods, for instance, the Council adopted in 1994 a set of rules which combined a EC law measure and a CFSP common position: the former introduced a cautious version of the principle of mutual recognition whereby the competent national authorities would have the right to refuse to grant export authorisations if they deemed that to do otherwise would undermine a set of specific principles related, amongst others, to arms embargoes and non-proliferation of weapons of mass destruction; the latter laid down these principles, hence providing the *modus operandi* of the EC measure, along with the scope of products whose exports were subject to the latter measure.⁴² However, following the *Werner* and *Leifer* case-law, it became clear that these rules were contrary to EU law.

⁴⁰ See Case C-367/89 *Richardt*, n35 above, para. 22, Case C-83/94 *Leifer*, n39 above, para. 26, Case 70/94 *Werner*, n39 above, paras 25-27 In the latter case, and with reference to German legislation on external trade, the Court accepts that public security would be undermined by the risk of serious disturbance to foreign relations or to peaceful coexistence of nations (para. 27).

⁴¹ *Ibid*, para. 35.

⁴² See Council Regulation 3381/94 setting up common rules on exports of dual-use goods [1994] O.J. L 367/1 and Decision 94/942/CFSP, [1994] OJ L 367/8. For a critical analysis of these rules, see P Koutrakos, 'Exports of Dual-Use Goods under the Law of the European Union', (1998) 23 ELRev 235.

The Council duly amended them and set out common rules in a single EU law instrument which refers to the Court's case-law expressly in its preamble.⁴³

4. Wholly exceptional clauses

The above analysis dealt with the extent to which the Union legal order enables Member States to deviate when they deem it necessary. The exceptional clauses examined above enable national authorities to deviate from specific EU law principles and rules provided that certain conditions are met. However, there are two further clauses in primary law which are defined as 'wholly exceptional'⁴⁴ for two reasons: on the one hand, there is no limit to the type of measure which a Member State may adopt and, on the other hand, in adopting such a measure, the State in question may deviate from the entire body of EU law.

These provisions are laid down in Articles 346 TFEU (ex Article 296 EC) and 347 TFEU (ex Article 297 EC). The former is about trade in and production of arms, munitions and war materials, and the latter is about extraordinary circumstances related to national and international security.

4.1. Article 347 TFEU

Article 347 TFEU (ex Article 297 TEU) reads as follows:

Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the internal market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.

The poor drafting of the above provision is striking.⁴⁵ The reference, first, to the consultation amongst Member States and then to the national deviation from EU law, as well as the use of the term 'called upon' may suggest that, rather than conferring a right upon them, Article 347 TFEU acknowledges the inherent duty of the Member States to act as fully sovereign subjects of international law. After all, the four sets of circumstances mentioned therein under which Member States may deviate from the entire *corpus* of EU law are exceptional in their significance and touch upon the very core of the function of the State and, therefore, the latter's sovereignty. That they render the action of the State necessary hardly seems worthy of further analysis.

⁴³ Council Regulation 1334/2000 setting up a Community regime for the control of exports of dual-use items and technology, [2000] L 159/1, amended a number of times and repealed recently by Council Regulation 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items [2009] OJ L 134/1. For a different view of the legal regime on exports of dual-use goods, see A Dashwood, 'Dual-use Goods: (Mis)Understanding Werner and Leifer' in A Arnall, P Eeckhout and T Tridimas (eds), *Continuity and Change in EU Law - Essays in Honour of Sir Francis Jacobs* (Oxford: Oxford University Press, 2008) 354.

⁴⁴ Case 222/84 *Johnston*, n9 above, para. 27. See also the Opinion of AG Jacobs in Case C-120/94 *Commission v Greece (re: FYROM)* at para. 46.

⁴⁵ For an analysis of ex Article 297 EC, see P Koutrakos, 'Is Article 297 EC "a reserve of sovereignty"?', (2000) 37 *CMLRev* 1339, and C Stefanou and H Xanthaki, *A Legal and Political Interpretation of Articles 224 and 225 of the Treaty of Rome: The Former Yugoslav Republic of Macedonia Cases* (Aldershot: Dartmouth and Ashgate, 1997).

However, the wholly exceptional nature of the circumstances which may necessitate national action and its implications notwithstanding, Article 347 TFEU clearly sets out certain parameters within which the Member State are expected to act. These may be divided in three categories. The first consists of substantive conditions: it is only in the circumstances laid down therein that a Member State may deviate from EU law. The second is procedural: the Member State which would deem it necessary to act in such circumstances should consult with other Member States in order to adopt a common approach aiming to protect the internal market. There is also another dimension in this which involves the Commission. According to Article 348 subparagraph 1 TFEU (ex 298 subparagraph 1 EC),

If measures taken in the circumstances referred to in Articles 346 and 347 have the effect of distorting the conditions of competition in the internal market, the Commission shall, together with the State concerned, examine how these measures can be adjusted to the rules laid down in the Treaties.

The above are duties imposed under primary law, and the Member States are bound by the duty of cooperation which is set out in Article 4(3) TEU in terms more elaborate than in the previous constitutional arrangements:

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

The conditions set out in Article 347 TFEU and implied by the duty of cooperation are not the only reminders that the wholly exceptional role of Member States should be carried out within EU law parameters. Article 348 subparagraph 2 TFEU (ex Article 298 subparagraph 2 EC) sets out an extraordinary procedure for judicial review. It reads as follows:

By way of derogation from the procedure laid down in Articles 258 and 259, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in Articles 346 and 347. The Court of Justice shall give its ruling in camera.

It follows from the above that quite what it is that necessity makes Member States choose to do and under which conditions may not be dissociated from the Union legal order even in cases of extraordinary seriousness. This is entirely consistent with the picture which emerged from the analysis of the exceptional clauses set out in primary and secondary Union law. However, the 'wholly exceptional' nature of the circumstances set out in Article 347 TFEU and the Article 348 TFEU procedure raise questions about the enforcement of the EU law conditions outlined above. What is the level of supervision which the Commission and the Member States are prepared to exercise? What is the intensity of control which the Court of Justice deems appropriate? To what extent are Member States free to determine how best to respond

to what they deem to be a serious threat to their ability to protect their citizens and their duty to protect their, as well as the international, security?

The record and the practice of the relevant actors so far, or rather the lack thereof, only allude to the answer to this question: there has only been one action brought against a Member State under Article 298 EC. Given the maturity of the Union legal order, this suggests reluctance by both the Commission and Member States to challenge choices made by a State in circumstances which the latter deems exceptional. This case was Case C-120/94 *Commission v Greece (re: FYROM)* the subject-matter of which was the embargo imposed by Greece against FYROM (Former Yugoslav Republic of Macedonia).⁴⁶ The Commission alleged a violation of ex Article 297 EC (now Article 347 TFEU). The Court delivered no judgment on this case, as the embargo was lifted and the Commission withdrew the action early enough. However, Advocate General Jacobs delivered an Opinion which touched upon the most central issues raised when a State deems that a deviation from EU law is necessary in order to protect vital interests.

In his Opinion, he analyses the relevant issues with considerable clarity, detachment, and subtlety. Whilst he affirms the existence of the role of both Community supervision by the Commission and judicial review by the Court in the areas dealt with under ex Articles 297 EC and 298 EC (now Articles 347 and 348 TFEU), he points out that the ‘scope and intensity of the review that can be exercised by the Court is severely limited on account of the nature of the issues raised’ and continued as follows:⁴⁷

There 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. The nature of the problem is encapsulated in remarks made by an English judge in a rather different context: ‘there are ... no judicial or manageable standards by which to judge these issues, or to adopt another phrase ... the court would be in a judicial no-man’s land’.

Therefore, given ‘the extremely limited nature of the judicial review that may be carried out in this area’,⁴⁸ he confines it, in essence, to determining whether reliance upon ex Article 297 EC (now Article 347 TFEU) involves manifest errors or abuse of power. He argued that ‘the question must be judged from the point of view of the Member State concerned’ and elaborated as follows:⁴⁹

Because 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.

⁴⁶ [1996] ECR I-1513.

⁴⁷ Ibid, para. 50.

⁴⁸ Ibid, para. 60.

⁴⁹ Ibid, para. 54.

Examining whether ‘in the light of all the circumstances, including the geopolitical and historical background, Greece could have had some basis for considering, from its own subjective point of view, that the strained relations between itself and FYROM could degenerate into armed conflict’,⁵⁰ he concludes as follows:⁵¹

I do not think that it can be said that Greece is acting wholly unreasonably... even if [the threat of war] may be long-term and remote....

The very careful wording of this conclusion is noteworthy,⁵² as is the absence of any reference to the procedural aspects of ex Article 297 EC (now Article 347 TFEU) and the failure by Greece to comply with them.⁵³ The latter notwithstanding, the analysis put forward by Advocate General Jacobs, and the issues which it tackles, is linked to the overview of the construction of ‘necessity’ and its implications by the Court of Justice in relation to the exceptional clauses in primary law. They both suggest a nuanced and balanced approach to the tensions between State sovereignty and the Union legal order, judicial supervision and discretion enjoyed by the executive: the rejection of any claim by the Member States to a *domaine réservé* is accompanied by an acknowledgment of their discretion to determine how best to protect their security; the requirement that reliance upon the notion of necessity, purported to justify a national deviation from EU law, be subject to EU control is followed by an understanding of this notion in sufficiently broad terms to accommodate national concerns; the full application of EU control mechanisms entails the active involvement of national courts which are entrusted with the application of the principle of proportionality.

It becomes apparent that the management of necessity by Member States within the parameters set by the Union legal order does not lend itself to the convenience of a straightforward assessment: it requires a careful balancing exercise between differing interests, it is based on the application of general principles on the basis of quite specific, and often difficult to assess, circumstances, and involves the interaction of a range of actors. This multilayered system has no place for maximalistic positions which would either render EU law inapplicable and the role of Member States immune to EU control, or would dictate an uncompromising application of EU mechanisms with no regard for the specific challenges that necessity raises for national authorities.

However, the range of options which may be taken in between these two extremes is infinite, as the criteria against which necessity is measured are inherently indeterminate. Similarly, the role of the Union institutions (legislature, executive, judiciary) in this balancing exercise is far from straightforward and may evolve over

⁵⁰ Ibid,

⁵¹ Ibid, para, 56.

⁵² Further in his Opinion, AG Jacobs points out that ‘what matters is not so much that Greece’s fears may be unfounded but rather that those fears appear to be genuinely and firmly held by the Greek Government and, it would appear, by the bulk of the Greek people. Where a government and a people are fervently convinced that a foreign State is usurping a part of their cultural patrimony and has long-term designs on a part of their national territory, it would be difficult to say that war is such an unlikely hypothesis that the threat of war can be excluded altogether. If such matters were to be judged exclusively by what external observers regarded as reasonable behaviour, wars might never occur’ (para. 58).

⁵³ See the criticism in Koutrakos, n45 above, at 1356-1359.

time pursuant to their interactions with national authorities. The remaining part of this analysis will examine how these have evolved in the context of trade in and production of armaments, munitions, and war material.

4.2. Article 346 TFEU⁵⁴

Article 346 TFEU 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 EU Treaty was viewed as placing 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.⁵⁵ This approach was tolerated by the EU institutions.⁵⁶ It is interesting that the European Parliament confined itself to arguing regularly for the deletion of Article 346 TFEU,⁵⁷ as if that would not be the only way for preventing the erroneous and misguided interpretation of its proviso. 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.⁵⁸

⁵⁴ 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.

⁵⁵ In relation to public procurement, see COM (2004) 608 final *Green Paper on Defence Procurement*, p 6.

⁵⁶ See Koutrakos, n38 above, 175–82.

⁵⁷ 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.

⁵⁸ 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 wrong. First, the proviso of Article 347 TFEU 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 both by 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(b) EC should be invoked only when the protection of the core of national sovereignty is at stake.

Third, any reliance upon Article 346 EC 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(2) 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 the procedural ones (that is the duty to cooperate with the Commission inferred from Article 348(1) 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 European Security and Defence Policy.

4.2.1. The case-law

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*,⁵⁹ 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:⁶⁰

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.

It, then, concluded that:⁶¹

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.

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,⁶² and was reaffirmed by the Court of Justice more recently in Case C-337/05 *Commission v. Italy*,⁶³ and Case C-157/06 *Commission v. Italy*.⁶⁴

⁵⁹ Case C-414/97 *Commission v Spain* [1999] ECR I-5585.

⁶⁰ *Ibid*, para. 22.

⁶¹ *Ibid*, para. 23.

⁶² Case T-26/01 *Fiocchi* [2003] ECR II-3951.

⁶³ [2008] ECR I-2173.

⁶⁴ [2008] ECR I-7313. This, along with Case C-337/05, are annotated in M Trybus, (2009) 46 CMLRev 973.

These cases were about the purchase of Augusta 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.⁶⁵ 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:⁶⁶

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

It then pointed out that⁶⁷

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.

The argument of the Italian Government that a deviation from the EC public procurement rules was necessary in order to protect the confidentiality of 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.⁶⁸

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 it 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:⁶⁹

⁶⁵ 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.

⁶⁶ N63 above, para. 43.

⁶⁷ Ibid, para. 47.

⁶⁸ 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).

⁶⁹ N63 above, para. 59.

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.

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, that is an area long viewed as within the twilight zone between EU law and national sovereignty, which 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 not 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 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 which exemplified the presumption, widely held by Member States, that primary law granted them *une carte blanche* in the area. It by no means follow 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.

4.2.2. The problems facing the defence industries

Following the end of the Cold War, the defence industries in the Member States suffered 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.⁷⁰ This highly fragmented state gave rise to a number of initiatives, originating in both industry and State bodies, to achieve a degree of convergence which would enhance the competitiveness of the European defence industries.

⁷⁰ 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 203–205.

Furthermore, the European Union has gradually placed greater emphasis on its Security and Defence Policy. Since 1998, considerable time and energy has been spent on establishing institutions, setting out strategies, and consolidating structures in ways which would enhance the Union's international role. In this context, the *European Security Strategy* which defines the strategic priorities for the European Union sets out the latter's ambition for '[a]n active and capable European Union [which] would make an impact on a global scale'⁷¹ in terms of "shar[ing] in the responsibility for global security".⁷² A number of ESDP missions has been undertaken, some of them well beyond Europe's borders, their range covering military and police operations, rule of law, border monitoring, and security sector.⁷³ Finally, the Lisbon Treaty places greater emphasis on the security and defence policy.⁷⁴

The development of the European Security and Defence Policy has placed defence capabilities at the core of any debate about the Union's international role. It is noteworthy that first the Treaty Establishing a Constitution for Europe, and now the Lisbon Treaty provide for the establishment of the European Defence Agency (EDA), which⁷⁵

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.

It is indicative of the significance attached by the Member States to the issue of military capabilities that the EDA should have been established before the Constitutional Treaty was even signed.⁷⁶ In the context of this analysis, a noteworthy achievement is the adoption by EDA in November 2005 of a voluntary code on defence procurement. This entered into force on 1 July 2006 and applies to contracts worth more than €1m which are covered by Article 346 TFEU.⁷⁷ This 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

⁷¹ *A Secure Europe in a Better World—European Security Strategy* (Brussels, December 12, 2003), p.14. See also *Report on the Implementation of the European Security Strategy* (Brussels, 11 December 2008).

⁷² *Ibid*, 2.

⁷³ See the analysis in Grevi, D Helly, D Keohane (eds), *ESDP: The first 10 years (1999-2009)* (Paris, EU Institute for Security Studies, 2009). For an analysis from an international law perspective, see Naert, F., *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Antwerp: Intersentia, 2010).

⁷⁴ It also renames it Common Security and Defence Policy.

⁷⁵ Article 42(3) subparagraph 2 TEU.

⁷⁶ Joint Action 2004/551/CFSP [2004] OJ L245/17.

⁷⁷ 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]'.

reasons of pressing operational urgency, follow-on work or supplementary goods and services, and extraordinary and compelling reasons of national security.

All these developments have gradually rendered defence industries at 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.

4.2.3. Interpretative and legislative initiatives by EU institutions

In December 2006, the European Commission put forward its view as to the proper interpretation of Article 346 TFEU, and expressed its intention to enforce it rigorously by enforcement proceedings before the Court of Justice.⁷⁸ The aim of the document is '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'.⁷⁹

The Commission draws upon the wording of Article 346 TFEU⁸⁰ 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 that⁸¹

... 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.

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,⁸²

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.

⁷⁸ 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).

⁷⁹ Ibid p3.

⁸⁰ 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).

⁸¹ Ibid.

⁸² Ibid, p8 (the emphasis in the original).

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 above provision. 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 the balance between the leeway 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 it should also engage in adjusting the list mentioned in Article 346 (2) TFEU in a rather creative manner.⁸³ More importantly, one of the main tenets of the Communication is the acknowledgment 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)?⁸⁴ In the context of Article 347 TFEU, Advocate General Jacobs stressed the highly subjective nature of the assessment that national authorities are called upon to make and the corresponding paucity of judicially applicable criteria for the exercise of judicial control of high intensity. His argument is worth-citing in full

... it is not for the Court to adjudicate on the substance of the dispute between Greece and FYROM. It is not for the Court to determine who is entitled to the name Macedonia, the star of Vergina and the heritage of Alexander the Great, or whether FYROM is seeking to misappropriate a part of Greece's national identity or whether FYROM has long-term designs on Greek territory or an immediate intention to go to war with Greece. What the Court must decide is whether in the light of all the circumstances, including the geopolitical and historical background, Greece could have had some basis for considering, from its own subjective point of view, that the strained relations between itself and FYROM could degenerate into armed conflict. I stress that the question must be judged from the point of view of the Member State concerned. Because 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.

The interpretation of Article 346 TFEU is not the only issue relating to the notion of necessity which has attracted considerable attention recently. The other is the legal regulation of defence industries at EU level. The European Commission had advocated the use of EU law, along with other instruments, for the regulation of the defence industries since the mid1990s. After a series of initiatives assessing the

⁸³ 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).

⁸⁴ See, for instance, the principles set out by the case-law on exports of dual-use goods outlined above.

serious economic problems facing them,⁸⁵ and advocating the adoption of a wide range of measures,⁸⁶ the Commission put forward its so-called 'defence package' in December 2007, following which two specific measures have been adopted by the Council, namely Directive 2009/43 on intra-EU transfers of defence products,⁸⁷ and Directive 2009/81 on public procurement in the fields of defence and security.⁸⁸ An analysis of these measures is beyond the scope of this article. Suffice it to point out that they aim to bring the benefits of the internal market to this sensitive area whilst acknowledging that the relevant products have special characteristics which may not be addressed by EU secondary legislation governing the movement and procurement of other, non-strategic goods.

5. Conclusion

This article discussed how the EU legal order accommodates the cases where Member States deem that the principle of necessity justifies a deviation from EU law. The analysis of the exceptional clauses in specific policy areas, both in primary and secondary law, as well as the wholly exceptional clauses in the EU Treaties, suggests that the wording and context of the relevant provisions acknowledge, rather than grant, the right of Member States to act in circumstances where they deem it necessary and in contravention of the EU rules. As the Union is based on the principle of limited competence, it would not have the power to grant Member States a right which is inherent in their existence as fully sovereign subjects of international law. Instead, EU law is focused on how to address the tensions which the exercise of this right may raise in the context of the Union's constitutional order.

In seeking to ensure that reliance upon the notion of necessity is not abused, and that it complies with certain substantive and procedural requirements, EU law endows the courts with considerable powers. This becomes even more significant in the context of the decentralised judicial architecture of the Union, as the assessment of the balancing exercise articulated by the case-law of Court of Justice also involves national courts. Another aspect of this balancing exercise is its dynamic nature. The right of Member States to deviate from EU law in order to protect a certain social interest is examined against the extent to which this interest is already protected under EU law. Therefore, the dividing line between what is necessary for the national authorities to do and what is redundant in the light of an EU intervention in the area is subject to continuous redefinition.

No area exemplifies this evolving process as clearly as the regulation of defence industries. The shift in the prevailing assumptions about the role of EU law in the area, the contribution of the Court of Justice, the gradual acceptance of the proper interpretation of Article 346 TFEU, the adoption of secondary legislation on intra-EU transfers and public procurement, all illustrate an incrementally developing legal and political environment. To strike the balance between what the Member States deem

⁸⁵ COM(96) 10 final *The Challenges facing the European Defence-Related Industry. A Contribution for Action at European Level* (adopted on 24 January 1996).

⁸⁶ 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).

⁸⁷ [2009] OJ L 146/1.

⁸⁸ [2009] OJ L 216/76

necessary to do and what EU law requires them to do within this environment is not going to get easier.