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Legal Limits of the National Defence Privilege in the European Union

Legal Limits of the National Defence Privilege in the European Union

Overview of the recent European Court of Justice judgement on Art. 296 European Community Treaty and the new role of the Commission in armaments: A step towards a single market in armaments?

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Preface

This paper on legal aspects of European Security and Defence Policy, and particularly the interpretation of Art. 296 of the Amsterdam Treaty[1] (formerly 223 of the Rome Treaty) allowing "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", in national exemption from European Union Regulations was written by Elena Bratanova, who served an internship at BICC during the summer of 2003. It brings together some of the relevant literature concerning the interpretation of Art. 296 and discusses a number of consequences of recent decisions by the European Court. The objective is to contribute to the current debate on the roles of European institutions and national governments in the emerging European defence market from a legal perspective. Elena Bratanova worked within the ESDP Democracy project, of which BICC is a partner (see *www.esdptransparency.org*). She benefited from comments from Jocelyn Mawdsley, Hartmut Küchle and Michael Brzoska. However, the responsibility for any errors remains with the author.

Introduction

Armaments are hard defence materials of a highly sensitive nature, which are intended for the armed forces and for military use. As such they represent an important part of the internal market and their automatic exemption could have a negative influence on its functioning.
Despite this, until now the Court has avoided ruling on this matter thus providing a more precise interpretation of the treaty articles supposed to exempt armaments from the Single Market. One reason for this could be the Court's unwillingness to place limits on the sovereignty of the Member States regarding national security and defence. Moreover, it could be seen as a bold move bearing in mind that the first attempt in this direction, the European Defence Community (1952), failed because the French Parliament refused to ratify the European Defence Community Treaty. This was also the destiny of attempts to create a political union through the Fouchet Plans in 1962. The fact that only 3-4% of the trade in hard defence materials takes place on an intra-

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1 Now consolidated into the Treaty establishing the European Community, also called the European Community Treaty, http://europa.eu.int/eur-lex/en/search/search_treaties.html

community basis shows that there is no urgent danger of jeopardising the single market.[2] Therefore, achieving clarity on the division of competence between the Commission and a Member State, when the Member State takes a measure for reasons of national security, will have an influence on the general question of the constitutional relationship between the Member States and the Union.[3] Due to the above reasons, the development of a European foreign policy with military instruments was prevented and the European Economic Community developed as a 'civilian power' with only economic competencies. The result is the liberal interpretation of Arts. 296 and 297 by the Member States and the general exclusion of armaments.

Box 1 – Treaty Establishing the European Community, selected articles

EN C 325/148 Official Journal of the European Communities 24/12/2002

Article 30

The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exporter goods in transit justified 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. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Article 39

1. Freedom of movement for workers shall be secured within the Community.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
(a) to accept offers of employment actually made;
(b) to move freely within the territory of Member States for this purpose;

2 For more details see "The Challenges Facing the European Defence Related Industry" Com(96) 08

3 Trybus, M., "The EC Treaty as an instrument of European Defence Integration: Judicial Scrutiny of Defence and Security Exceptions", [2002] 39 *Common Market Law Review*, pp. 1-26, p.2

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.
4. The provisions of this article shall not apply to employment in the public service.

Article 46

1. The provisions of this chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.
2. The Council shall, acting in accordance with the procedure referred to in Article 251, issue directives for the co-ordination of the above mentioned provisions.

Article 58

1. The provisions of Article 56 shall be without prejudice to the right of Member States:
(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;
(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.
2. The provisions of this chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with this Treaty.
3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 56.

Article 296

1. The provisions of this Treaty 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 common 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.

Article 297

Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common 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.

Article 298

If measures taken in the circumstances referred to in Articles 296 and 297 have the effect of distorting the conditions of competition in the common market, the Commission shall, together with the State concerned, examine how these measures can be adjusted to the rules laid down in the Treaty. By way of derogation from the procedure laid down in Articles 226 and 227, 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 296 and 297. The Court of Justice shall give its ruling in camera.

In this light, it is worth mentioning that since the end of the Cold War derogations from the principle of free-movement are determined on the basis of legal principles rather than according to the politically sensitive nature of the activity concerned.[4] Furthermore, in order to understand the relationship between Community law and policy and national law, one always needs to keep two basic rules in mind: supremacy and direct effect. In a conflict situation between EC law and Member States law the Community law prevails[5] and has a direct effect when it grants rights to individuals that must be confirmed in the national courts[6].
Important recent cases before the European Court of Justice are regarded as the first step on the way to a single market in armaments and defining the scope of Art. 296. It has brought to

4 Koutrakos, P., "Community Law and Equal Treatment in the Armed Forces" [2000] 25 *European Law .Review*. 433 at 441

5 Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastigen* [1963] ECR 1; Case 6/64 *Costa v. ENEL* [1964]ECR 585

6 see note 4 Van Gend case

an end the misuse of Art. 296 ECT and has given the Commission a strengthened enforcement position. The clarification of the scope of this article has enabled the Commission to make fresh proposals in this area.

This paper will concentrate on an analysis of these decisions and will ask to what extent the new economic and political attitude that comes with them explores the legal boundaries of the Commission's role in armaments policy. The increasing prices of modern defence equipment, the deficit in defence budgets and job losses in defence firms make it necessary to put the problem on the European table again. The Commission suggests that a common set of regulations offers more advantages and choices for finding a solution to these problems and that community law provides an appropriate framework in order to regulate any liberalised market. Furthermore, it could be argued that "the only way the European taxpayer can get value for money will be to operate in common many of the force elements now deployed on a national basis"[7]. Certainly, the European Community was designed primarily to meet economic needs, but one of the paradoxes of European integration is that although the EU is founded on the desire to preserve peace, its security and defence element is the least politically and legally sophisticated policy area. Recent major developments under the second and third pillar show that the Union is moving towards an integrated European Security and Defence Policy making the creation of adequate military capabilities an overriding concern for the Community. This also explains the growing role of the Commission which is "one of the very few institutions in the world that have experience with a true single market and its implementation"[8]. Organisations like OCCAR have succeeded in the abandonment of juste retour by collaborative project management for multinational arms procurement to reduce costs and to help the states harmonise procurement rules and principles. However, their activities have not led to the rationalisation of production in the defence industry at the EU level due to the limited number of participants, on the one hand. On the other hand, OCCAR has no policy role and manages only a very small part of the national procurement programmes of its members. The Commission has had more time to gain experience regulating the trade with dual

7 Roper, "Keynote Article: Two Chairs for Mr. Blair? The Political Realities of European Defence Co-operation" [2000] 38 *Annual Review Journal of .Common .Market .Studies*. 7 at 22

8 Trybus, M., "The Challenges facing the European Defence Related Industry – Commission Communication Com (96) 08" [1996] 5 *Public Procurement Law Review*. CS 98 at. 101

use material, which is at least a start and suggests that it could achieve an adequate regulation over hard defence materials. Moreover, it can take over and use the experience of the above mentioned organisations in collaborative projects and defence procurement.

1. Developments in the 1990s – Changing Attitudes?

According to Art. 28 ECT, quantitative restrictions on imports and all measures having equivalent effect are prohibited. However this prohibition is not absolute and the Treaty gives reasons where measures introduced by Member States can be justified. One of the reasons is public security. Trybus defines public security as "a wide concept covering all aspects of security, internal and external including the concept of national security."[9] The only articles which allow the Member States to derogate from the Treaty for reasons involving national security, are Art. 30, 39 (3), 46 (1), 58 (1), 296 and 297. When dealing with these issues the Court tries to ensure a reasonable balance between the internal market interests of the Community and the public security interests of the Member States. However, the Court applies different criteria and scrutinises them with different degrees of intensity.[10] The determining factor is the commercial link, which explains why it applies a strict test of proportionality to Art. 30. 39 (3), 46 (1), 58(1) and a low one to Art. 297. It is entirely in the authority of the European Court of Justice (ECJ) to define the meaning and scope of the EC understanding of public policy, public security and public health. The Member States have a certain margin of latitude due to the different circumstances which lead to the use of the public security exemptions in different Member States. However, these must be narrowly interpreted[11] and the ECJ can closely scrutinise their use[12] in order not to affect the functioning of the internal market as whole.
Article 296 (1) (b) EC allows a Member State "to take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production or trade in arms, munitions or war material". In this respect its effect is different from that of the above listed

9 see note 2, p. 4
10 see note 2, p.2
11 C-67/74 *Bonsignore v. Oberstadtdirektor der Stadt Köln* [1975] ECR 297
12 C-36/75 *Rutili v Minister for the Interior* [1975] ECR 1219

exceptional clauses[13]. Therefore, the status of Art. 296 is also of a "wholly exceptional character"[14] and the aim for excluding some products from the treaty regime must be directly in relation to the very core of national security.
The reluctance of the Court to rule on this exemption and the historical background behind its creation has led to a liberal interpretation of Art. 296 (1) (b) which means that this Article is regarded as a "general and automatic exemption of hard defence material from the application of the Treaty"[15]. However this does not authorise Member States to take measures solely on commercial grounds, nor does it provide a blanket exemption from the internal market provisions for all military materials.

> *"Art. 296 (1) (b) applies only to arms, munitions and war materials…[and only to], the interests in respect of which a Member State may take measures it considers necessary for the protection of the essential interests of its security."*[16]

This meant that Art. 296 (1) (b) could not be invoked in the context of dual-use goods, which are subject to the Community regime, and can only be exempted on the restrictively interpreted derogation of Art. 30, 39 (3), 46 (1) and Art. 58(1)(b).[17] The Art. 296 exemption applies to a list of hard defence materials drawn up by the Council in accordance with Art. 296 (2), but it has never officially been published.[18] This led to the conclusion that national governments cannot adopt measures under Art. 296 (1)(b) regarding products not covered by the Art. 296 (2) list. The notion that Member States can only invoke Art. 296 1 (b) for products included in the Art. 296 (2) is also supported by the wording of the Treaty itself, the French version refers to "la liste

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13 see the opinion of Jacobs AG on Case C-120/94 *Commission v. Greece* [1996] ECR I-1513 at para. 46

14 Case C-222/84 *Margarite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651 at paragraph 27

15 Trybus, M., "On the application of the EC Treaty to Armaments" [2000] 25 *European Law Review* 633 at 665

16 see note 7 at 433

17 see note 10 at paragraph.26 and Eikenberg, K., "Article 296 (ex.223)E.C: and External Trade in Strategic Goods" [2000] 25 European Law Review. 117, at 127, 134 for further references see footnote 48.

18 The list was adopted on April 15th 1958. It has never been officially published and remained unchanged. See Trybus, M., "*European Defence Procurement Law: International and National Procurement Systems as Markets for Liberalised Defence Procurement in Europe*", Kluwer Law International (London), 1999 at 13-14

des products" and the German to "die Liste der Waren".[19] Further Koutrakos compares the Art. 296 (2) list with COCOM munitions list[20], which served as a model for the first list and includes many dual-use goods, and comes to the conclusion that the Member States did not intend to create such an extensive list.[21]
Both the Court and the Commission find it difficult to prove when Member States do not follow the rules laid down by the system, partly because defence contracts involve secrecy, partly because they are waiting for a clear case which will help to narrow the interpretation of the Article. Therefore, defence procurement is practised on a national level fragmenting the internal market, preventing the standardisation of defence criteria and as a result causing duplication of research [22]and developments costs.[23] This led the Commission[24] to rethink the system of regulating armaments and to propose a more limited interpretation in its Communications.
On this basis it has been argued that:

> *"The exception is not automatic but must be expressly invoked by the Member States who wish to rely on it. The Treaty applies to hard defence materials and the Community has jurisdiction over these products unless a Member State can prove the existence of a situation justifying a derogation from the regime."*[25]

However, the Member States were unwilling to agree to this initiative and preferred to maintain the present structure protecting their national industry even at the price of increased costs. In fact some Member States are considering co-operation but on an intergovernmental basis through organisations like the WEAG and OCCAR, which allows them to protect politically sensitive issues such as jobs and maintain their national sovereignty on defence, whilst co-ordinating research and development in joint projects to reduce costs. This would mean

19 Kotrakous, Panous, Trade, Foreign Policy & Defence, Hart Publishing: London 2001, at. p.184
20 The Co-ordinating Committee on Military Export Controls (COCOM) was an agreement regulating exports of armaments and sensitive materials to the Soviet bloc.
21 See note 18, p. 186
22 See note 14 at 664
23 Sir Leon Brittan in Wheaton, J., "Defence Procurement and the European Community: The Legal Provisions",[1992] 1 *Public Procurement Law Review* 432, p. 433
24 see 1, p. 14
25 see note 17, p. 664

that an internal market in armaments could not exist unless Art. 296 was deleted from the Treaty with an express commitment from all Member States to support a common defence equipment market. However, the provision was not deleted at Maastricht, Amsterdam and Nice, and it is unrealistic on political grounds to assume that this will happen in the next decades. Therefore, the suggestion, even if optimal from a European point of view, is not adequate to the political situation and does not represent a solution to the questions arising when considering European Defence Policy.

2. The Commission Communiqué[26] of 2003

The European Commission communiqué issued on 11 March 2003 is based on principles set out in two communications in 1996 and 1997 on the industrial and market aspects of European Defence and was requested by the European Parliament in April 2002. The Communication proposes action in seven fields with the intention that this could bring savings in costs and better value for money: standardisation, monitoring of defence-related industries, intra-community transfer, competition, procurement rules, export control of dual-use goods and research. In the following I will concentrate on three of the areas which I consider most problematic and controversial in terms of whether compromise between the Member States and the Community could be achieved.

a) Competition Policy and State Aid

Domestic aid and intervention distort international competition just as much as tariffs do. On the other hand, competition and choice bring long-term benefits to the public and avoid political influence or favouritism. Therefore, one of the main achievements of the European Union has been to limit and in many cases entirely forbid state aid in member countries. For this reason the Commission continues to argue that the EC competition law (Art. 85, 86 EC) should also apply in the defence sector in order to prevent the distortion of competition.[27] Furthermore, mergers can have an impact on competition. Mergers and take-overs in the defence field have increased and clarity is especially relevant for the defence industry. Therefore, the Commission emphasises that it is necessary to supervise and

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26 European Commission (2003), European Defence – Industrial and Market Issues: Towards an EU Defence Equipment Policy, COM(2003) 113 final, at. 11-12, Brussels

27 see note 22, p. 437

ensure that mergers contribute to the economic efficiency of the Community, serve to avoid duplication and preserve the competitiveness of the defence industrial base with competition outside the EU rather then strengthen the position of individual Member States. The Merger Regulation[28] is also relevant in cases regarding the dual-use markets. The joint venture should be notified in cases where the civilian activities of a company represent even only 2.5 per cent of its turnover and the rest are military activities.[29]

It is, however, difficult to formulate a comprehensive approach concerning state aid, because a lot of the companies in this sector manufacture both strictly military and non-military products. According to Art. 87, EC state aid is in breach of EC law if it distorts or threatens competition and is capable of affecting trade between the Member States.

The non-military materials are subject to the standard provisions regarding state aid. However, it is likely that aid to the military sector may affect the civil one and so distort competition in the civilian market. One solution to the problem could be the integration of the co-ordination of state aid into the EU's own policy in the relevant field.

Nevertheless, according to the Commission, the specifics of the defence industry should be taken into account and the legal provisions concerning competition should be modified accordingly.

It remains an open question as to how exactly it intends to do this. On this point they should build on the work of OCCAR and the Framework Agreement.

b) *Intra-Community Transfer and Exports*

The Commission suggests facilitating the intra-Community trade of defence-related materials by rationalising the controls carried out by the Member States. One way to do this is to replace the national licensing system by Community measures, which should apply to intergovernmental programmes and industrial co-operation programmes. One important development in this field has been the Letter of Intent (LoI)[30] issued on an ad hoc basis and its Framework Agreement with the purpose of facilitating the reform of the European Defence Industry. It is still controversial

28 Reg. 4064/89 [1989]OJ L257/13

29 see note 18, p. 178 case reference: Case IV/M. 528 *British Aerospace/VSEL* [1994] OJ C348/6

30 The Letter of Intent and the following Framework Agreement included the EU's six largest arms-producing countries: France, Germany, Italy, Spain, Sweden and the UK, 2000:http://projects.sipri/loi/loisign.htm

as to what extent the agreement is legally binding and in how far it is just a policy decision. A 'white list' including export destinations which are permitted is one of the most important outcomes of the agreement.
Dual-use goods also represent an important part of Community transfers. Therefore, differences between national export control regulations and community export controls could have a negative effect on competition. The Community Regulation (1334/2000) contains a common list of goods and legally binding common principles and rules for the enforcement of dual-use export controls by Member States.
The Commission intends to start working on an appropriate legislative instrument at the end of 2004.

c) Defence Procurement

The Commission is of the opinion that opening up defence procurement at the EU level will ensure that the main rules apply uniformly for all companies. To some extent this is already the case between the Member States who are also members of WEAG, but the problem is that this is seen more or less as a gentlemen's agreement without any binding nature. According to the communiqué, the first step is to develop a common approach which will then lead to a single set of rules for procuring defence equipment in Europe.
The communication also deals with plans to issue a Green Paper in 2004 which should contain some guidelines for dealing with stakeholders seeking agreement on procurement rules applying to defence goods and takes into account the level of sensitivity of the equipment. Furthermore, the paper does not argue that an immediate strict 'European approach' is necessary as existing contractual obligations mean that a transitional period should be foreseen.
The Commission's last initiative in the field of defence-related industries suggests common policies among the member states also in matters traditionally reserved to Member States on the grounds of Article 296. The Commission is asking for harmonisation not only in trade but also in six other areas: standardisation, monitoring of defence related industries, competition, procurement and research.

3. Changed Attitude in the Light of Recent Case Law: Commission v. Spain

Decisions on cases have recently given the Court the opportunity to inject clarification into the varying interpretations of the effect of Art. 296. On the one hand, the governments of the Member States have always been in favour of the automatic exclusion of

hard defence materials through Art. 296 1 (b) from the scope of the Treaty as a whole without any justification. Considering the historical background, one may conclude that they did not have any difficulties following this line. Nevertheless, the Commission has set a new policy agenda (with the support of the Court of Justice) through its communications and discussions papers which forms a new narrow interpretation of the Article giving the Community considerable control over defence matters. It argues that derogation has to be justified and it has to be proven that the situation actually exists. Also Art. 308 ECT has been useful for the Commission because it allows it to make a proposal if "action by the Community should prove necessary to attain, in the cause of the operation of the common market, one of the objectives of the Community and this Treaty has not provided a necessary power".
The case of Commission v. Spain[31] involved a 1987 Spanish law which exempts exports and imports of hard defence material from VAT (value added tax). VAT is important for the European Community and was the first tax to be harmonised in 1997[32], because 'the proper functioning of the internal market requires VAT and excise systems that are efficient and fully reflect the needs of EU businesses and consumers.'[33] EC directive 77/338 states that all inter-Community trade is subject to VAT and contains no exemption for equipment exclusively for military use. Spain, however, justified its exemption by reference to Art. 296(1)(b) and argued that it had adopted its national law on the basis of this article. Exemption from VAT constituted a necessary measure in order to guarantee the achievement of the essential objectives of its overall strategic plan and to ensure the effectiveness of the Spanish armed forces both in national defence and as part of NATO. The Commission brought an action under Art. 226 EC in order to ensure the application of EC law. Art. 226 settles a general enforcement procedure and gives the Commission broad powers to bring enforcement proceedings against Member States which breach their obligations under Community law. This judgement takes over from the ruling that

31 Case C-414/97 *Commission v. Kingdom of Spain* [1999] E.C.R. I-5585

32 Directive 77/388/EEC of 17 May 1977 see also Council Directive 91/680/EEC of 16 December 1991 amending the first Directive 77/3888 EEC with a view of abolition of fiscal frontiers.

33 Communication from the Commission to the Council, the European Parliament, and the Economic and Social Committee, *Tax Policy in the European Union – Priorities for the Years Ahead*, COM (2001) 260 final, para 3.1

emerged in the earlier Johnston case that every exception to the treaty is exhaustive and should be narrowly interpreted:

> *"Because of their limited character those articles do not lend themselves to a wide interpretation and it is not possible to infer from them that there is inherent in the treaty a general proviso covering all measures taken for reasons of public safety. If every provision of Community law were held to be subject of a general proviso, regardless of the specific requirements laid down by the provisions of the Treaty, this might impair the binding nature of Community law and uniform application"*[34]

Commission v. Spain was the first time the Court dealt specifically with Art. 296(1)(b) and decided that there is no general exemption from the Treaty. The Court ruled that:

> *"In the present case, the Kingdom of 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 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."*[35]

Moreover, as the Advocate General pointed out in his opinion that the income from VAT payments on imports and the acquisition of armaments will not jeopardise this objective because only a small percentage will go to the budget of the Community and the major part re*mains for the State's coffers.*

Box 2 – Case Summaries

Case C-222/84 Margarite Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651

Facts: A female officer of the Royal Ulster Constabulary (RUC), now the Police Service Northern Ireland (PSNI), brought an action against a decision by her employer refusing to renew her contract of employment. RUC had decided a new policy based on the fact that women were neither trained in the use of firearms nor permitted to use them. The policy states that RUC does not employ women as full-time members of their reserves on the grounds that women are neither trained in the use of firearms nor permitted to use them.
ECJ: "Measure is justified under Art. 2 (2) Equal Treatment Directive. Allowing women to carry and use firearms increased their risk of

[34] see note 13 at paragraph 26
[35] see note 30, para.22

becoming the targets for assassination. The MS had the discretion to decide whether, "owing to the requirement of national security and public safety or public order, the context in which the occupational activity is carried out prevents that activity from being carried out by a policewoman."The case does not involve Art. 296 directly but it refers without any differentiation to Art. 30, 39 (3), 46 (1), 58 (1) (b), 296 and 297 when it states that these articles should not be widely interpreted otherwise they could disturb the binding nature and uniform application of community law.

Case C-285/98 Tanja Krail v. Germany [2000] E.C.R. I-69

Facts: A woman, who was trained in electronics, applied for voluntary service involving the electronic maintenance of weapons in the Bundeswehr (the German armed forces). Her application was rejected on the basis that, according to German law, women were barred from serving in military positions involving the use of arms. The law reflects Art. 12 a (4) sentence 2 Basic Law.
ECJ: "...[...] the Equal Treatments Directive (76/207/EEC of 9 February 1976) precludes the application of national provisions, such as those under German law, which impose a **general exclusion** of women from military posts involving the use of arms and which allow them access only to the medical and military music services."
This case similar to Johnston does not deal directly with Art. 296, but in paragraph 16 it states again that: Art. 30, 39, 46, 296 and 297: "deals with exceptional and clearly defined cases. It is not possible to infer from those articles that there is inherent in the Treaty a general exception excluding from the scope of Community law all measures taken for reasons of public security. To recognise the existence of such an exception, regardless of the specific requirements laid down by the Treaty might impair the binding nature of Community law and its uniform application."

Case C-273/97 Sidar v. The Army Board [1999] 3 C.M.L.R. 559

Facts: Mrs. Sirdar, a female soldier, had received an offer from the Royal Marines to be employed as a chef. However, the Army Board and the Secretary of State for Defence informed her that she was ineligible because there was a general policy of excluding women from RM. Their presence is incompatible with the requirement of '**interoperability**'. Every RM has to be capable of fighting in a commando unit.
ECJ.: " The question is therefore whether, in the circumstances of the present case, the measures taken by national authorities, in the exercise of the discretion, which they are recognised to enjoy, do in fact have the purpose of guaranteeing public safety and **whether they are appropriate and necessary to achieve that aim.**" (paragraph. 28)
ECJ: " the competent authorities were entitled[...] to come to the view that the specific rules for deployment of the assault units of which the Royal Marines are composed, and in particular the rule on **interoperability** to which they are subject, justified their composition remaining exclusively male" (Paragraph 31)

The case points out the distinction in case of derogation from those Articles which are 'wholly exceptional (Art. 296, 297) and from those which are merely 'exceptional' (Art. 30, 46, 58). Further it states that Art. 296 and 297 are clearly defined and do not lend themselves to any wide interpretation. The cases which may occur should be strictly constructed.

Case C-83/94 Criminal Proceedings against Peter Leifer and others [1995] E.C.R. I-3231

Facts: The public prosecutor in Darmstadt brought criminal proceedings against Mr. Leifer for disturbing Germany's international relations when delivering plant and chemical products to Iraq from 1984 to 1988 without the necessary export licences prescribed by German law of foreign trade (paragraph 2 Außenwirtschaftsgesetz).
ECJ: "[...] Art. 184 is to be interpreted as meaning that rules restricting exports of dual-use goods to non-member countries fall within the scope of that article and that in this matter the Community has exclusive competence, which therefore excludes the competence of the Member States save where the Community grants them specific authorisation."
"[...] The question is whether the measures concerned are necessary and appropriate to achieve the objectives pursued, and whether or not those objectives could have been attained by less restrictive measures."
"Consequently, provided that it observes the principle of proportionality, a Member State may, exceptionally, adopt under Art. 11 of the Council Regulation No2603/69 of December 1969 establishing common rules for export, national measures restricting the export to non-member countries of dual-use goods [...] on the ground that this is necessary in order to prevent the risk of a serious disturbance to its foreign relations or to the peaceful coexistence of nations which may affect the public security of a Member State within the meaning of that article."
In this case a refusal to issue a licence if the goods can objectively be used for military purposes was a proportional requirement and falls within the margin of discretion which the national authority has. Because of the special provision in Art.11 the Court does not consider it necessary to deal with Art. 296 (1) (b).

Case C-70/94 Fritz Werner Industrie – Ausrüstungen GmbH v. Germany [1995] E.C.R. I-3189

Facts: The Federal Export Office refused Werner a licence for the export of a vacuum-induction oven to Libya on the grounds that such a refusal is necessary to protect the public security of Germany under Paragraph 7 Law on Foreign Trade (Aussenwirtschaftesgesetz) owing to a federal disruption of foreign relations.
ECJ: "[...] Art. 184 EC Treaty... does not preclude national provisions applicable to trade with non-member countries under which the export of a product capable of being used for military purposes is subject to the issue of a licence on the grounds that it is necessary in order to

avoid the risk of a serious disturbance to its foreign relations which may affect the public security of a Member State...”

Case 367/89 Criminal Proceedings against Aime Richerdt and Les Acceddoires Scientifiques SNC [1991] E.C.R. I-4621

Facts: The Finance Ministry of the Grand Duchy of Luxembourg brought criminal proceedings against Mr. Aime Richards for attempting to effect the unlawful transit of units for the production of bubble memory circuits to a Soviet agency without a licence, which is contrary to Grand Ducal Regulation requiring a licence for certain goods for security reasons.
ECJ: “...Art.30 EC Treaty, as an exception to a fundamental principle of the Treaty, must be interpreted in such a way that its scope is not extended any further than is necessary for the protection of the interests which it is intended to secure. Measures adopted on the basis of Art. 30 can therefore be justified only if they are such as to serve the interest which that article protects and if they do not restrict intra-Community trade more than is absolutely necessary.”

a) Significance of the ECJ Judgement for the Inter-Community Transfer of Goods

The importance of the decision on inter-community transfer is that – outside of core national security concerns – the objectives of the common market takes precedence over national decisions, suggesting that no automatic exemption exists for armaments. This in turn means that the burden of proof has been reallocated from the Commission to the Member States who have to justify the need for the exemption. The Court can then review the grounds of the decision on national security and its justification: “...it is for the Member State which seeks to rely on those exemptions to furnish the evidence that the exemption does not go beyond the limits of such case”[36]. It is right to question whether the Court may have gone too far on this point taking into account the fact that defence is still in the competence of the Member States and they are responsible for these issues. The Court is obliged to take this fact into account when trying to reduce the flexibility of the Member States. But what follows from the Court’s ruling is that armaments are subject to the internal market provisions and Art. 296 should no longer be broadly interpreted. In effect the European Court of Justice has again enhanced integration by not changing the law but by clarifying the scope of Art. 296 according to academic

[36] see note 30, para.22

arguments[37] so that it facilities the free movement of armaments in the Community.

However, the case gives rise to some questions, the importance of which do significantly change the scope of the article and question the political implications of the judgement. It appears to suggest that the proportionality requirements in the free movement derogation apply to the exemption in Art. 296 (1)(b) through the word 'necessary' in the judgement.38 This implies that the beneficial aspects of protecting the national security interests should be balanced against the negative effects on the Common Market. A conclusion could be made that one needs the same level of scrutiny for the justification as is needed for Art. 30. Moreover, the Court has interpreted the Treaty provisions in the same way in Johnston, Krail[39,] Sirdar[40] and Commission v. Spain. There could be a political rationale behind this lying in the failure of the Member States to delete Art. 296 at Maastricht and Amsterdam when it was on the agenda. The subsequent maintenance of Art. 296 at these intergovernmental conferences implies that there is indeed an intention that different interpretations should be made between Art. 30 and Art. 296.The reason for this is to be seen in the policy choices Member States have when procuring arms and the fact that matters of defence and national security are within the competence of the Member States. Therefore, the intensity of scrutiny in relation to Art. 296 is lower compared to Art. 30 and a measure should, according to interpretations in the literature, only to be declared disproportionate when it:

> *"(1) is clearly unsuitable to promote national security and national security is put forwards in a bad faith;*
> *(2) where the Member State has arbitrarily chosen a measure which is more detrimental to the internal market than necessary; or*
> *(3) when the balance between the two interests is manifestly not present."*[41]

What is needed in this area is a clear statement by the Court in order to make the abuse of the internal market provisions less possible. Art. 296 (1)(a) makes potential abuse easier as it states that states are not obliged to disclose any information to the Court and the Commission which they feel is contrary to their

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37 see note 16 Eikenberg, p.117
38 see 14,p. 666
39 Case C-285/98 *Tanja Krail v. Germany* [2000] E.C.R. I-69
40 Case C-273/97 *Sidar v. The Army Board* [1999] 3 C.M.L.R. 559
41 see at.2, p. 11

essential security interests[42] and this makes it difficult for the Court to monitor the use of Art. 296(1)(b). The in camera proceedings as required by Art. 298 applying to Art. 296 (1) (a) suggest, however, that there is a system to protect the national security fears of the Member States to disclose information. Moreover, the information the Commission needs in order to take actions against abuse of Art. 296 (1) (b) is not always subject to secrecy and the motives for protection may be found in parliamentary minutes, public statements of politicians, or in the measure itself.

However, despite these recent developments and the decision that the burden of proof lies with the Member State which tries to invoke the exemption of the proposed measure, this could be complicated to enforce: "[...] it is for the Member State which seeks to rely on those exceptions to furnish evidence that the exemption in question does not go beyond the limits of such cases."[43]

A removal of Art. 296 would be beneficial, but also the reaction of the Commission and the Member States is key and may affect the future of Art. 296 and the applicability of proportionality to it. It is almost certain that the security interests of the Member States will result in the maintenance of Art. 296 and this will create a delicate situation for the Court to balance between the national security interest and the single market interest.

This shows a need for the Commission and the Council to clarify their roles in the use of Art. 296 especially when a common European Defence identity is shifting the need away from a national security interest of individual Member States to a security interest of the European Union.[44] This means that employment, the defence industrial base and Member States' security are better protected at a European level by removing the fragmentation in the European Defence market and the standardisation problems it causes.[45]

Furthermore, the Court's decisions in Aime Richardt[46], Werner[47] and Leifer[48] also reflect the development of the

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42 Peers, S., "National Security and European Law" [1996] 15 *Yearbook for European Law*. 363 at 379-80 on the application of Art. 296 (1) (a)

43 see note, p.22

44 see note 14, p.667

45, see .note 5, p. 11-12,

46 Case 367/89 *Criminal Proceedings against Aime Richardt and Les Accessoires Scientifiques* SNC [1991] E.C.R. I-4621

47 Case C-70/94 *Fritz Werner Industrie – Ausrüstungen GmbH v. Germany* [1995] E.C.R. I- 3189

interpretation of Art. 296 (1)(b) with respect to the export of goods. The Court held that a national measure aimed to protect the security interests of a Member State and as such an issue of Common Foreign and Security Policy must nevertheless comply with Common Commercial Policy and that the Community has a competence to review such an act. This means that the European Union should agree a joint position and not present a divided front to the world.

Therefore, the conclusion is that Art. 296 cannot be used to prevent harmonisation in the area and the development of a single market in armaments. Nevertheless, there are outstanding problems to be resolved in order to achieve greater clarity. It is, for instance, necessary to publish the list of products it applies to, as well as the situations under which it can apply. Although a Council response now exists which published the list[49], this is not a legally binding document. It will though probably make the extension of Art. 296 (1)(b) to other products not covered by the list more difficult.[50]

Box 3 – The list according to Art. 296 EC Treaty

(2001/C 364 E/091) WRITTEN QUESTION E-1324/01
by Bart Staes (Verts/ALE) to the Council (4 May 2001)

Subject: Article 296(1)(b) of the EC Treaty
Pursuant to Article 296(1)(b), Member States are permitted to waive the general principle of competition (Title VI of the EC Treaty) in the case of military procurement. The Council adopted the list of products to which this applies on 15 April 1958.
What products appear on the list of 15 April 1958 to which Article 296(1)(b) refers?

Reply (27 September 2001)

The list of the arms, ammunition and war material, including nuclear arms, to which the provisions of Article 296 paragraph 1(b) of the Treaty of Rome are applicable is given below.

1. Portable and automatic firearms, such as rifles, carbines, revolvers, pistols, sub-machine guns and machine guns, except for hunting

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48 Case C-83/94 *Criminal Proceedings against Peter Leifer and others* [1995] E.C.R. I-3231

49 Response to written question E-1324/01 by Bart Staes [Verts/ALE] to Council, O.J. C-364 E. 20th December 2001 at 85-86

50 Trybus, M., "The List on Hard Defence Materials Under Art. 296 EC" [2003] 12 *Public Procurement Law Review*. NA15, NA 21 "for the sake of good governance, an official publication of the list in Official Journal would be preferable to this bizarre erosion of secrecy"

weapons, pistols and other low calibre weapons of a calibre less than 7 mm.

2. Artillery, and smoke, gas and flame throwing weapons such as:
   (a) cannon, howitzers, mortars, artillery, anti-tank guns, rocket launchers, flame throwers, recoilless guns;
   (b) military smoke and gas guns.
3. Ammunition for the weapons at 1 and 2 above.
4. Bombs, torpedoes, rockets and guided missiles:
   (a) bombs, torpedoes, grenades, including smoke grenades, smoke bombs, rockets, mines, guided missiles, underwater grenades, incendiary bombs;
   (b) military apparatus and components specially designed for the handling, assembly, dismantling, firing or detection of the articles at (a) above.
5. Military fire control equipment:
   (a) firing computers and guidance systems in infra-red and other night guidance devices;
   (b) telemeters, position indicators, altimeters;
   (c) electronic tracking components, gyroscopic, optical and acoustic;
   (d) bomb sights and gun sights, periscopes for the equipment specified in this list.

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6. Tanks and specialist fighting vehicles:
   (a) tanks;
   (b) military type vehicles, armed or armoured, including amphibious vehicles;
   (c) armoured cars;
   (d) half-tracked military vehicles;
   (e) military vehicles with tank bodies;
   (f) trailers specially designed for the transportation of the ammunition specified at paragraphs 3 and 4.
7. Toxic or radioactive agents:
   (a) toxic, biological or chemical agents and radioactive agents adapted for destructive use in war against persons, animals or crops;
   (b) military apparatus for the propagation, detection and identification of substances at paragraph (a) above;
   (c) counter-measures material related to paragraph (a) above.
8. Powders, explosives and liquid or solid propellants:
   (a) powders and liquid or solid propellants specially designed and constructed for use with the material at paragraphs 3, 4 and 7 above;
   (b) military explosives;
   (c) incendiary and freezing agents for military use.

9. Warships and their specialist equipment:
   (a) warships of all kinds;
   (b) equipment specially designed for laying, detecting and sweeping mines;
   (c) underwater cables.
10. Aircraft and equipment for military use.
11. Military electronic equipment.
12. Cameras specially designed for military use.
13. Other equipment and material.
14. Specialised parts and items of material included in this list insofar as they are of a military nature.
15. Machines, equipment and items exclusively designed for the study, manufacture, testing and control of arms, munitions and apparatus of an exclusively military nature included in this.

b) Relevance of the Judgement for Competition Policy

Furthermore, it is problematic that the defence companies in Europe have been isolated from competition by Art. 296, which has made them inefficient and prevented the formation of effective internal markets in armaments. This also has the consequence that it is not immediately possible to open up the market to non-EU companies because there is a potential danger of the loss of the defence industrial base in certain key sectors. For instance, the military capacities of EU Member States represent about 10 per cent of that of the US[51] and there is a real danger that if the EU defence market industries do not develop their competencies in advanced technologies the US market will remain closed except for states which have stronger bilateral links. On this point there is a collision of interest between some of the Member States, particularly, France and Britain, which try to realise their national interests when defining Community policy on this matter. France brings forward the idea of competition within Europe and purely European co-operation on defence matters without taking into account a global defence procurement market. The British, however, insist on an open global competition, even if it should happen through bilateral links or a ‘coalition of willing’. This and the fact that the Member States are the only legitimate customers of the defence industry lead to the conclusion that a separate public procurement directive is needed for European armaments. The development of a common European defence policy implies a need for the public procurement system to be

[51] Commission Communiqué 2003, p. 5

based on the European rather than the national level.[52] However, various factors have brought Britain and France more closer and there is an acceptance of a multinational approach and willingness to participate in multinational projects for major weapons systems.[53] This also leads to the conclusion that today a decisive direct influence on the changes in the European defence market has not been the national governments, but the industry. As Burkhard Schmitt pointed out:

> *"What is novel about this ...movement towards greater Europeanisation of defence matters is undoubtedly the reversal of roles: it is no longer governments that are steering European co-operation on armaments but industry itself that is moving ahead of political constraints and adopting them, precipitating change and now acting as a driving force in the implementation of a common defence."*[54]

c) New Interpretation of Defence Procurement

At present the Supplies Directive[55] regulates the public procurement of goods due to Art. 3 and applies to all products apart from those in Art. 296 (1) (b) and so there is an automatic exclusion of armaments from this regime. However, after the Court clarified the interpretation of the provision in Commission v. Spain , the Treaty applies to hard defence material whereas the directive does not. Nevertheless, it "imposes a negative obligation to refrain from discrimination irrespective of whether the Directive applies."[56] Therefore, the procurement of armaments following the re-interpretation of Art. 296 (1) (b) is regulated by the Treaty and places an obligation of transparency upon the State.
This is enhanced by Art. 4 (1) of the Service Directive[57], which states that unless Art 296 (1) (b) is invoked and proven, service

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[52] see more Cox., "The Future of European Defence Policy: The Case for A Centralised Procurement Agency" [1994] 3 *Public Procurement Law Review*. 63

[53] Mawdsley, Jocelyn "The European Union and Defence Industrial Policy" 2003 *Paper published by Bonn International Centre for Conversation*, pp. 15-16

[54] Schmitt, Burkhard, From Co-operation to Integration: Defence and Aerospace Industries in Europe, Chaillot Paper 40, Paris: Institute for Security Studies, Western European Union, July 2000

[55] Council Directive 93/36/EEC [1993]O.J.L – 199/1

[56] Trybus, M., "Procurement for the Armed Forces: Balancing Security and the Internal Market" [2002] 27 European Law Review. 692 at. 698

[57] Public Service Directive 92/50/EEC [1992] O.J. L – 209/1

contracts have to be advertised and procured by the rules of the directive.[58] Moreover, after recent developments in case law[59], the Treaty can be interpreted to impose a positive obligation, for instance requirements in relation to awarding procedures, through the prohibition of discrimination. Hence a need for transparency arises.

> *"That obligation of transparency which is imposed on the contracting authority consists in ensuring for the benefit of any potential trader, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed".*[60]

Therefore, Commission v. Spain has meant that the Community public procurement regime could facilitate the procurement of armaments and bring more transparency to the armaments market. With this judgement the Court confirmed the position of the Commission. However, it is still too early to foresee if the public authorities have to follow the EC Treaty or the Supplies Directive when procuring armaments and it is not clear what procedures are required in this process. Therefore, the responsibility is placed on the Commission and the Court to enforce these rules and regulations through compliance procedures if the Member States try to protect their present protective regimes.

The new draft procurement directive deals with these problems and with the procurement of armaments in Art. 7:

> *"This Directive shall apply to public contracts awarded by contracting authorities in the field of defence, except for public supply and service contracts to which the provision of Art. 296 of the Treaty apply."*

As Martin Trybus pointed out the use of the word "contract" rather then "products" to which the provision of Art. 296 (1) (b) apply means that the directive implements the narrow version of Art. 296 EC favoured by the Court in Commission v Spain. A possible consequence of this is that the new Directive might be intended to apply to hard defence materials unless a Member State can invoke the exemption for national security reasons and

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[58] see 38, p. 698

[59] Trybus, M., "Procurement for the Armed Forces: Balancing Security and the Internal Market" [2002] 27 European Law Review. 692

[60] Case C-324/98, *Telaustria Verlags GmbH und Telefonadress GmbH v. Telekom Austria AG* [2000] E.C.R. I - 10745

justify it for the Court.[61] This would represent a significant change in the regulation of the procurement of armaments, but it does not take into account the special characteristics of the defence sector, such as the need to protect an industrial base in such products for security purposes.[62] This new directive implies that armaments are now subject to the same provisions as dual-use goods with the exception of the more limited interpretation of Art. 296 (1) (b). Therefore, Art. 296 (1) (b) no longer offers an automatic exemption as it has been restrictively interpreted, removing the certainty that armaments are exempted from the free-movement provisions by the other Treaty exemptions. Art. 16 of the draft procurement directive, which reflects the provisions of previous directives, contains three exclusions from its application: "contracts declared secret", "special security measures" and "basic interests of security"[63], which indicates that armaments are within the Community competence when those interests outweigh the national security interests. However, it is unlikely that this will affect any major contract for hard defence materials as they will meet these requirements. Consequently, it is necessary that regulation occurs at the European level so that there is no significant differentiation between armaments and dual-use goods as well as enforcing a European defence market through the Community institutions. In effect this will allow the development of competition and will make rationalisation possible, resulting in more efficient goods and processes.

4. Conclusion

Despite the courageous step taken by the Court and the Commission in putting issues of an internal market in armaments and the need for integration in the armaments industry on the Community agenda, there is still no established liberalised defence equipment market.

The Community does not have the competence for defence and there is no adequate legal basis for common defence policy in the Treaty itself. Moreover, defence policy is excluded from the enhanced co-operation provisions in Art. 17 of the TEU and will continue to be taken by unanimous decisions[64]. This means that

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61 See at.38, p. 712

62 see 38, p. 712

63 for further explanation of the exemptions see 38, pp. 704-709

64 Jäger, "Enhanced Co-operation in the Treaty of Nice and Flexibility in the Common Foreign and Security Policy" [2002] 7 European .Foreign Affairs Review 297 at 307

common defence policy cannot develop without unanimity, unlike economic foreign policy.
If the Commission tries to rush a hard defence market managed by the Community without considering the special characteristics of this sector it might lead to more frequent use of Art. 296 1 (b) and Art. 7 of the Draft Directive. In practice this would mean that there is no single market on hard defence materials within the Community framework. This conclusion is further confirmed by the exemption contained in Art. 17 (c) of the Draft Directive to exclude all acquisition of international organisations from the application of the treaty. This could be problematic as in recent years OCCAR, which is meant to manage the defence procurement in collaborative projects of some of the Member States (which are also the contracting authority of the Directives), has emerged and it could use this provision to avoid the application of the Directive. Martin Trybus argues that in this case one needs to interpret international organisation narrowly "as an organisation with a membership including states that are not Member States of the EU".[65] Therefore, organisations like OCCAR are not international organisations in the sense of Art. 17 (c) of the Draft Directive and would have to follow it while conducting their procurement.
The new interpretation of Art. 296 (1)(b) could be adopted by secondary legislation if removal of the article seems unlikely in order to facilitate the building of a common defence market. This implies that "within these limits, the EC Treaty can be considered as an instrument of defence integration"[66] It is expected that the Draft Directive will be implemented into the national laws of the Member States by the end of 2004.
However, it is crucial that the Member States make a positive decision in favour of a common market for defence goods and commit themselves to implementing their choice.
In the light of these developments the Commission's new proposals are following the Court's direction and provide a vision for creating "a viable, sustainable and competitive European Defence Market". While the law has been clarified, it is up to the Member States to continue to follow this direction and find a correct balance between their national security interests and the internal market interests.

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65 See 38, p. 710
66 see 2, p.1

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