The Possibilities under EU Public Procurement Law for a Public-Private Ecosystem to Ensure Military-logistic Capabilities in a Changing Security Context

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1. Introduction

War in Eastern-Europe, changing global structures of power and evolving alliances are rapidly changing Europe's security structures. Although military cooperation within the EU is expanding ambitiously, national security remains the sole responsibility of each individual Member State according to Article 4(2) TEU. The changing security context therefore raises major challenges for the armed forces of the EU Member States. Most of these states are now rapidly increasing their military expenditure as a response to Russia's military aggression. Much of this expenditure, however, only pays out in the long term. The development and production of military equipment are long lasting processes, especially under the current economic conditions of increased global demand and shortages of raw materials. For many countries, the recruitment of military personnel remains a pressing challenge as well.

In the Netherlands, for instance, the war in Ukraine has further pressured the existing challenge of how the army can still fulfil its constitutional tasks[1] of protecting its own and allied territory as well as maintaining and promoting peace within the international legal order with a limited budget and a structural shortage of military personnel.[2] It is clear that these constitutional tasks both require national capabilities as well as international cooperation within NATO and the EU.

To effectively protect its own and allied territory, the Dutch Armed Forces need sufficient military-logistic capabilities. A major part of these capabilities, however, will only be used during military security crises. The Dutch Ministry of Defence plans to seek extensive cooperation with the private sector to overcome the structural shortage of military personnel.[3] This public-private cooperation mechanism should ensure the permanent availability of sufficient military-logistic capabilities to be prepared for a possible military crisis. The Defence Ministry thus aims to set up a so-called Ecosystem Logistics (hereinafter: the Ecosystem) in which public service contracts will be awarded to economic operators. There should be strict security conditions for participation, as the participants and parts of

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

[2] Due to the war in Ukraine and the need to supply the Ukrainian armed forces with military equipment, a shortage in equipment seems to be arising as well. Even though the government has announced to increase the annual budget for the Ministry of Defence, these constraints do not seem to go away quickly. For the recently announced strategic investments, see: Netherlands Ministry of Defence, S*terker Nederland, Veiliger Europa: Investeren in een Krachtige NAVO en EU* - Defensienota, The Hague: June 2022.

[3] The Ministry pursues the creation of an *Adaptieve Krijgsmacht,* (adaptive armed forces) in English this is also known by the broader concept of 'Total Force'.

their personnel need to be military deployable. Specifically, this means that the economic operators as well as parts of their personnel should possess the Dutch nationality.

These security conditions raise different types of public procurement law issues, such as whether - and under what conditions - it would be possible to exempt the Ecosystem from the application of EU public procurement law, based on one of the security exceptions in the EU Treaties. Within EU public procurement law it is, after all, not allowed to discriminate on the basis of nationality. In 2020, we carried out contract-research for the Ministry of Defence to answer a variety of legal questions raised. The question as to whether exceptions to EU law are possible for military-logistics service contracts has become even more pressing in light of the 2022 outbreak of war between Russia and Ukraine, as NATO and the EU[4] will require a higher availability of military(-logistic) capabilities from their Member States.

In this paper, the main aspects of the legal reasoning will be presented which led to the conclusion that the Ecosystem can be exempted from the application of EU public procurement law. The paper, in that regard, reflects on how EU Member States can ensure military-logistic capabilities through public-private cooperation to face the current security challenges within the framework of EU law. The legal reasoning is based on two possible legal routes for derogating from EU internal market law.

The first legal route examines whether the Ministry can deviate from the provisions of the EU Public Procurement Directives when awarding public contracts within the Ecosystem to protect public security (and public policy) based on Articles 52 (establishment) and 62 (services) TFEU. As the Ecosystem will consist of both military as well as non-military services it cannot as a whole be based on Article 346 TFEU, which will therefore not be discussed in this paper. The second solution variant addresses the question as to whether an exception could alternatively be based on Article 347 TFEU, which provides Member States the possibility to deviate from internal market rules if necessary to effectively respond to war and pressing security threats. Before considering these solutions, the first section will address the main characteristics of the Ecosystem, including some features of the research method that was used to answer these legal questions.

2. The Dutch Logistics Ecosystem within the context of EU law

In April 2019, the Deputy Commander of the Royal Netherlands Army announced that he was to start preliminary market consultation (further referred to as 'the survey') among about a dozen logistics companies with the aim of eventually creating the Ecosystem, in line with the plan to create 'adaptive armed forces'. This should lead to the establishment of a long-term strategic collaboration between the Ministry of Defence and undertakings in which personnel, assets and methods are reciprocally shared and exchanged. The primary purpose of the Ecosystem is strategic in nature, so as to provide the logistics capabilities necessary to safeguard national security in crisis situations, as also required under allied obligations in the NATO and EU context.[5] By entering into durable collaboration with undertakings, the Ministry of Defence seeks to put guarantees into place in terms of the speed and scalability of logistics capabilities during security crises.

2.1. Military alliances and the constitutional role of the Dutch armed forces

The geographical scope of the capabilities sought after by the Ecosystem underscores the fact that it is concerned in particular with allied obligations (NATO and EU) and not just with the Netherlands' own

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

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

national territorial integrity. To guarantee security in Europe after WWII, the North Atlantic Treaty[6] had already been signed in 1949 by most of the countries of Western Europe, the US and Canada. The North Atlantic Treaty is based on the right of collective self-defence, as enshrined in Article 51 of the UN Charter. This principle simply means that "an armed attack against one or more of them in Europe or North America shall be considered an attack against them all", as laid down in Article 5 of the North Atlantic Treaty. However, the North Atlantic Treaty does not only create responsive obligations, but also contains obligations of a preventive nature, as the parties to the treaty undertook to "by means of continuous and effective self-help and mutual aid, [...] maintain and develop their individual and collective capacity to resist armed attack" (Article 3). In short, NATO member states must have the capabilities to *effectively* offer each other protection in military crisis situations. A number of these obligations have also been formulated more explicitly. In 2014, for example, NATO countries agreed to link the above obligation to a budgetary commitment. They agreed that at least 2 percent of each country's GNP was to be spent on defence, of which at least 20 percent was to be invested in materiel.[7] Only recently many European NATO members have been starting to comply with this commitment. The essence of the obligations still lies in the capability to offer each other effective protection. The effective utilisation of industrial and operational capabilities in crisis situations then requires the necessary logistics capabilities.

The logistics capabilities must therefore be sufficient to sustain the deployment of troops outside the Netherlands' own territory, as they should at least be able to sustain the deployment of one brigade-sized task force at a distance of approximately 1,500 kilometres for a period of one year.[8] This would make the Ecosystem suitable for contributing to the protection of at least a section of the eastern border of allied (NATO and EU) territory for such a period. This strategic goal is expressed in specific terms in the so-called *red button scenario* the Ecosystem provides. This means that in various types of crisis situations, the Ministry of Defence must have the necessary logistics capabilities of participating undertakings at its disposal. As a starting point for this scenario, the Survey uses the situation in which Article 5 of the North Atlantic Treaty is triggered following an armed attack on a NATO member.[9] This falls under the Dutch first main Defence task, namely the protection of own and allied territory (*Defence Main Task I*).[10] The Survey shows that the market (in this case the undertakings which participated in the Survey) can (and wishes to) meet the Ministry of Defence needs in terms of logistics capabilities. This goes beyond simply guaranteeing deployment of the capabilities of the participating market players. In order to be able to function militarily in crisis situations, periodic large-scale exercises and the associated training of (civilian) personnel are also required in peacetime.[11]

In addition to providing logistics capability for the first main Defence task, the Ecosystem should also provide logistics capability for the carrying out of the other two Dutch main Defence tasks, namely the promotion of the international rule of law and stability (*Defence Main Task II*) and the provision of support to civilian authorities in law enforcement, disaster relief and humanitarian aid (national and international; *Defence Main Task III*).[12] The Ecosystem therefore fits the constitutional role of the Dutch Armed Forces, which extends beyond its own territorial integrity. As enshrined in Article 97 of the

[6] North-Atlantic Treaty, Washington D.C., 4 April 1949.
[7] NATO, *Wales Summit Declaration*, 5 September 2014, para. 14.
[8] R. Meijers and D. Verhoef (Kirkman Company), *Verslag verkenning Logistiek Ecosysteem - naar een strategische en innovatieve samenwerking* (Survey Report Logistics Ecosystem – toward a strategic and innovative collaboration, March 2020, p. 17.
[9] See: *Survey Report Logistics Ecosystem*, p. 88 (Annex 2).
[10] See: Netherlands Ministry of Defence, *Final Report: Future Policy Survey – A new foundation for the Netherlands Armed Forces* 2010*,* p. 25.
[11] *Survey Report Logistics Ecosystem*, p. 20.
[12] See: Netherlands Ministry of Defence, *Final Report: Future Policy Survey – A new foundation for the Netherlands Armed Forces* 2010*,* p. 25.

Constitution, the armed forces also serve to "maintain and promote the international legal order". This requires international cooperation in the EU and NATO context.

2.2. Ensuring national capabilities through public-private cooperation permissible under EU law?

It is clear – in terms of free movement – that the Ecosystem would constitute an impediment to cross-border trade. By exclusively and directly awarding public contracts[13] to the undertakings participating in the system, other (foreign) economic operators are denied access to this specific part of the public procurement market in the Netherlands. In particular, the establishment and nationality requirements which would be imposed on undertakings for participation in the Ecosystem are restrictions to cross-border trade, as these requirements discriminate foreign logistics companies.

The EU internal market can best be seen as a pillar of post-war European integration. Economic liberalisation was crucial for peace and prosperity, and still forms the basis for the EU as an economic power bloc in the world. Since the Treaty of Rome, the internal market freedoms have been enshrined in the EU Treaties in provisions in which they were given the form of 'prohibitions' on trade barriers between Member States (so-called 'negative integration'). The CJEU has consistently held that establishment and nationality requirements fall within the scope of these prohibitions.[14] Positive integration measures, in the form of legislative harmonisation such as the EU public procurement directives, provide for specific 'rules of the game' to be complied with in the internal market.

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

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

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

As noted before, the EU Treaties provide for possibilities to justify derogation in cases where a Member

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

[14] On establishment requirements, see for instance: ECJ 4 December 1986, *Commission v. Germany*, Case 205/84, para. 52 where the Court held that such an establishment requirement "has the result of depriving Article 59 of the Treaty of all effectiveness, a provision whose very purpose is to abolish restrictions on the freedom to provide services of persons who are not established in the State in which the service is to be provided".

State wishes to take measures to pursue key objectives which may impede cross-border trade. This possibility is often no longer available as soon as the matter is regulated by secondary EU legislation. The decisive question is whether such secondary rules regulate the relevant matter *exhaustively*.[15] If it cannot be inferred from the *text* and *purpose* of a Directive that its intention is to regulate the matter exhaustively, Member States can still invoke the justification grounds as laid down in Articles 36, 52 and 62 TFEU. With regard to the Defence Procurement Directive[16] adopted in 2009, Article 2(d) provides that services such as those for which the Ecosystem will be created fall within the scope of this Directive because they serve a specific military purpose. But the Defence Directive did not regulate the matter exhaustively, as Article 2 also explicitly states that the Directive applies "subject to Articles 30, 45, 46, 55 and 296 of the Treaty" (the current Articles 36, 52, 62 and 346 TFEU).

This is not so much a legislative choice as a natural outcome of the division of competences between the EU and the Member States. For the legal basis of the Directive in Article 114(10) TFEU states that such harmonisation measures shall include "a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Union control procedure". This is no coincidence, given that according to the mentioned Article 4(2) TEU national security has remained the sole responsibility of the Member States. As acknowledged by the Defence Directive itself, contracts can thus be exempted from its application, based on the aforementioned justification grounds, when they:

> "necessitate such extremely demanding security of supply requirements or which are so confidential and/or important for national sovereignty that even the specific provisions of this Directive are not sufficient to safeguard Member States' essential security interests".[17]

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

To exempt contracts from the application of the Directive on the basis of the public security ground contained in the mentioned Treaty provisions, several conditions need to be fulfilled. First of all, there must be an actual public security interest. The starting point of the Court in this respect is that grounds for exceptions to EU law must be interpreted 'narrowly'. In other words, there is no 'general proviso' for measures taken on grounds of public security.[18] This would otherwise impede the functioning of EU law (its *effet utile*), in particular the internal market. An exception on the grounds of public security must therefore relate to specific circumstances with a specific security risk. According to established case law of the Court, however, these 'specific circumstances' "may vary from one country to another and from one period to another".[19] Logically, this implies a certain margin of discretion for the national authorities in determining security requirements.[20] As the security risk intensifies, the margin of discretion will

[15] See for instance: E. Manunza, *Europese aanbestedingsrechtelijke problemen bij privatiseringen en bij de bestrijding van georganiseerde criminaliteit*, Dissertation VU Amsterdam, Kluwer 2001, second part.
[16] Directive 2009/81/EC OF The European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC.
[17] Directive 2009/81/EC, Preamble nr. 16.
[18] ECJ 15 May 1986, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, Case 222/84, European Court Reports 1986, pp. 1651-1694, para. 26.
[19] ECJ 4 December 1974, *Yvonne van Duyn v. Home Office*, Case 41/74, European Court Reports 1974, pp. 1350-1351, para. 18.
[20] ECJ 17 October 1995, *Landgericht Darmstadt Germany v. Peter Leifer, Reinhold Otto Krauskopf and Otto Holzer*, Case C-83/94, European Court Reports 1995, I – 3248, para. 35.

increase.[21] This margin of discretion is also in 'the spirit' of the EU Treaties since Lisbon, given the confirmation in Article 4(2) TEU that national security is a solely national responsibility and that the Common Security and Defence Policy (CSDP) gives the Member States room to participate, or not, in certain forms of cooperation.[22]

The concept of public security is not interpreted so narrowly as to relate only to the internal security of a Member State, but also concerns the external security of a Member State.[23] This external security is inextricably linked to international relations in a broad sense, in particular to membership or non-membership of a military alliance such as NATO. In this respect, the Court has recognised that "the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations may affect the security of a Member State".[24] Furthermore, it held in the *Leifer* judgment that:

> "(...) it is difficult to draw a hard and fast distinction between foreign-policy and security-policy considerations. Moreover [...] it is becoming increasingly less possible to look at the security of a State in isolation, since it is closely linked to the security of the international community at large, and of its various components".[25]

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

According to the case law of the Court of Justice EU (the Court), the restrictive measure must be aimed at the attainment of an overriding requirement of public interest and must be proportionate to the objective pursued. More concretely, this means that the requirements of *suitability*, *necessity* and *proportionality* must be met. This entails assessing whether the measure in question is suitable for protecting the interests it seeks to protect and whether it is the most appropriate means which does not impede trade more than is necessary to protect the relevant interest. In a military context, the degree of autonomy of the Member State depends on the intensity of the security risk. The Court ruled that the necessity of a measure lies in the existence of "*real, specific and serious risks* which could not be countered by less restrictive procedures" (emphasis added).[26] In addition, the objective pursued by a measure must be achieved in a coherent and systematic manner for that measure to satisfy the abovementioned suitability criterion.[27] The market restrictions must also be as transparent as possible

[21] This is also the case for the different types of security exceptions, see for instance: M Trybus, 'The EC Treaty as an Instrument of European Defence Integration: Judicial Scrutiny of Defence and Security Exceptions', *Common Market Law Review* (2002) 1347-1372.
[22] For instance within Permanent Structured Cooperation Based on Article 46 TEU and Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States.
[23] ECJ 4 October 1991, *Aimé Richardt,* Case C-367/89, European Court Reports 1991 I-04621 para. 22.
[24] ECJ 17 October 1995, *Fritz Werner Industrie Ausrüstungen GmbH*, Case C-70/94, European Court Reports 1995, I-03189, para. 27.
[25] ECJ 17 October 1995, *Landgericht Darmstadt Germany v. Peter Leifer, Reinhold Otto Krauskopf and Otto Holzer*, Case C-83/94, European Court Reports 1995, I – 3248, para. 27.
[26] ECJ 13 July 2000 *Alfredo Albore*, Case C-423/98, European Court Reports 2000, I-05965, paras. 14-16
[27] ECJ 21 December 2011, *European Commission v. Republic of Austria,* Case C-28/09.

in order to minimise their negative impact on the internal market. This means that the restrictions must be clear and unambiguous, objectively foreseeable to private actors and, as far as possible, publicly disclosed beforehand.[28]

In short, the Defence Procurement Directive does not constitute a uniform and exhaustive regime. It follows from the Court's case law that Member States have not been deprived from adopting measures to protect public policy and public security. In the sections below, it will be shown that the example of the Ecosystem potentially fulfils the aforementioned legal requirements of suitability, necessity and proportionality and can be exempted from the application of EU public procurement law.

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

The first question that needs to be addressed is whether the Ecosystem is suitable for protecting the public security interest as prescribed by the EU Treaties. The two most relevant features of the Ecosystem in that regard are, first, that it primarily is an instrument to fulfil international obligations arising from the North Atlantic Treaty and the EU's Common Security and Defence Policy (CSDP) and secondly, that due to a lack of available military personnel cooperation with private parties is needed to fulfil these obligations.

International obligations require national capabilities

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

The North Atlantic Treaty, in that regard, enjoys a privileged legal position within the EU Treaties.[29] This is because the North Atlantic Treaty entered into force in 1949, almost ten years before the Treaty of Rome (1958) and Article 351 TFEU provides that "rights and obligations arising from agreements concluded before 1 January 1958 [...] between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties". This is also emphasised in Article 42(7) TEU, which explicitly states that "commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation".

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

[28] W.T. Eijsbouts, J.H. Jans, A. Prechal, A.A.M. Schrauwen and L.A.J. Senden (ed.), *Europees Recht. Algemeen Deel*, Europa Law Publishing 2020, p. 147.

[29] Building on the research report, this was also elaborated in: N. Meershoek, 'The Constraints of Power Structures on EU Integration and Regulation of Military Procurement', *European Papers* 2021(1), pp. 831-868.

In crisis situations, the State may adopt emergency legislation to demand assets from private entities (see also below Section 4 on Article 347 TFEU). In the event of a *national crisis* in one Member State, mutual obligations and a degree of solidarity will normally prompt other Member States to provide assistance by making capabilities available (whatever may be needed). Possessing the capabilities to meet this obligation is an intrinsic goal of the setting-up of a well-functioning Ecosystem for logistics services. However, in the event of an *international crisis situation* such as war, the very same Member States will always first deploy their own capabilities to the best of their abilities for their own national security. The Covid-19 crisis has highlighted this notion in a different context, as even within the EU's integrated market, Member States first placed the necessary medical equipment at the disposal of their own hospitals and populations before again allowing cross-border trade in it. This vulnerability is inherent to the system of both NATO and the EU, as these organisations are primarily structured on the basis of mutual obligations; not on the basis of common capabilities to meet the security needs of their member states.[30]

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

Collaboration with private undertakings required due to the military's reduced personnel size

Theoretically speaking, the highest degree of security of supply would be achieved with the highest degree of self-sufficiency (autarky) in operational and industrial terms.[31] This means that a State must have sufficient capabilities within its borders to protect itself against an attack from outside. In a certain sense, it is irrelevant whether the capabilities are entirely in the public sphere of the State or also partly with private undertakings, in view of the fact that in a crisis situation the government has the authority to demand those private capabilities. It is obvious that complete self-sufficiency is practically impossible for most countries. As a scenario, it is unworkable not only from a financial and practical point of view but also from the point of view of international relations. In today's globalised and nuclear world order, it is necessary for the Netherlands to be part of economic and military power blocs. From a military perspective, this means that it should contribute militarily to these alliances to maintain its influence therein.

In the case of logistics services, the main question is how to ensure that the availability of logistics capabilities meets the increased demand (immediately and continuously) in a crisis situation. Taking into account the current organisation of defence and security in the EU, there can be no doubt that in crisis situations the State must be able to requisition assets from private entities by means of emergency legislation. This possibility is also recognised by the EU Treaties in Article 347 TFEU (see below Section 4).

Since the dissolution of the Soviet Union, the Dutch military has been considerably reduced in size. The military's personnel numbers halved between 1990 and 2010 and they have come to consist entirely of professional personnel. The amount of military material has been reduced as well. For example, of the 913 tanks in 1990, only 91 were left in 2009. Over the same period, defence expenditure fell by 15 percent in real terms.[32] This decline continued until 2015 in the wake of the financial crisis, after which

[30] Though the EU intends to introduce a European Rapid Deployment Capacity, see: Council of the EU *A Strategic Compass for Security and Defence* 2022 cit.

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

[32] *Future Policy Survey – A new foundation for the Netherlands Armed Forces* 2010*,* pp. 30-32.

an upward trend began again.[33] The current trend of increasing and unpredictable changes in security threats requires an expansion of logistics capabilities as part of overall operational capabilities. At the time of writing, the Ministry of Defence has approximately 8,300 vacancies to fill in a personnel force of just under 60,000 people, more than 40,000 of whom are military personnel. By far the largest numbers of vacancies are military positions.[34] To fulfil its constitutional tasks it appears to be necessary for the Dutch armed forces to partly rely on the personnel of other entities with the status of military *reservist*.

3.3. Is the Ecosystem 'necessary' to safeguard national security?

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

Keeping national security affordable requires cooperation with private undertakings

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

The fact that a measure was chosen partly because of the financial interests of the State will not render the applicability of a justification for that measure problematic in any way. In the context of public health, the Court's established case law holds that the risk of "seriously undermining the financial balance of the social security system" may indeed justify a restriction on free trade.[35] As regards EU public procurement law, the Court also held that, in the context of a system with a social objective, solidarity and cost-efficiency are relevant considerations which may under certain circumstances justify the direct award of public contracts.[36] The security objective combined with increased cost-efficiency resulting from the exchange of logistics capabilities leads to a similar justification for the non-application of EU procurement law.

[33] SIPRI Database Military Expenditure, *Data for all countries 1988-2019,* see: https://www.sipri.org/databases/milex

[34] At the time of writing of the report in 2020. See also the interview with the Netherlands Chief of Defence, Admiral Rob Bauer: https://www.platformdefensiebedrijfsleven.nl

[35] ECJ 28 April 1998, *R. Kohll*, Case C-158/96 European Court Reports 1999, I-01931, para. 41.

[36] ECJ 11 December 2014, *Spezzino*, Case C-113/13, para. 65.

Military deployability requires collaboration with 'Dutch' private undertakings with employees of 'Dutch' nationality

Due to the importance of safeguarding national security and the ability to satisfy EU and NATO assistance obligations, combined with the fact that the armed forces simply do not have the (public) personnel and materiel resources to ensure this, it is essential that all economic operators participating in the Ecosystem fall under the jurisdiction of possible Dutch emergency legislation in times of crisis. It is therefore necessary to make participation in the Ecosystem conditional on establishment on Netherlands territory. In the *red-button scenario*, (part of) the personnel of the private undertakings participating in the Ecosystem will also have to be militarily deployable. This is necessary because the logistics of military operations are directly linked to the operations themselves. For the Ecosystem, this means that it is necessary to make participation conditional on employing a specified number of reservists and so-called "reservables".[37] These employees should have Dutch nationality in order to be able to function as military personnel in crisis situations.

The EU Treaties contain specific exceptions for so-called 'public service' and 'official authority' (see Articles 45(4) and 51 TFEU). The Court adopted a functional interpretation these concepts, by only including activities which are "directly and specifically connected with the exercise of official authority".[38] Military personnel, including "reservables", falls within this category.

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

It is inherent to the system of EU law that trade restrictions can be adopted in times of military crisis. This is reflected by the previously mentioned Article 347 TFEU (more on this in Section 4) and the more intergovernmental nature of the EU's defence and security policy. This EU policy area provides for cooperation and pooling of national capabilities, but not for actual shared capabilities to be used by a supranational body in times of crisis. Application of the public security justification and the considerations below should therefore be interpreted as far as possible in the light of the aforementioned feature of the system of EU law, namely that it is relies on the military capabilities of the Member States, and the Netherlands' obligations to contribute to EU and NATO defence policy.

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

The Ministry of Defence has, for practical and financial reasons, embarked on a personnel policy of increasing flexibility. Following the evaluation of the Logistics and Personnel 2017/18 pilot project, the Royal Netherlands Army announced its intention to enter into a long-term strategic cooperation with the business community.[39] In the light of these developments, the Ecosystem endeavours to provide maximum achievable logistics capabilities. This means specifically that in crisis situations personnel from participating private actors must be used.[40] In this sense, the Ecosystem is part of a broader development in which civilian capabilities are integrated into the armed forces in order to provide the Ministry of Defence with flexible capabilities that can be deployed at times when a greater need (also for military positions) temporarily arises in a particular location. This only works if long-term strategic partnerships with private actors are entered into. As such, the Ecosystem coherently fits in a more general policy.

[37] Personnel willing to become reservists.
[38] See for instance: Case C-114/97, *Commission v. Spain* (1999), para. 35. First emphasised by the Court in: Case 2/74 *Reyners* (1974), para. 45.
[39] *Survey Report Logistics Ecosystem*, p. 10.
[40] *Future Policy Survey – A new foundation for the Netherlands Armed Forces* 2010*,* pp. 184-185.

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

It follows from the case law of the Court that the geopolitical position of a Member State and the securing of that position can widen a Member State's margin of discretion. In the *Campus Oil* judgment of 1984 the Court, for instance, accepted that measures taken by Ireland to benefit the security of oil supply were justified. Arguments for this were that these measures would in particular ensure Ireland's neutrality and the independence necessary for that in times of crisis.[41] Obligations ensuing from NATO membership can also widen the margin of discretion in invoking an exception to EU internal market rules. In the *Commission v Belgium* judgment of 2003, the Court applied an extremely marginal proportionality test. The Belgian government had directly awarded a public contract for aerial photography to a Belgian company. According to Belgium, the direct award was possible because the Public Procurement Directive (Directive 92/50/EC) did not apply due to the special security measures necessary to ensure the security of installations on Belgian territory, including NATO installations. The Court held that Belgium was indeed responsible for this and that it was therefore for the Belgian authorities "to lay down the security measures necessary for the protection of such installations", referring in particular to NATO installations.[42] The Court did not examine whether it was in fact possible to guarantee security within the parameters of the Public Procurement Directive.

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

As emphasised in Article 36 TFEU – but applying in full to all justifications – national measures must not constitute a "means of arbitrary discrimination or a disguised restriction on trade between Member States". Put simply, EU law never provides a basis for measures that are in essence protectionist. According to the Court, this means that the justifications cannot be interpreted in such a way as to allow measures serving "purely economic interests".[43] In the *Campus Oil* judgment, the Court added a degree of nuance to this. In the context of measures taken by Ireland for the supply of petroleum products, the Court held that such a measure, because of the "exceptional importance as an energy source in the modern economy, [is] of fundamental importance for a country's existence since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon [it]".[44]It is thus justified, in the interests of public security, to take measures to ensure a constant minimum supply of petroleum products. After all, such a measure by far transcends purely economic considerations.[45] The Court added that "the fact that the rules are of such a nature as to make it possible to achieve, in addition to the objectives covered by the concept of public security [...] objectives of an economic nature" does not exclude application of the public security justification.[46]

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

[41] ECJ 10 July 1984, *Campus Oil*, Case 72/83, European Court Reports 1984, 02727 (see p. 2738, where this is referred to).
[42] ECJ 16 October 2003, *Commission v. Belgium*, Case C-252/01, European Court Reports. 2003, I-11859, paras. 29-30.
[43] ECJ 10 July 1984, *Campus Oil*, Case 72/83, European Court Reports 1984, 02727.
[44] *Campus Oil*, para. 34.
[45] *Campus Oil*, para. 35.
[46] *Campus Oil*, para. 36.

Certainty regarding provision of logistics services in a crisis situation requires proportional 'Do ut des'[47] relationships between the Ministry of Defence and third parties in times of peace and stability

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

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

From a legal point of view, this does not need be problematic, as long as the civilian services contracts are proportional to the objective of the Ecosystem as a whole, which is ultimately aimed at safeguarding national security. The Ministry should, in that regard, examine how many public contracts have to be awarded within the Ecosystem to make participation commercially attractive for the economic operators. An indication that the Ministry could be able to adequately meet the requirement of proportionality in the organisation of the Ecosystem is the fact that it has stated that it will not accommodate all logistics services in the Ecosystem and reserves the right to put logistics services out to public tender.[48]

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

As already argued, the EU Treaties themselves ensure that the internal market system is not absolute. Ultimately, the internal market is only a 'means' to achieve the EU's aim of promoting peace, its values and the well-being of the peoples of Europe (Article 3(1) TEU). Although this was not expressed so explicitly until the Lisbon Treaty (2009), the relative nature of the internal market had already been made evident since the Treaty of Rome (1957) in the exception provision of the current Article 347 TFEU.[49]

This provision clarified immediately from the EEC's establishment in 1957 that, in the four situations listed in the Article, Member States are permitted to take security measures which could adversely affect the functioning of the internal market.

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[47] *Do ut des* is not just an expression. It derives from Roman law and indicates the will to do something for something (or for own personal gain). In Roman Law the 'do ut des' fell under the contracts "*without a name'*.

[48] *Survey Report Logistics Ecosystem.*

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

The text of this Article reads:

> "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 **I)** serious internal disturbances affecting the maintenance of law and order, **II)** in the event of war, **III)** serious international tension constituting a threat of war, or **IV)** in order to carry out obligations it has accepted for the purpose of maintaining peace and international security."

This means that, in addition to the exceptions from Articles 52 and 62 TFEU discussed in the first legal route, the Dutch government could also invoke Article 347 TFEU for the purpose of the Ecosystem if it can be regarded as a response to one of these types of crisis situations. An important feature of Article 347 TFEU is the obligation for Member States to consult each other to minimise the negative impact on the internal market.[50] As Article 347 TFEU is a more specific provision compared to the public security provisions discussed before, only meant as a sort of last resort, justifying derogation based on the public security exceptions would be the most logical solution for the Ecosystem. Here below we will assess the Ecosystem under the angle of the last three of these situations.

4.1. Preventive response to war

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

According to Cosmas, Article 347 TFEU seems "to constitute the demarcation line between the normal circumstances in which national and Community institutions function and difficult situations of national danger which affect the more general relationship between the Community and Member States".[51] Cosmas acknowledges that this cannot be read literally in the provision, but that it is clear from its objective, which is "to confer on the Member States the greatest possible capability to deal with certain exceptional and truly dangerous eventualities". In fact, Cosmas does not consider it necessary for any of the situations mentioned to actually occur; it is sufficient if "the measures taken are directly and exclusively linked to those situations". According to Cosmas, preventive measures which "are directly and exclusively linked to the exceptional situations [the article] (...) describes" can also fall under the scope of this ground for the exception provided in Article 347 TFEU.

Of crucial importance is Cosmas's interpretation that otherwise the provision would be robbed of its "practical usefulness" and be rendered "entirely redundant".[52] Cosmas did add to his reasoning that such

[50] To a certain extent Article 347 TFEU therefore inherently includes a sort of proportionality requirement, as Member States need to consult each other. Question remains whether this is also open to judicial review. Koutrakos argues, in that regard, that some sort of proportionality test should be applied by asserting that it would be the role of the Court to "struck the balance between, on the one hand, ensuring the effectiveness of Community law and, on the other hand, not encroaching upon the rights enjoyed by the Member States in the sphere of foreign policy and defence", although the extent of judicial review over application of Article 347 TFEU would be more "limited" than over other security exceptions, see: P. Koutrakos, 'Is Article 297 EC a "Reserve of Sovereignty"', *Common Market Law Review* 2000, pp. 1354-1355.
[51] Opinion of Advocate General Cosmas in Case C-423/98, *Alfredo Albore* [2000], para. 27.
[52] Advocate General Cosmas, para. 31.

measures could be made conditional on being temporary, and this can be assessed by the Court.[53] In particular, regulatory measures of a more general nature would be inadmissible if adopted on a permanent basis. According to Cosmas, the permanence of measures often indicates that they "have not been taken exclusively for the purpose of resolving problems" falling within the scope of Article 347 TFEU. However, to the extent that the Ecosystem has a permanent character, it can still be argued that it is aimed exclusively at the red-button scenario. However, this requires a more extensive substantiation than is necessary for a temporary measure.

Advocate General Cosmas's opinion shows that the Ecosystem can be brought within the scope of Article 347 TFEU; questions do arise, however, regarding the requirement that only measures aimed exclusively at enabling the Netherlands armed forces to respond adequately to a possible war or threat of war can be brought under this exception. This would require that, if such a situation actually occurs, the Netherlands would be able to apply emergency regulations to the participating undertakings in question so that maximum logistics capabilities become available. For the civilian logistics services to be included in the Ecosystem it would then have to be demonstrated that the actual amount of those services is necessary for the exclusively military purpose of the Ecosystem.

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

The term 'threat of war' has a very broad scope and is, to a certain extent, subjective. Its subjective character lies in the fact that it is not defined in EU law, which leaves a wide margin of discretion to the Member States.[54] There is no doubt that since the annexation of Crimea by Russia in 2014 there has been 'international tension' threatening the territorial integrity of (Eastern) European States, much more so since Russia's 2022 full-scale invasion of Ukraine. The Ecosystem serves to provide logistics support to possible military missions for protecting Dutch allies (in both EU and NATO context) when necessary. It is conceivable that this international tension will spread to other geographical areas within NATO and/or EU territory. In addition, the Netherlands government has a wide margin of discretion in determining that such a threat exists. The question remains whether this context of international tension is a concrete enough 'threat of war' directed against the allied relations that the Ecosystem seeks to protect.

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

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

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

[53] Advocate General Cosmas, para. 32.
[54] See: M. Trybus, *European Union Law and Defence Integration*, Hart Publishing 2005, p. 187. See also: Opinion of Advocate General Cosmas in Case C-423/98, *Alfredo Albore* [2000], para. 29.

5. Conclusion: what future for EU public procurement regulation in the military sector?

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

In the Dutch context, the Defence Ministry seeks to overcome the constraints on ensuring sufficient logistics capabilities that arise from staff shortage by engaging in strategic cooperation with economic operators through the development of a so-called Ecosystem. To be able to count on the capabilities of these actors militarily in times of crisis they need to be located in Netherlands, employ Dutch personnel with the status of *reservist* and participate in military exercises in peacetime. These (discriminatory) requirements entail internal market restrictions and therewith raise the question of their admissibility under EU public procurement law and the internal market freedoms as enshrined in the EU Treaties.

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

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

It should be noted that in the Dutch context, the proportionality requirements will usually be met if the general principles of Dutch law (such as the principles of good governance), that still apply after exception from EU law, are complied with.[55]

More generally, the example of the Ecosystem shows that the principles of EU public procurement law are not always suitable to regulate procurement in a military context. This is remarkable, as the EU legislature specifically sought to adapt these principles according to the requirements of the military context by adopting the Defence Procurement Directive in 2009. Questions arise as to whether this directive can be effective in regulating military procurement and as to whether it was adopted under the correct legal basis in the EU Treaties.[56] In times of war and worldwide increase in military spending the question how to effectively regulate military procurement for European security will only become more pressing.

[55] For an extensive analysis of these principles see the last part of the original research report on which this paper is based.
[56] These questions are addressed in: N. Meershoek, 'The Constraints of Power Structures on EU Integration and Regulation of Military Procurement', *European Papers* 2021(1), pp. 831-868 and N. Meershoek, 'Why the EU Internal Market is not the Correct Legal Basis for Regulating Military-Strategic Procurement: On functional division of competences', *European Law Review* 2022 (forthcoming).