Security and Integration in the Context of the Internal Market

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I. Introduction

The European integration process has always been about security. Various integration theories explain the start of the process either as motivated by the need to deal with the old enmity between France and Germany in the aftermath of the Second World War or, more recently, as an attempt to create a basis for a viable European counterbalance to the Soviet Union in case the US were to withdraw from the Continent. The monetary integration of 1990s was put forward as a matter of war and peace. The Member States that joined since the end of the cold war were often motivated at least partially by security considerations.

However, when the provisions of the Treaty and their use are examined, a paradox emerges. There is no serious Common Defence Policy, let alone a European army. There is cooperation, but little integration. And even at the heart of the European project, the single market, Member States have insisted on, and have been granted, considerable autonomy when it comes to matters relating to security. Rather than actually pooling their resources, they have steadfastly sought to keep them separate, largely with the blessing of EU institutions.

The argument of the present chapter is that the strategy of pursuing integration for reasons of security but then failing to integrate in critical respects, in particular when it comes to matters such as security related aspects of the internal market, is contradictory. If Member States want security through integration, they need to give up full autonomy, and if they want autonomy, they cannot have security through integration. We will explore this argument in the context of the internal market, but a similar argument could probably be made also in respect of the Common Foreign and Security Policy. A contrast could perhaps be drawn with the field of justice and home affairs, where the majority of the Member States have increasingly decided to pool some of their sovereignty to obtain advantages in terms of security, as well as to compensate for the effects of the free movement principles of the single market.[1] However, our main focus in this chapter is on the external aspects of security.

The chapter will proceed as follows: we will first explain how external security concerns have acted as a reason to integrate in the history of the EU project. We will then note how Member States have hedged their bets in the context of security, writing exceptions to the Treaty and creating special procedures that limit the application of the internal market rules in the context of security. We examine how the EU institutions, in particular the Court of Justice, have reacted to the special status of security in the internal market. Finally, we point out the tension between integration and autonomy, with the insistence on autonomy serving to undermine security in practice, and highlight the recent drive to improve matters.

II. Security Concerns as a Reason to Integrate

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[1] J.-C. Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge 2010), 168 talks of the need to 'ensure that the free movement of persons would not also become a "free movement of criminals"'.

The purpose of this section is to set out briefly how security concerns acted as a catalyst to the integration process both in the 1950s and in more recent times.

The War must be mentioned whenever the origins of integration are examined. The Schuman Declaration that formed the basis for the Treaty of Paris 1951 on the European Coal and Steal Community was explicitly phrased in terms of security. It called for 'the elimination of the age-old opposition of France and Germany.'[2] The method for this was '[t]he pooling of coal and steel production… as a first step in the federation of Europe' which would 'change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims. The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible'. The logic that emerges is that European integration project is meant to prevent a new war between those countries, given the devastation that their previous conflicts had wrought. Integration was to bring security by answering the German question.[3]

More recently, Rosato has argued that the true reason for integration was the need to respond to another security threat, namely the danger posed by the Soviet Union.[4] He claims that the Western European countries were faced with an overwhelming adversary that they could not hope to deter or defeat individually or even as members of a loose decentralized coalition. They were momentarily protected by the presence of US troops and weapons, but could not rely on this continuing indefinitely. As a result, France and West Germany came together in a more centralized form of cooperation to bolster their economic power and to create a basis for a European counterbalance to the Soviet threat in the case of a US withdrawal. In short, according to this view the true father of European integration was Joseph Stalin, and indeed the Soviet leadership did perceive European integration as a hostile act directed against it.[5] The integration project was an elaborate insurance policy against the existential threat of the Americans getting out and the Soviets wanting to come in.

Security concerns have acted as a catalyst for integration later on in the project as well. In the run up to the EMU and euro, the economic and monetary integration was described as a matter of war and peace for the 21st century.[6] Integration was seen as a response to the growing power of Germany due to reunification. France in particular wished to tie Germany closely to the European project lest it be led to pursue the temptations that its size and geographic position might once again offer, while for Germany there was a threat of the formation of coalitions designed to balance its power.[7]

Security concerns were also a major driver for many of the Member States that joined the Union after the end of the cold war. For countries such as Finland that had remained neutral after the Second World War, the EU was seen as offering protection against an unstable or possibly resurgent Russia; this arguably informed even the decision to join the euro.[8] The same considerations were also an important motivation for countries that had been

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[2] The text of the Declaration is available at 'The Schuman Declaration – 9 May 1950' <http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm> (accessed 27 February 2018).

[3] See e.g. D. Dinian, *Europe Recast: A History of European Union* (Palgrave 2004), 29.

[4] S. Rosato, *Europe United: Power Politics and the Making of the European Community* (Cornell 2011).

[5] See M.P. Rey, 'Le retour à l'Europe? Les décideurs soviétiques face à l'intégration ouest-européenne, 1957–1991' (2005) 11 *Journal of European Integration History* 7–9.

[6] 'Kohl and Mitterrand: A Shared European Belief to Guarantee Peace' *Liberation* (6 June 1994).

[7] See eg W. Sandholtz, 'Choosing Union: Monetary Politics and Maastricht' (1993) 47 *International Organisation* 1, 31–34, and, relying on German Foreign Ministry documents, M. Sauga, S. Simons, and K. Wiegrefe, 'The Price of Unity: Was the Deutsche Mark Sacrificed for Reunification?' *Der Spiegel* (30 September 2010).

[8] For an English language summary in the context of the EU accession, see S.J. Blank, *Finnish Security and European Security Policy* (Strategic Studies Institute of the US Army War College 1996). For the euro, see, e.g, 'Finland and the EU: In and Happy' *The Economist* (9 October 1997).

a part of the Soviet sphere or the Soviet Union itself, such as Poland and the Baltic States.[9] The EU was perceived as a source of security.[10]

Of course, the close relationship between security and integration should not come as a surprise. Already in 1960s Riker examined the reasons that had led previously independent countries to form federations in the course of history, and came to the conclusions that in almost all cases the key factor was the need to pool resources for military purposes to improve the chance of victory in a conflict.[11]

III. Security Concerns as a Constraint to Integration

Given that considerations of external security have acted as a powerful driver for states to integrate, it is surprising how little effective security integration there is in the EU.[12] While Member States have pooled or delegated their sovereignty in various areas ranging from agriculture to competition policy, they have not done so for matters relating to external security to a significant extent. The statement in Article 4(2) TEU that 'national security remains the sole responsibility of each Member State' is telling, and was further emphasized by the Member States in the now defunct new settlement for the United Kingdom of 2016, where it was recorded that '[t]his does not constitute a derogation from Union law and should therefore not be interpreted restrictively.'[13]

For the internal market, the focus of this Chapter, public security appears as an exception for each of the four freedoms in Articles 36, 45(3), 52, 62 and 65(1)(b) TFEU. There are also specific rules in Articles 346–348 TFEU that concern security. They are a manifestation of the way the Member States have hedged their bets, seeking to safeguard their autonomy in the field. It is the interpretation of these sets of rules that we will now turn to.

A. Public Security as an Exception to the Four Freedoms

A desire to maintain autonomy in respect of public security was at the forefront of the Treaty drafters' mind already in the 1950s, when provisions such as Article 36, 45(3), 52 and 62 TFEU were written into the Treaty. Similarly, when capital movements were freed at the primary law level in the Maastricht Treaty in the early 1990s, public security was included as one of the exceptions in Article 65(1)(b) TFEU. And in 2004 when the Directive on Citizens' Free Movement was adopted, public security was again seen as the weightiest of reasons to

[9] R.E. Baldwin, 'The Eastern Enlargement of the European Union' (1995) 39 *European Economic Review* 474, 480 writes: 'EU membership might be a critical factor in assuring that any resurgence of authoritarianism in the former USSR (should it occur) would not lead to a "Finlandization" of the CEECs.' A. Moravcsik and M.A. Vachudova, 'National Interests, State Power, and EU Enlargement' (2003) 17 *East European Politics and Societies* 42 and 43 talk of tremendous 'geopolitical benefits' of joining, when compared to the potentially catastrophic costs of being left behind.

[10] See also G. Gotev, 'Barroso: Without EU Enlargement, Russia Would Have Gobbled up Bulgaria, the Baltics' *EurActive* (29 October 2014).

[11] W.H. Riker, *Federalism* (Brown and Co 1964), 12 - 48.

[12] In the field of the Common Foreign and Security Policy, the former Second Pillar, P. Koutrakos, *The EU Common Security and Defence Policy* (Oxford 2013), 1 refers to 'the decidedly intergovernmental nature of [the CSDP] framework, the cautious wording of the relevant provisions, and the consistent failure of the Member States to meet the targets they themselves proclaimed, with fanfare, as necessary for the conduct of security and defence policy'.

[13] European Council Conclusions, EUCO 1/16, 18.

exclude citizens of other Member States, and the only one available in the case of very long term residents.[14]

The Court of Justice has grappled with the public security exceptions in its case law for a long time. While the cases have been decided on their individual fact patterns and there have been fluctuations, it seems that the general tendency has been a marked deference towards the autonomy of Member States. The notion of what counts as public security has been interpreted broadly, and the application of the principle of proportionality has been lenient. We will examine these in turn.

Campus Oil was an early opportunity for the Court to consider the remit of the notion of public security.[15] The case concerned free movement of goods. In issue was an Irish rule requiring petroleum importers to purchase up to 35 per cent of their requirements at a price fixed by the Government from the Whitegate Refinery, which was the only oil refinery in the country. This was an obvious restriction on free movement, but could it be justified on public security grounds? The plaintiffs, as well as the Commission, argued that there was no connection between public security and the purchase order; rather, the measure was in their view of purely economic nature. For the Commission, public security was in any event only about national defence and the maintenance of civil peace. The Court, following Advocate General Slynn,[16] disagreed. For the Court, 'petroleum products, because of their exceptional importance as an energy source in the modern economy, are of fundamental importance for a country's existence since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon them. An interruption of supplies of petroleum products, with the resultant dangers for the country's existence, could therefore seriously affect the public security that Article 36 allows States to protect.'[17] In other words, contrary to the view of the Commission, the concept of public security does not just relate to military security, and law and order,[18] but extends also to other kinds of threats to the institutions and the essential public services of a State.[19] Further, the Court overlooked the protectionist effect of the measure and, in the words of Gormley, seemed to 'place public security in something of a privileged position' by elevating 'it to a level at which, once it has been made out that a measure can be justified under that heading, other effects of the measure can be ignored'.[20]

The ruling of the Grand Chamber in *PI* provides a more recent example of the same trend of giving public security a broad reading,[21] increasing the room for manœuvre that Member States have. The case involved an Italian national who was convicted in Germany of serious sexual offences involving his partner's daughter, who had been only eight years old

[14] Art. 28(3) of Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

[15] 72/83 *Campus Oil Ltd and Others v Minister for Industry and Energy and Others*, EU:C:1984:256, [1984] ECR 2727.

[16] Opinion of AG Slynn in 72/83 *Campus Oil Ltd and Others v Minister for Industry and Energy and Others*, EU:C:1984:154, [1984] ECR 2757.

[17] 72/83 *Campus Oil Ltd and Others v Minister for Industry and Energy and Others*, para. 34.

[18] L.W. Gormley, *Prohibiting Restrictions on Trade within the EEC: The Theory and Application of Articles 30–36 of the EEC Treaty* (North Holland 1985), 139 criticises the Court for adopting a formula that is 'too widely phrased'.

[19] For a recent description of the meaning of the term, see C-304/14 *Secretary of State for the Home Department v CS*, EU:C:2016:674, para. 39.

[20] L.W. Gormley, *Prohibiting Restrictions on Trade within the EEC: The Theory and Application of Articles 30–36 of the EEC Treaty* (North Holland 1985), 136. Arguably, it has since extended this type of approach further; see e.g. J. Snell, 'Economic Justifications and the Role of the State' in P. Koutrakos, N. Nic Shuibhne and P. Syrpis (eds), *Exceptions from EU Free Movement Law* (Hart 2016).

[21] C-348/09 *PI v Oberbürgermeisterin der Stadt Remscheid*, EU:C:2012:300.

when the offences started. There was no doubt that the issue was within the concept of public policy, but did it also involve public security, given that due to Mr I's length of residence under Directive 2004/38 only 'imperative grounds of public security' could justify his expulsion? Advocate General Bot thought not. For him, public security was only disturbed if serious criminal offences have effects that 'go beyond the individual harm caused to the victim'.[22] Public security could only be relied on in cases of more general threats to the security of Union citizens; thus, a drug gang could constitute a threat to public security, while an individual committing incest within a family context would not. The Court disagreed. It emphasized the seriousness of the offence and the freedom of Member States to determine the requirements of 'public security in accordance with their national needs, which can vary from one Member State to another and from one era to another'.[23] The Court also referred to Article 83(1) TFEU and Directive 2011/93,[24] which concern sexual exploitation of children, and went on to decide that Germany could legitimately find a direct threat to the calm and physical security of its population, bringing the matter within the notion of public security. For the Court, there was no requirement of generalized broader effects going beyond the harm to the specific victims. Again, the Court extended the remit of public security beyond any narrow view, making it quite difficult to see how it differs from the concept of public policy. The public policy ground has always been about serious threats to fundamental interests of the society, but after *PI* the serious nature of a crime is now a factor that can also trigger the public security heading. The blurring and overlap is a matter of concern, as the system protecting free movers against expulsion laid down in the Citizens' Free Movement Directive[25] is based on a clear distinction between these concepts.[26]

The Court has on occasion been deferential also in the conduct of the proportionality assessment when public security has been at stake. *Campus Oil* again provides a good example. The Commission had argued that the Irish purchase requirement was in any event an inappropriate and ineffective method for protecting public security. The real security threat was a shortage of crude oil, and Ireland maintaining refining capacity did not serve to safeguard against that. Further, the aim could be achieved by the less restrictive means of holding sufficient reserve fuel stocks. Advocate General Slynn had considerable sympathy with these arguments. However, the Court thought otherwise. It held that a country with a refinery could enter into long term contracts for the supply of crude oil, which might improve its energy security in the event of a crisis, and in any event the possibility of a shortage of refined petroleum products could not be discounted completely. The Court did not address the possibility of Ireland increasing the fuel stocks that it held, but instead focused on the detail of the existing Irish system. The Court set limits to the price the importers could be charged and quantities they could be made to purchase from the Whitegate Refinery, but left the final assessment for the referring national court. The Court by no means gave Ireland a blank check, but neither did it engage in a comprehensive assessment of the alternative methods Ireland could have employed to achieve the same result.[27]

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[22] Opinion of AG Bot in C-348/09 *PI v Oberbürgermeisterin der Stadt Remscheid*, EU:C:2012:123, para. 38.
[23] C-348/09 *PI v Oberbürgermeisterin der Stadt Remscheid*, para. 23.
[24] Directive 2011/93/EU of the European Parliament and of the Council on combating the sexual abuse and sexual exploitation of children and child pornography [2011] OJ L335/1.
[25] Art 28(3) of Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.
[26] See G. Anagnostaras, 'Enhanced Protection of EU Nationals against Expulsion and the Concept of Internal Public Security: Comment of the *PI* Case' (2012) 37 *ELRev.* 627, 633–636.
[27] For a more searching analysis, see C-398/98 *Commission v Greece*, EU:C:2001:565, [2001] ECR I-7915.

Another example is *Richardt*,[28] where the Court failed to exercise any proportionality control at all over a restriction on the transit of dual use goods.[29] The case concerned the export of a machine for the production of bubble memory circuits from France to the Soviet Union, via Luxembourg. The French authorities had decided that no authorization was needed, but the machine was seized by Luxembourg officials. They took the view that the goods were of strategic nature and that their transit therefore did require an authorization. The Court simply acknowledged this, and said that the matter could indeed be covered by the public security exception in Article 36 TFEU and as a result Luxembourg was entitled to make the transit subject to a special authorization. In doing this the Court completely skipped the key step in free movement law: It did not examine at all whether there were less restrictive means of achieving the same objective but simply accepted the system of authorization without more.[30] For example, there was no discussion of a possible need to consider the reasons for the decision of the French authorities that no authorization was required.[31]

Altogether, the picture that emerges from this case law is that the Court is more deferential towards the security interests of Member States than it has been in many other fields.[32] It allows them to invoke public security even when matters are at some remove from the core areas of security such as national defence or law and order, and it sometimes fails to investigate the proportionality of national measures with its customary zeal. Member States have maintained their autonomy. They are not propelled to ensure their energy security through joint measures,[33] but individual Member States can adopt their own mechanisms. They do not need to tolerate serious foreign criminals on their soil, even if they have been long term residents, but can export the problem to another Member State. They were able to assess independently the dangers that the export of strategic goods could pose, irrespective of the views of the other Member States.[34]

The fact that the Court has allowed Member States considerable autonomy in its public security case law probably reflects the recognition of the limited nature of and the limitations to Union activities in the field. Until fairly recently, the EU has done relatively little to harmonize matters related to public security,[35] let alone seek to provide it.[36] The sole

[28] C-367/89 *Criminal Proceedings against Aimé Richardt and Les Accessoires Scientifiques SNC*, EU:C:1991:376, [1991] ECR I-4621.

[29] In Case C-83/94 *Criminal Proceedings against Peter Leifer, Reinhold Otto Krauskopf and Otto Holzer*, EU:C:1995:329, [1995] ECR I-3231 the Court does mention the principle of proportionality but leaves its application entirely in the hands of the referring national court, also emphasizing that the assessment must take into account the discretion enjoyed by the national authorities.

[30] The Court did consider the proportionality of the penalties laid down by legislation, but this is a not the same issue.

[31] For criticism, see I. Govare and P. Eeckhout, 'On Dual Use Goods and Dualist Case Law: The *Aimé Richardt* Judgment on Export Controls' (1992) 29 *CMLRev.* 941.

[32] See also Opinion of AG Cosmas in C-423/98 *Alfredo Albore*, EU:C:2000:158, [2000] ECR I-5965, para. 54. The Court's assessment in the case was brief, as Italy had not sought to justify the measure in issue.

[33] Although sometimes they may nevertheless choose to do so, see Regulation (EU) No. 994/2010 of the European Parliament and of the Council concerning measures to safeguard security of gas supply [2010] OJ L295/1.

[34] However, EU legislation has subsequently been adopted in the field; see Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items [2009] OJ L134/1.

[35] There are some prominent relatively recent exceptions, such as Directive 2009/43/EC of the European Parliament and of the Council simplifying terms and conditions of transfers of defence-related products within the Community [2009] OJ L146/1, Directive 2009/81/EC of the European Parliament and of the Council 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 [2009] OJ L216/76. However, the initial verdict on their effectiveness has been damning; see European Parliament, Directorate-General for External Policies, Policy Department, *The Impact of the 'Defence Package' Directives on European Defence* (2015).

responsibility of Member States for national security has even been recorded in Article 4(2) TEU. The national measures had to be respected, as there was little prospect of effective Union action that could replace them.

Defining the concepts of security and the limits of the security exceptions has naturally also implications for the constitutional order of the European Union. There have for example been questions whether the concept of national security is being pushed too far to include not only matters such as a threat of war by a foreign enemy but also issues such as criminal activities and migration.[37] There are also views that internal and external security should be combined.[38] One commentary sums up the core of the matter: 'those who will have a final say on what 'security' is will also have a final say on the *Kompetenz-Kompetenz* issue.'[39]

B. Security Concerns in Articles 346–348 TFEU

The existence of Articles 346 and 347 TFEU demonstrates that the authors of the Treaty wanted to create different kind of security exemptions than the ones dealing with the four freedoms. The exemptions in Articles 346 and 347 TFEU are more comprehensive than the internal market exceptions because they allow derogations from the Treaties as a whole. The two articles mainly operate in areas of defence and national security and leave even more discretion for Member States than the public security exceptions. Both articles are subject to Article 348 TFEU which describes the judicial review process in cases where Article 346 or Article 347 TFEU has been invoked.

Article 346 TFEU deals with confidentiality of information, and trade or production of armaments. It is somewhat paradoxical that just a few years after the calls of the Schuman declaration for solidarity in the production of war raw materials, a derogation clause appeared in the Rome Treaty which made exactly the opposite possible. Article 346 TFEU became a symbol of national autonomy in defence, and defence was de facto excluded from the scope of the internal market rules. This led among other things to a fragmentation of the defence markets and an exemption of defence industry related activities from the reach of EU competition law. From an economic point of view, exempting a major industrial sector from the Common Market is questionable as Member States spend roughly 200 billion euro annually on defence[40] and the European defence industry employs more than 500 000 people and has an annual turnover of over 97 billion euro. [41] The Member States' wide interpretation of Article 346 TFEU has not changed much in 60 years. They continue to use Article 346

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[36] However, the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, [2007] OJ C306/1 did introduce Art. 42(7) TEU which creates an obligation of mutual assistance in case of armed aggression against a Member State, and Art. 222 TFEU that provides for joint action by the Union and its Member States in the case of a disaster or a terrorist attack.

[37] See European Parliament, Directorate General for Internal Policies, Policy Department C: Citizen's rights and constitutional affairs, a study on *National Security and Secret Evidence in Legislation and Before the Courts: Exploring the Challenges* (2014). The report states at 32: 'While the origins of the term "national security" in the United States in the 1950s were framed by the threat of war by a foreign enemy, the concept has broadened to include criminal activities, terrorism and migration.'

[38] K. Tuori, 'A European Security Constitution', in M. Fichera and J. Kremer (eds), *Law and Security in Europe: Reconsidering the Security Constitution* (Intersentia 2013), 75.

[39] M. Fichera, 'Security Issues as an Existential Threat to the Community', in M. Fichera and J. Kremer (eds), *Law and Security in Europe: Reconsidering the Security Constitution* (Intersentia 2013), 106.

[40] See European Defence Agency, 'Defence Data Portal' <http://eda.europa.eu/info-hub/defence-data-portal> (accessed 7 October 2017).

[41] See European Commission, 'Defence Industries' <https://ec.europa.eu/growth/sectors/defence_en> (accessed 7 October 2017).

TFEU actively, although for example a defence procurement directive was created to improve the functioning of the defence market.[42]

Despite the broad approach favoured by the Member States, the Commission began to stress a narrower view to the interpretation of Article 346 TFEU in the 1990s and the Commission's stance was finally codified in an Interpretative Communication in 2006.[43] The Commission has however been relatively reluctant to challenge the Member States' interpretation in the Court of Justice as only very few judgments concerning Article 346 TFEU have been handed down in the context of Article 258 TFEU enforcement proceedings.[44]

The Court has shaped the correct interpretation of Article 346 TFEU in several cases after the mid-1980s.[45] In a nutshell, the Court has concluded that Article 346 TFEU does not lend itself to wide interpretation and that it is not a general and automatic national security exception from the Treaty,[46] although a Member State has a particularly wide discretion in assessing the needs of its security.[47] The burden of proof is on Member States to demonstrate the legality of the measures used.[48] As these principles show, the Court has tried to find a balance between the security interests of Member States and the interests of the Union.[49]

Article 347 TFEU is a 'wholly exceptional'[50] provision of the Treaty which concerns serious internal disturbances or warlike situations. It is a safeguard clause of general scope which applies only in the absence of special rules. Unlike the other Treaty derogations, Article 347 TFEU does not actually confer on Member States the right to deviate from the Treaty. Rather, it acknowledges the existence of this right, as a part of the status of Member States as fully sovereign subjects of international law.[51]

The Court has dealt with Article 347 TFEU in a number of cases. However, there is no actual judgment on the correct interpretation of the provision. The case *Commission v Greece (FYROM)* was the closest to becoming a judgment, but it did not, because the Commission withdrew the action.[52] The case concerned trade sanctions imposed by Greece against Former Yugoslav Republic of Macedonia (FYROM). The Commission argued that Greece had improperly used Article 347 TFEU to justify the non-application of common export and import rules. The Commission used the Article 348 TFEU procedure, and interestingly *FYROM* is the only case so far where Article 348 TFEU procedure has been utilized. AG Jacobs delivered his Opinion before the action was withdrawn and it is thus the most authoritative interpretation available on Article 347 TFEU. He pointed out: 'It is difficult to identify a precise legal test for determining whether a trade embargo is a suitable means of pursuing a political dispute between a Member State and a third State. The decision to take such action is essentially of a political nature.'[53] This highlights the fact that Member States enjoy a very wide margin of discretion in considering their security needs.

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[42] See the European Parliament, *The Impact of the "Defence Package" Directives on European Defence* (n. 35), 40.

[43] See European Commission, 'Interpretative Communication on the Application of Article 296 of the Treaty in the Field of Defence Procurement', COM (2006) 779 final.

[44] M. Trybus, *European Union Law and Defence Integrati*on (Hart 2005), 133.

[45] See M. Trybus, *Buying Defence and Security in Europe: The EU Defence and Security Procurement Directive in Context* (Cambridge 2014), 108, for an overview.

[46] 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, EU:C:1986:206, [1986] ECR 1651, para. 26.

[47] T-26/01 *Fiocchi munizioni SpA v Commission*, EU:T:2003:248, [2003] ECR II-3951, para. 58.

[48] C-414/97 *Commission v Spain*, EU:C:1999:417, [1999] ECR I-5585, para. 22.

[49] See also for example a more recent judgment in C-615/10 *Insinööritoimisto InsTiimi Oy*, EU:C:2012:324.

[50] 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, para. 27.

[51] P. Koutrakos, 'Is Article 297 EC a "Reserve of Sovereignty"?' (2000) 37 *CMLRev.* 1339, 1340.

[52] Order of the President of the Court, C-120/94 *Commission v Greece*, EU:C:1996:116, [1996] ECR I-1513.

[53] Opinion of AG Jacobs in C-120/94 *Commission v Greece*, EU:C:1995:109, [1996] ECR I-1513, para. 65.

However, Member States do not have totally free hands with Article 347 TFEU because: it deals with exceptional and clearly defined cases;[54] it is subject to sincere cooperation;[55] the Court of Justice is able to review the use of Article 347 TFEU;[56] and Article 347 TFEU cannot be 'understood to authorize any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union.'[57]

Articles 346 and 347 TFEU were inserted into the Treaties on the one hand in order to balance between the objectives of the Common Market and national security interests of Member States, and on the other to manifest an exclusion of defence matters from the Common Market. The manifestation of the exclusion has been the dominant trend through the history of the integration although the Commission and the Court of Justice have been trying to set some limits to the interpretation of the two exemptions. The provisions are unique – no similar exemptions have been included in the Treaty for other national concerns – and of considerable economic importance, given the size of the relevant expenditures and industries. To the extent that integration is meant to enhance the security of Europe as a whole, they are also deeply counterproductive.

IV. Conclusion

The overall argument in this chapter has been that external security concerns have pushed Member States to integrate, but at the same time Member States have hedged their bets and sought to maintain a certain freedom of manoeuver in the field, and this has been accepted by EU institutions. Security was at the forefront in the 1950s when the integration project was launched, whether because of the desire to ensure peace among the West European nations or because of the need to create a basis for a credible counterweight to the Soviet Union in the case of a possible US withdrawal from Europe, as powerfully argued by Rosato.[58] Security considerations have also played a significant role later on, in particular by providing a driving force for some of EU's enlargement. Yet while European countries have come together to improve their security, they have not done so wholeheartedly. Just in the area of internal market, the focus of our study, important exceptions to the creation of the single market persist in security related fields. This can be seen particularly clearly in the derogations to the four freedoms, where both the notion of public security and the principle of proportionality have been interpreted in a way that is favourable to Member State autonomy. The same picture emerges for Articles 346–348 TFEU.

Yet it seems that there is a tension in this basic set up: by safeguarding their individual autonomy Member States are not reaping in full the collective security benefits of integration that they desire.[59] This can be called 'the cost of non-Europe', which involves costs both in

[54] 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*.
[55] Art. 4(3) Consolidated version of the Treaty on European Union [2016] OJ C202/16.
[56] Art. 348 Consolidated version of the Treaty on the Functioning of the European Union, [2016] OJ C 202/47.
[57] C-402/05 and C-415/05 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461, [2008] ECR I-6351, para. 303.
[58] S. Rosato, *Europe United: Power Politics and the Making of the European Community* (Cornell 2011).
[59] Similar argument arises in the context of free movement of persons for cases such as C-348/09 *PI v Oberbürgermeisterin der Stadt Remscheid*. Does the ability of Member States to expel nationals of other Member States who have committed crimes, even when they may have resided in the host country for a very long time, truly make Europe a safer place? From an overall Union perspective, is it really better to move criminals around than to try to rehabilitate and integrate them in the country of residence? See for trenchant criticism U. Belavusau and D. Kochenov, 'Kirchberg Dispensing the Punishment: Inflicting "Civil Death" on Prisoners in *Onuekwere* (C-378/12) and *MG* (C-400/12)' (2016) 41 *ELRev.* 557.

terms of reduced security and in terms of wasted resources.[60] In concrete numbers the cost of non-Europe in defence is estimated to be more than 26 billion euro annually.[61] This concern has been noted for example in the 2016 German Government White Paper on Security Policy,[62] which talks of the need to relinquish 'individual sovereignty for the greater sovereignty of all'.[63] The White Paper commits Germany to pursuing a European Security and Defence Union. It calls for the creation of permanent structured cooperation in the defence sector in accordance with Articles 42(6) and 46 TEU, and remarks that the intention of the Treaties is to create a common defence.[64] In the context of the internal market, particularly important are the calls for integration of civilian and military capabilities, and for the strengthening of the European defence industry. The White Paper notes that Europe's defence industry remains fragmented along national lines, with each Member State wishing to preserve its autonomy. This puts Europe at a disadvantage and requires consolidation.

The Union has in recent years taken some steps to begin to address matters. For example, the Defence Package of 2007 resulted in a series of potentially important concrete legislative measures, although their effects have admittedly been limited to date.[65] Further, some of the traditional Community instruments have been given a new role. In particular, trade sanctions and energy policy have de facto become EU security policy tools. It is noteworthy that many of these instruments fall within the remit of the Commission which has thus also become a security provider.[66]

Brexit and the result of the US presidential election[67] may provide unforeseen impetus for further integration in the field. Britain has often acted as an influential opponent to integration in the area of defence, while France and Germany have been more enthusiastic.[68] Now this brake is being removed.[69] Further, there is a desire to rally the herd and to demonstrate the continuing vitality of the Union after Brexit, and security might well serve as a vehicle for that, in particular as much could be achieved in this area without the need for Treaty changes. If in the future there would be any doubt over the US's commitment to the European security, this might also lead to a rethinking of the EU's role in security and defence of Europe – indeed, it has been argued that it has been the steady presence of the US that has

[60] See M. Trybus, *Buying Defence and Security in Europe: The EU Defence and Security Procurement Directive in Context* (Cambridge 2014), 44, 59.

[61] B. Ballester, European Parliament, *Cost of Non-Europe in European Security and Defence Policy*, PE 494.466 (2013), 7 and 8 writes: 'The spread for the cost of non-Europe in defence is thought to range from €130 billion, at the higher end, to at least €26 billion, on a more conservative calculation. Such calculations are by definition approximations based on assumptions which are uncertain or ultimately impossible to test. While neither number can therefore pretend to scientific accuracy, it is nevertheless the case that if the EU were to operate in a more integrated manner and in conditions more similar to the United States, the Member States would need to spend significantly less than the current defence budget of €190 billion (in 2012) to achieve the same level of effectiveness'.

[62] German Government, *2016 White Paper on German Security Policy and the Future of the Bundeswehr* (German Government Federal Ministry of Defence 2016).

[63] Ibid., 130.

[64] Ibid., 73.

[65] European Parliament, *The Impact of the 'Defence Package' Directives on European Defence* (n. 35).

[66] M. Drent et al., *New Threats, New EU and NATO Responses* (Clingendael 2015), 45.

[67] See, e.g., 'Donald Trump Sets Conditions for Defending NATO Allies Against Attack' *The New York Times* (20 July 2016).

[68] For a detailed assessment, see I. Bond et al, *Europe after Brexit: Unleashed or Undone?* (Centre for European Reform 2016), 9–11.

[69] For a graphic demonstration, see the declaration by the UK Defence Minister in September 2016 that any attempts to create an EU defence union will be vetoed by the UK for as long as it remains a member, T. Peck, 'Britain Will Veto EU Army, Says Defence Secretary' *The Independent*, (17 September 2016). However, legally many of the elements of such a union may not be subject to a national veto.

allowed the Europeans to indulge in economic integration without a serious security component.[70]

In fact, there has been a flurry of recent activity. As one of the first reactions to the British 'leave' vote, the French and German foreign ministers issued a proposal for a European Security Compact.[71] Within days of the referendum, a new EU Global Strategy[72] was presented to the European Council with the aim to guide EU foreign and security policy. Security and defence is one of the priority areas for the work on putting the global strategy into effect. The Implementation Plan on Security and Defence was presented by the High Representative to Member States at the Council meeting on 14 November,[73] with the Council adopting conclusions on implementing the EU Global Strategy in the area of security and defence and setting out the level of ambition as well as concrete actions, such as a Permanent Structured Cooperation (PESCO), with a defined timetable.[74] The Commission added to this with a publication of a European Defence Action Plan on 30 November 2016. The main pillars of the plan include supporting defence research and defence capability development with the launch of a European Defence Fund, unlocking EU tools to invest in the whole European defence supply chain, and improving the functioning of the Single Market for defence.[75] The Action Plan is significant in two ways: first, the fact that the Commission will launch a European Defence Action Plan is as such remarkable legally and politically; and second, the key message of the plan is that the Union is willing to fund defence related co-operation, which is a considerable change to previous Union policies.

At the time of this writing, in November 2016, it is of course impossible to predict what fruit the flurry of activity will bear. Grand visions and plans have been presented, [76] but the actual level of ambition has not moved from co-operation to real integration and concrete progress has been relatively slow. The worrying question is whether this is good enough from the perspective of the security of the Union and its citizens. Even if the requisite political will were to be found, this is an area where the time lag between political decisions and capability improvements on the ground may be years, even decades.

[70] S. Rosato, *Europe United: Power Politics and the Making of the European Community* (Cornell 2011).

[71] J.-M. Ayrault and F.-W. Steinmeier, 'A Strong Europe in a World of Uncertainties' *Diplomatie* (28 June 2016).

[72] European Union Global Strategy, *Shared Vision, Common Action: A Stronger Europe A Global Strategy for the European Union's Foreign And Security Policy* (2016). The strategy had been long in preparation, but it is telling that its release was not postponed.

[73] Council of the European Union, 'Implementation Plan on Security and Defence' 14392/16 (14 November 2016).

[74] Council of the European Union, 'Council Conclusions on Implementing the EU Global Strategy in the Area of Security and Defence' 14149/16 (14 November 2016).

[75] European Defence Agency, 'Commissioner Bieńkowska Outlines Upcoming European Defence Action Plan at EDA Annual Conference' (10 November 2016).

[76] See for example: Ministero degli Affari Esteri e della Cooperazione Internazionale, 'Gentiloni and Pinotti, 'Establishing a Schengen-like Defence Agreement to Respond to Terrorism' (11 August 2016); Elysee, 'François Hollande, 'Discours du Président à l'occasion de la Semaine des Ambassadeurs' *Elysee* (30 August 2016); and Council of the European Union, 'Bratislava Declaration and Roadmap', Statements and remarks 517/16 (16 September 2016).