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# TFEU 346: CHALLENGES AND POSSIBILITIES

**Vilius Kuzminskas**[1]

**Abstract**

Public procurement currently is one of the main tools of various public policy implementation - starting from the green environmental friendly compulsory requirements and finishing with a significant share of public procurement reservation for socially exposed groups of society. In general, the idea of implementation of public policy through the public procurement is not new and neither is shocking or amazing. But the legal possibilities to implement policy through the procurement in recent decades changed dramatically, because of the legal regulation changes due to European Union public procurement directives. While some of these changes, that are done in common (civil) public procurement area, might be considered as justifiable and written off to the permanent efforts of European Commission to deepen internal market integration, some other changes are just too exceptional and not compatible with commission goals or EU purposes overall. Further more, here comes really important side effect of commission efforts to deepen integration of internal market through the regulation of procurement - European Union regulations of the procurement in defence area. It must be noted, that first directive of procurement in defence area come into the power only in 2009 - and 2019 is the year, which might be considered as tenth anniversary of first viable commission effort to impose European regulations to the defence procurement area. Nevertheless, effectiveness and legality of the EU defence procurement regulations in general is still questionable due to the treaty of European Union and the exception stated in article 346 (ex 296). Irrespective of this, EU commission keeps putting efforts to limit the usage of the exception not only through the soft-law regulations, but from time to time challenging the usage of the exception in the ECJ. But is the EU defence procurement directive the only legal way to move forward with defence area procurement - or is there another way, fixed in TFEU 346? Of course it is, but before taking this side road, comprehensive evaluation of the exception application clauses, fixed in the Treaty of Function of European Union article 346 must be done, ECJ cases, concerning this issue must be revealed and other member states lessons learned studied. Moreover, public procurement in defence area doctrine different approaches and current practices in national regulations must be disclosed and evaluated, advantages and disadvantages of the possible solutions must be revealed. Lastly, the question if public procurement in defence area regulation viability, started by the EU commission 10 years ago - and might be called a version of public procurement in defence area 1.0 - must be reevaluated and ideas of moving towards public procurement in defence area for version of 2.0 must be proposed.

**Keywords:** public procurement, defence, TFEU 346

## Introduction

[1] PhD student of Department of Private Law, Faculty of Law, Vilnius University, LL.M, MBA. Subject of the PhD studies research – public procurement. Head of Procurement Policy Division Ministry of National Defence Republic of Lithuania.

As states Hoeffler, military sovereignty, defined as the state's capacity to possess arms and maintain security of supply in defence acquisition, is one of the fundamental features of modern nation-states[2]. This idea is nor new nor unexpected, this is a reality of every modern state, including those, who are members of European Union. That is the reason and main cause why in the Treaty of European Function (hereinafter - TFEU) clause 346 (ex 296) was included into the treaty of European communities since the beginning of the first treaty. Moreover, as states Butler[3], wording of this clause remain the same in treaties since 1957. Neither the less, the wording might stay the same, but the interpretation of the clause changed significantly, due to European Commission incentives. But this was not an easy way for European Commission - many obstacles, including significant unwillingness of member states to give up discretion in national security, had to be mitigated. The main problem was and actually still persists and will persist in foreseeable future - European union never was a real military union. Due to his, as states Hoeffler, the Commission's initiatives to limit this practice and to regulate defence procurement through EU secondary legislation constantly failed throughout the late 1990s and 2000s. In contrast, Directive 2009/81/EC constitutes the EU's first supranational legal act which integrates the trade and the production of military goods and services[4].

The first Commission incentives to establish European wide rules for defence procurement might be associated with communications of 1996[5] and 1997[6]. But these incentives were not a game changer, more or less it was just declaration of Commissions point of view. The real change was the case of European Court of Justice (hereinafter - ECJ) case against Spain[7], where ECJ ruled in an infringement case against Spain that ex-Article 296 TEC did not justify a quasi-automatic exemption of arms procurement from single market rules, but it had to be interpreted narrowly as well as other exemptions of the TFEU - the only articles in which the Treaty provides for derogations applicable in situations which may involve public safety are Articles 36, 48, 56, 223 and 224 of the EC Treaty (now, after amendment, Articles 30 EC, 39 EC, 46 EC, 296 EC and 297 EC), which deal with exceptional and clearly defined cases. Because of their limited character, those articles do not lend themselves to a wide interpretation. Due to this significant rule, more attentive consideration to the application of TFEU 346 clauses must be applied and “exceptional and clearly defined cases” meaning must be revealed.

## 1. TFEU 346: the regulation itself and primary requirements

TFEU 346 (ex 296) states, that:

*1. The provisions of the Treaties shall not preclude the application of the following rules:*

[2] C. Hoeffler, ‘European armament co-operation and the renewal of industrial policy motives’ (Journal of European Public Policy 2012), Volume 19, Issue 3.
[3] L.R.A Butler, ‘EU and US defence procurement regulation in the transatlantic defence market’, Cambridge university press 2017, 79.
[4] C. Hoeffler, ‘European armament co-operation and the renewal of industrial policy motives’ (Journal of European Public Policy 2012), Volume 19, Issue 3.
[5] European Commission. The challenges facing the European defence-related industry: a contribution for action at European level. COM(1996)10 [1996].
[6] European Commission. Implementing European Union strategy on defence-related industries. COM(1997)583, [1997].
[7] Commission of the European Communities v. Kingdom of Spain, C-414/97 [1999], European Union Court of Justice.

*(a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;*

*(b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.*

In order to follow stated regulations first of all arises fundamental question: which security interests should be considered as essential. Firstly, due to the nature of security interests it is very hard, o even impossible, to determine which security interests may be considered as "secondary", because even insignificant devaluation of any security interest may result in unpredictable result and unacceptable damages of overall state security. Secondly, even more important question arise: who is responsible for these essential security interests definition? Notably, ECJ rules, that definition of essential security interests is the responsibility of member states[8] but as stated ECJ, although Article 296(1)(b) EC refers to measures which a Member State may consider necessary for the protection of the essential interests of its security, that article cannot, however, be read in such a way as to confer on Member States a power to depart from the provisions of the EC Treaty based on no more than reliance on those interests. This point of of view complied with Commission's point of view, because Commission considers that it is the Member States' responsibility to define and protect their security interests, and that it is not for the Commission to assess Member States' essential security interests, nor which military equipment they procure to protect those interests[9].Also, ECJ rules, that consequently it is for the Member State which seeks to take advantage of Article 296 EC to prove that it is necessary to have recourse to that derogation in order to protect its essential security interests[10]. So the most important point should be not the definition of essential security interest, but the test of taken measures are necessary for the protection of the essential security interests and do not go beyond the limits. This means the test of proportionality is mandatory requirement in every case.

As states Trybus[11], the test of proportionality has three elements: first, the measure in question has to be suitable to promote the objective of public security. Second, the measure has to be adequate. This means that there is 'no other measure, less restrictive from the point of view of the free movement of goods, capable of achieving the same objective'. The measure must 'not restrict intra-Community trade more than is absolutely necessary'. Third, the measure needs to be proportionate in the strict sense. The positive effect of the measure on the objective of public security has to be balanced with the negative effect on the internal market. This strict test will be applied to all free movement exclusions. If the test is not satisfied the European Court of Justice will rule against the use of the exemption.

But all of mentioned above is just a part of judicial challenges, EU member states faces in case of attempt to comply unexpectedly high requirement of current TFEU interpretation stated in Commission *soft law* documents and ongoing ECJ practice.

[8] European Commission v. Republic of Finland, C-615/10 [2012], European Union court of Justice.
[9] 8.Interpretative communication on the application of Article 296 of the Treaty in the field of defence procurement [2006] COM(2006) 779 final.
[10] European Commission v. Republic of Finland, C-615/10 [2012], European Union court of Justice.
[11] M. Trybus, 'The Limits of European Community Competence for Defence'. (journal of European Foreign Affairs Review 2004), vol. 9.

## 2. Later challenges to overcome

In order to apply TFEU 346 part 1, first of all an essential security interest, which must be protected, should be revealed. Taking into consideration the above mentioned transparency requirements and nature of EU Treaties, firstly it would be necessary to consolidate essential security interests of a particular Member State in national law. Moreover, the definition of essential security interest should be officially defined in generally applicable terms (not for each procurement process individually) - otherwise it may infringe principle of transparency. This requirement is also recognized in defence area procurement doctrine, f.e. Heuninckx[12]. Moreover, it must be noted, that discretion of defining essential security interests have some limitations - essential security interest must be essential and of the highest importance, because solely economic and protectionist measures might not be considered as essential security interest[13]. Taking all of above into consideration, essential national security interest must be named and then it is possible to continue further.

In order to comply with TFEU 346 (1) (a) procurement must be related with secret information, that cannot be revealed and in case of disclosure of this information irreparable damage to national security is done. As already mentioned above, when the essential national security interest is named, further must be disclosed how that interest will be secured in case of application of TFEU 346 (1) (a). Disclosure should be not just a formal act or insignificant declaration, but a direct link between the invoke of the exemption and the protection on essential security interest, caused by above stated exemption, must be reasoned. Lastly, but must importantly, reasons why less restrictive measures cannot by applied must be revealed. And the last part of exemption application is the most challenging. The main problem, from the legal point of view is directly connected with the procurement directive. The legal rules, stated in the directive allows procurement authority to exercise procurement, which involves secret information, in accordance with the rules, who are already included in the directive itself. So this makes justification quite difficult challenge, because sufficient efforts and specific knowledge must be empowered to justify use of exemption. All of this means extensive use of administrative resources, which not always are available.

In order to comply TFEU 346 (1) (b), procurement must be related to necessity of the protection of the essential interests which are connected to the production or trade in arms, munitions and war material. The firs question, that needs to be answered is whether the intended to procure goods are included into 1958 the Council list of products to which this provision applies according to Article 346 EC Treaty[14]. As states Aalto[15], this list has made been public through a reply to written a question in the European Parliament, but the original list has not been officially published in official journal. This could be considered as shortage of legal certainty, but the list it self is not detailed and because of that almost all munitions and war material should be considered as items that fall in the scope of the list. However, question related to dual purpose materials still exists, because TFEU (1) (b) literally requires that such measures shall not adversely affect the conditions of competition in the internal

[12] B. Heuninckx, '346, the Number of the Beast?' [2017] Public Procurement Research Group. Public Procurement: Global Revolution. VIII. 2017.
[13] European Commission v Federal Republic of Germany, C-372/05 [2009]. European Union court of Justice.
[14] Council of the European Union. Legislative acts and other instruments. Extract of the Council decision of 255/58 1958 April 15. REV4 14538/4/08.
[15] E. Aalto, 'Towads a European defence market' [2008]. (European Union Institute for Security studies Chaillot paper) No. 113.

market regarding products which are not intended for specifically military purposes. Must be noted, that European Commission narrow interpretation of list application only to solely military purpose goods was rejected by ECJ in InsTiimi Oy[16] case. ECJ ruled, that it must, indeed, be noted that the word 'military' used in that list and the words 'insofar as they have a specifically military nature. Moreover, ECJ stated, that it is necessary to reiterate that, recently, in recital 10 in the preamble to Directive 2009/81, the EU legislature stated that the term 'military equipment', as used in that directive, should cover products which, although initially designed for civilian use, are later adapted to military purposes to be used as arms, munitions or war material. According to this, dual purpose goods also might be considered as items that fall in the scope of the list if these goods, even though designed for civilian purpose, but contains substantial modifications. The most important aspect in the evaluation of dual purpose materials and the procurement of these item does not adversely affect the conditions of competition in the common market is evaluation particular materials "intrinsic characteristics", that may be regarded as having been specially designed and developed for military use. All of this inevitably requires even more administrative resources and decent technical expert knowledge, which usually is not at the disposal of procurement authorities, but rather specific know-how only available to private market entities.

Further application of TFEU 346 (1) (b) is related to to disclosure of following conditions - particular essential security interest naming, direct link between that particular essential security interest and intended application of exemption. Lastly, reasonable circumstances must be disclosed, why the only possible way to secure essential security interest is possible only by inclusion of TFEU 346 (1) (b) and less restrictive measures, stated in procurement in defence area directive, are not sufficient.

Taking into consideration all above analyzed requirements to justify application of the exemption, it becomes rather clear, that application of the exemption became really complicated and demanding administrative resources and specific technical knowledge, that is not at the disposal of procurement authorities. This leads to obvious danger to significant damage to national security of particular member state and aspiration to devalue national security interest in order not to get involved into long and costly dispute procedure with European Commission.

### 3. Security of supply: the ultimate sacrifice of narrow interpretation

As already expressed above, legal application of TFEU 346, according to current interpretations of the Treaty, is not an easy way forward, but still a viable option in some cases. Security of supply is unilaterally recognized[17] (in ECJ cases, Commission soft law documents and procurement in defence area doctrine) as important justification for exemption application, however, current legal regulation complicates possibilities for pursuing it. As states Heuninckx[18] security of supply is still a valid concern for EU Member States: embargoes by foreign countries remain a possible threat. Indeed, some Member States from the borders of the continent, such as Cyprus, Malta, Finland or the Baltic States,

[16] European Commission v. Republic of Finland, C-615/10 [2012], European Union court of Justice.
[17] F.e. M. Trybus, 'The Limits of European Community Competence for Defence'. (Journal of European Foreign Affairs Review 2004), vol. 9 or Interpretative communication on the application of Article 296 of the Treaty in the field of defence procurement [2006] COM(2006) 779 final.
[18] B. Heuninckx, '346, the Number of the Beast?' [2017] Public Procurement Research Group. Public Procurement: Global Revolution. VIII. 2017.

are located in a geographical area that does not make them immune from foreign embargoes. The problem of too narrow interpretation of TFEU 346 exemption application leads to decline of the most important aspect of defence procurement - devaluation of security off supply. Modern military equipment tends to be very sophisticated, complex and expensive items, designated to ensure essential security interests and frequently requires arrangement between various types of armed forces. Inappropriate security of supply of maintenance items (or even a delay of delivery) for this equipment makes this expensive equipment impossible to operate and due to that ensure security of essential interest. According to all of mentioned above - application of the exemption is not an easy way forward, but the only possible way in particular cases. In foreseeable future, member states pursuing security of essential security interest, should be cautious and apply in TFEU 346 fixed exemption in accordance with above given insights, ECJ practice and constantly changing point of view of European Commission.

## Conclusions

Application of TFEU 346 stated exemption is not an easy nor legally secure way to ensure essential security interest of the particular state, but it is inevitable in modern military acquisitions. Essential security interest are the ones of the highest importance and none compromises in securing them could be done. However, TFEU and commitments for other European memberstates requires to take into consideration all legal aspects stated above in order to adopt a legally secure way to move forward with this exemption.

Challenges of interpretation of possibility to apply this exemption as well as European institutions continuous will to equalize rules (but not to take into account reality of differences in geography and actual situation of national security) of this exemption application, leads to wrong imaginary illusion, in which southern European countries (f.e. Spain) faces same security challenges as Baltic states. If some of the member states may discuss and spent countless amount of time to justify application of exemption, Baltic states do not have such luxury and time is critical in decision making process in order to secure essential security interests, because postponement of solutions may lead to situation, when it is too late for search for peaceful decisions.

## Bibliography

1. C. Hoeffler, ‘European armament co-operation and the renewal of industrial policy motives’ (Journal of European Public Policy 2012), Volume 19, Issue 3.
2. L.R.A Butler, ‘EU and US defence procurement regulation in the transatlantic defence market’, Cambridge university press 2017, 79.
3. European Commission. The challenges facing the European defence-related industry: a contribution for action at European level. COM(1996)10 [1996].
4. European Commission. Implementing European Union strategy on defence-related industries. COM(1997)583, [1997].
5. Commission of the European Communities v. Kingdom of Spain, C-414/97 [1999], European Union court of Justice.

6. European Commission v. Republic of Finland, C-615/10 [2012], European Union court of Justice.
7. M. Trybus, 'The Limits of European Community Competence for Defence'. (Journal of European Foreign Affairs Review 2004), vol. 9.
8. Interpretative communication on the application of Article 296 of the Treaty in the field of defence procurement [2006] COM(2006) 779 final.
9. B. Heuninckx, '346, the Number of the Beast?' [2017] Public Procurement Research Group. Public Procurement: Global Revolution. VIII. 2017.
10. European Commission v Federal Republic of Germany, C-372/05 [2009]. European Union court of Justice.
11. Council of the European Union. Legislative acts and other instruments. Extract of the Council decision of 255/58 1958 April 15. REV4 14538/4/08.
12. E. Aalto, 'Towads a European defence market' [2008]. (European Union Institute for Security studies Chaillot paper) No. 113.