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Article 346 TFEU and the limits of the internal market in defence procurement



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Abstract:

Article 346 TFEU is a distinctive provision of European Union law on defence procurement. It allows Member States to adopt exceptional measures to protect essential security interests, removing certain contracts from the ordinary rules of the internal market. This paper examines the case law of the Court of Justice of the European Union, the practical limits of Directive 2009/81/EC as an intermediate framework, and the impact of the current geopolitical context on the debate over exceptional measures in defence procurement. It argues that Article 346 TFEU is not an anomaly but a mechanism of functional adaptation whose legitimacy requires stronger justification and robust accountability. It also adds a criminological perspective on exceptional measures, discretion and institutional integrity.

Keywords:

Defence procurement; Article 346 TFEU; internal market; strategic autonomy; institutional integrity.

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Introduction

Each year, the General Gutiérrez Mellado University Institute organises a conference devoted to public procurement in the field of defence. At the event held on 16 April 2026, the programme was structured around two round tables, moderated by Dr Justo Huerta and General Álvaro Canales. During the question-and-answer session of the latter, the Navy's Director of Economic Affairs turned the discussion to naval procurement. Referring to his experience in the Logistics Support Headquarters and to the timeframes of ordinary procurement procedures, he described in particularly graphic terms the importance that the Navy attaches to Article 346 TFEU: "for us, it is what saves our lives". He concluded: "we need Navantia and we need Article 346".

Jordi Cañas, a Member of the European Parliament from 2019 to 2024 and currently Director of European Affairs at The Grey, provided the European counterpoint. He described himself as a supporter of Article 346, but argued that "the scope of its application is going to be more clearly defined" as the Union moves towards greater integration of the defence market. The exchange thus condensed a tension that currently runs through European defence procurement: preserving national capabilities regarded as essential while, at the same time, moving towards a more integrated European market.

That exchange gives rise to the question running through this paper: why can a legal exception designed for specific situations come to be perceived as an almost indispensable tool?

The answer does not lie in arguing that military procurement needs fewer controls, nor in claiming that the ordinary rules are useless. The issue is more specific. Some defence programmes combine sensitive technologies, very long development cycles, complex interoperability requirements and operational needs that can change rapidly.

For that reason, in my view Article 346 TFEU should not be seen solely as an exception to the rules of the internal market. It can also perform an adaptive function in situations characteristic of a sector that does not always fit comfortably within the general logic of public procurement.

Recognising those particularities does not amount to justifying every recourse to Article 346 TFEU. Operational needs do not remove the obligation to justify the decision, nor do they reduce the importance of oversight. They do, however, require us to acknowledge

that some situations cannot be satisfactorily addressed through a rigidly uniform application of the general rules.

With that starting point, this paper examines the development of the case law on Article 346 TFEU, the practical limits of Directive 2009/81/EC and the effect of the deteriorating geopolitical environment on this debate. It also adds a criminological perspective that is still relatively unusual in this field: the relationship between exceptional measures, discretion and institutional integrity.



Figure 1. F-111 frigate Bonifaz during construction at the Navantia shipyard, 2025. Source: Navantia. Reproduced with permission.

The logic of the internal market and its limits in defence

The construction of the European internal market has been closely linked to opening national markets and removing barriers to competition between operators from different Member States. Public procurement has been a central part of that process: it does not merely satisfy administrative needs; it also pursues transparency, equal treatment and the efficient use of public resources.

Competition therefore has a value that goes beyond economics. It is not only a means of obtaining better prices or higher quality. Open competition also limits the scope for discretion, makes favouritism more difficult and facilitates oversight. Competition and institutional integrity operate here as complementary objectives.

Transposing that logic to defence creates obvious tensions. Many military acquisitions do not pursue only the most economically advantageous tender. They must also take account of the protection of classified information, continuity of critical capabilities,

technological sovereignty, industrial resilience and security of supply in a crisis.

The distinction matters. In ordinary procurement, expanding competition is usually a desirable objective in itself. In defence, other strategic interests may prevail: preserving a national capability, securing a sensitive technology or guaranteeing the supply of a critical system.

Examples are easy to find. Some contracts require access to particularly sensitive information; others concern systems whose unavailability would compromise operational capabilities. In certain armament programmes, moreover, dependence on a manufacturer or interoperability with systems already in service effectively narrows the scope for competition.

These particularities have repeatedly been identified in the specialised literature. Studies produced within CESEDEN already warned years ago that the principles of the internal market cannot always be applied with the same intensity when essential security interests are at stake.[1]

The war in Ukraine has reinforced this debate. Industrial dependencies that for years appeared manageable began to be perceived as strategic vulnerabilities. Likewise, the difficulty of rapidly increasing production of certain systems or ammunition demonstrated that economic efficiency and strategic security do not always move in the same direction.[2]

The European procurement model was created to foster competition and open markets. Defence requires additional variables to be taken into account: strategic autonomy, industrial resilience and the capacity to respond to a crisis. The debate over Article 346 TFEU lies precisely at that intersection between market, security and institutional integrity.

Article 346 TFEU and its interpretation by the Court of Justice of the European Union

Article 346 TFEU occupies a distinctive position in the process of European integration. It allows Member States to adopt certain measures where essential security interests are

[1]PARDO GARCÍA-VALDECASAS, Juan José; MEIRIÑO, Arturo Alfonso; HUERTA BARAJAS, Justo Alberto; et al. La Contratación y el Artículo 346 del Tratado de Funcionamiento de la Unión Europea. CESEDEN Working Paper DT 02/2017. Spanish Institute for Strategic Studies (IEEE), Madrid, 2017. Available at https://www.defensa.gob.es (accessed May 2026).

[2]European Commission, Joint Communication on the Defence Investment Gaps Analysis and Way Forward, JOIN (2022) 24 final, Brussels, 2022. Available at https://eur-lex.europa.eu (accessed May 2026).

at stake, even where those measures depart from some of the ordinary rules of the internal market.

Because of its exceptional nature, the Court of Justice of the European Union has consistently interpreted the provision restrictively. Invoking national security is not enough automatically to depart from the common framework. The Member State must demonstrate that the measure is necessary to protect an essential security interest and that the exception does not go beyond what is strictly necessary.

That approach is particularly clear in three cases.

The first, Commission v Spain, did not concern a procurement procedure but tax exemptions applied to imports of arms and military equipment. Spain argued that those measures were covered by what was then Article 296 EC. The Court rejected that argument and established an idea that would repeatedly reappear: invoking national security in general terms does not in itself exclude the application of EU law.[3]

The second, Commission v Italy, directly concerned procurement. Italy had awarded contracts directly to Agusta for the acquisition of helicopters intended for various civilian and military bodies, relying among other grounds on confidentiality and technical specificity. The Court held that the necessary link between excluding competition and effectively protecting an essential interest had not been demonstrated. What mattered was not merely the outcome, but the criterion: a connection with the military sphere is not sufficient in itself. There must be a specific and proportionate connection between the measure and the interest invoked.[4]

The third, a second case against Italy, rejected a national rule that allowed the acquisition of light helicopters for the police and fire services to be excluded from Community rules without the exceptional circumstances justifying such exclusion having been demonstrated.[5]

The three judgments draw a coherent line. The Court recognises the distinctive nature of

[3]Court of Justice of the European Union, Commission v Spain, Case C-414/97, judgment of 16 September 1999. Available at https://eur-lex.europa.eu (accessed May 2026).
[4]Court of Justice of the European Union, Commission v Italy, Case C-337/05, judgment of 8 April 2008. Available at https://eur-lex.europa.eu (accessed May 2026).
[5]Court of Justice of the European Union, Commission v Italy, Case C-157/06, judgment of 2 October 2008. Available at https://eur-lex.europa.eu (accessed May 2026).

the sector, but prevents that distinctiveness from becoming an automatic exception. The burden of justification always lies with the Member State relying on it.[6]

The reason for that caution is clear: if merely invoking national security were sufficient to remove a contract from the common framework, the exception could ultimately hollow out the internal market rules.

Yet that case law also lends itself to an institutional reading. Requiring justification, necessity and proportionality does more than protect the internal market; it also controls the exercise of an exceptional power.

Every exception expands discretion to some extent. That does not make it illegitimate, but it does require the possibility of subsequently verifying that it was used for the purpose that justified it. From this perspective, the Court's case law protects competition, institutional integrity and accountability at the same time.

The European Commission adopted the same cautious approach in its Interpretative Communication on what was then Article 296 EC, now Article 346 TFEU: the exception must respond to specific essential security interests and must not become a general route for circumventing EU law.[7]

The debate therefore cannot be reduced to national sovereignty versus European integration. The real tension is different: how much strategic flexibility can be allowed without losing legal control. The balance lies in protecting essential security interests without abandoning transparency, oversight and accountability.

Directive 2009/81/EC: a solution that did not fully resolve the problem

The adoption of Directive 2009/81/EC responded to a concern that had long been present within the European institutions. If Article 346 TFEU was used too broadly, a significant share of defence procurement remained outside the dynamics of competition and transparency that characterise the internal market.

The Directive sought to provide an intermediate solution. Its purpose was not to eliminate

[6]See AVENTIN FONTANA, Vanesa. "Actualización del test de aplicabilidad del artículo 346 del TFUE en el contexto normativo y jurisprudencial actual", in PARDO GARCÍA-VALDECASAS et al., cited in note 1, pp. 72-91.
[7]European Commission, Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement, COM (2006) 779 final, Brussels, 2006. Available at https://eur-lex.europa.eu (accessed May 2026).

the particular features of defence or to prevent recourse to Article 346 TFEU where necessary, but to create a specific framework capable of introducing greater competition, public disclosure and oversight without ignoring the sector's distinctive characteristics.[8]

The adaptations were real: greater use of the negotiated procedure, more flexibility in advertising, enhanced protection of sensitive information, and clauses concerning continuity of supply.

The Directive itself allows negotiated procedures without prior publication in certain cases involving urgency, technical reasons or exclusive rights, together with specific safeguards for security of information and security of supply. Those circumstances therefore do not, in themselves, justify recourse to Article 346 TFEU. Its application requires identification of the essential security interest at stake and an explanation of why the mechanisms provided by the Directive are insufficient to protect it in the particular case, a possibility acknowledged in recital 16.

Even so, application of the Directive remained partial, as reflected in report COM (2016) 762. The negotiated procedure with publication of a contract notice still requires minimum time limits, prior publication in the Official Journal except in narrowly defined cases, and the invitation of several candidates. In urgent or particularly sensitive programmes, those requirements may be difficult to reconcile with operational needs.

Two recurring problems must also be added. The first is the existence of situations in which only one supplier can meet the requirement: interoperability, integration with systems already deployed or intellectual property rights drastically reduce the number of operators capable of performing the contract. The second concerns military research and development contracts, where technology evolves while the procurement file is being prepared and the subject matter of the contract is difficult to define precisely from the outset. Anyone who has taken part in military acquisition programmes knows that such projects do not operate like conventional administrative purchases.

The underlying approach was reasonable. Greater competition allows tenders to be compared, facilitates external oversight and may improve the use of public resources.

[8]Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security. OJ L 216, 20 August 2009, recital 16 and Arts. 22, 23 and 28. Available at https://eur-lex.europa.eu (accessed May 2026).

Publicity and transparency also reduce the space for arbitrary decisions and strengthen their legitimacy.

Practice, however, showed that a sector-specific regulatory framework did not eliminate the reasons that led Member States to rely on Article 346 TFEU. Years later, the Commission itself acknowledged that a significant share of defence procurement was still being awarded outside the Directive.[9]

This is the paradox that underpins much of the debate. The Directive was adopted to reduce recourse to Article 346 TFEU by creating a regime adapted to defence, yet that legal design does not in itself remove the material circumstances that lead Member States to regard it as insufficient. Operational urgency, dependence on a single manufacturer or the sensitivity of certain information remain after the rules have been adopted. Changing the legal framework does not automatically change the problem that the framework is intended to solve. As long as those circumstances persist, there will continue to be an incentive to rely on the derogation provided for in the Treaty rather than exhaust the mechanisms available under the special regime.

The reasons have varied. In some cases, Member States continued to consider that particular programmes directly affected essential security interests. In others, greater weight was given to the protection of sensitive technologies, security of supply or the preservation of strategic industrial capabilities.

The criminological perspective adds an important consideration here. Rules can change behaviour, but they do not in themselves eliminate the incentives that explain it. As long as public decision-makers consider that certain strategic risks outweigh the benefits of greater competition, there will continue to be an incentive to resort to exceptional mechanisms.

At this point, the strongest objection to the argument emerges: if Directive 2009/81/EC was designed precisely to accommodate the distinctive features of defence, why should Article 346 still be regarded as a mechanism of functional adaptation? The answer cannot be that the special regime is, by definition, insufficient.

[9]European Commission, Report on the implementation of Directive 2009/81/EC on public procurement in the fields of defence and security, COM (2016) 762 final, Brussels, 2016. Available at https://eur-lex.europa.eu (accessed May 2026).

The reform of the general public procurement framework in fact shows that the ordinary regime is beginning to incorporate tools designed to address security of supply, resilience, cybersecurity, the protection of sensitive information and certain risks linked to third countries. Added to this is a new European-preference framework aimed at strengthening strategic autonomy, economic security and the reduction of dependencies on third countries, thereby expanding the tools available within the common regime before recourse is made to an exception. Although the proposal excludes the defence and security regimes, in certain situations linked to essential security interests it requires that those interests cannot be protected by less intrusive measures. This is not the same legal regime as Article 346, but it reflects a logic consistent with the restrictive interpretation of security exceptions. The consequence is that, before resorting to an exceptional mechanism, it will be necessary to explain why the tools available within the common framework are insufficient.[10]

The fact that the Directive has not completely replaced Article 346 TFEU does not necessarily imply regulatory failure. Rather, it shows how difficult it is to reconcile objectives that may sometimes conflict: competition, economic efficiency, strategic security and institutional integrity.

Ukraine and the return of strategic security

Russia's invasion of Ukraine in February 2022 altered several of the assumptions on which Europe had built its security policy. The conflict exposed industrial, technological and logistical limitations that had remained in the background for years.

The question ceased to be only who could produce more cheaply and came to include another, much more complex one: who could produce in time. Producing ammunition, sustaining supply chains or rapidly increasing the output of particular systems acquired a value that is difficult to appreciate in periods of stability.

Within a short period, strategic autonomy, security of supply, industrial resilience and technological sovereignty moved to the centre of the European debate. The Commission

[10]European Commission, Proposal for a Regulation of the European Parliament and of the Council on public procurement and concessions, repealing Directives 2014/23/EU, 2014/24/EU and 2014/25/EU, COM (2026) 590 final, 2026/0265 (COD), Brussels, 9 September 2026, explanatory memorandum, section 1, Arts. 70-77 and 78(2). Available at https://eur-lex.europa.eu (accessed September 2026).

acknowledged significant gaps in defence investment and industrial capacity and promoted new initiatives to strengthen cooperation and joint production.[11]

That change reopened debates that had seemed relatively settled. For years, the discussion had focused on how to introduce more competition into defence procurement. Ukraine forced an additional question onto the agenda: what happens when the most economically efficient option is not the safest from a strategic point of view? The literature on European strategic autonomy had already identified that tension before the war.[12]

This was not a purely theoretical discussion. Industrial dependencies that were tolerable in normal times began to be viewed as vulnerabilities.

It is important to distinguish the political change from the legal one. The war in Ukraine has not altered the legal standard applicable to Article 346 TFEU, but it has changed the factual context in which Member States identify and justify their essential security interests. That is also why the perception of the provision has shifted: for some Member States, it ceased to be merely a singular exception and began to offer a margin of adaptation to a much more uncertain environment.

None of this invalidates the principles of the internal market, but it does require recognition that economic efficiency, strategic security and industrial autonomy do not always point in the same direction. Article 346 TFEU becomes relevant precisely in that space.

The cost of exceptional measures: criticism of Article 346 TFEU

The exception contained in Article 346 TFEU remains controversial. Although many Member States consider it necessary to protect essential security interests, both academic literature and the European institutions have warned of the risks associated with using it too broadly.

One of the main criticisms concerns its effects on European industrial integration. Frequent recourse to exceptional mechanisms may encourage market fragmentation, make cooperation between Member States more difficult and reduce incentives to develop large-scale joint programmes. The European Commission has repeatedly

[11]European Commission, JOIN (2022) 24 final, cited in note 2.
[12]FIOTT, Daniel. Strategic Autonomy: Towards “European Sovereignty” in Defence? EUISS Brief No. 12, European Union Institute for Security Studies, Paris, November 2018. Available at https://www.iss.europa.eu (accessed May 2026).

warned that the coexistence of multiple similar national programmes can generate duplication, additional costs and losses of efficiency that ultimately weaken the global competitiveness of the European defence industry.[13]

A second problem is added to that fragmentation: reduced effective competition. When a contract falls outside ordinary procurement procedures, opportunities for potentially capable operators to participate are reduced and some of the competitive mechanisms that normally help improve price, quality and innovation are weakened. This may be fully justified in particular cases, but it nonetheless affects how the market functions.[14]

The most delicate problem may be institutional rather than economic. From a criminological perspective, an exception expands the discretion available to decision-makers. That discretion may be necessary, but it requires controls capable of verifying that it is used for the purposes that justify it.

Public procurement is particularly sensitive from an integrity perspective: it brings together economic resources, administrative decision-making and significant public interests. Transparency, publicity and competition therefore also perform a preventive function. They reduce opportunities for arbitrary decisions and facilitate scrutiny.

This does not mean that recourse to Article 346 TFEU in itself generates corruption, fraud or favouritism. Such a conclusion would be unwarranted. The provision may respond entirely legitimately to national security needs. The criminological issue lies elsewhere: how risk changes when some of the ordinary safeguards are reduced.

Fraud prevention offers a useful point of reference here: risk increases when reduced effective competition, less publicity and weaker external oversight coincide. The OECD places public procurement among the areas of government activity most exposed to waste, mismanagement and irregularities, and warns that those risks can increase in urgent situations or when procedural safeguards are relaxed.[15]

Exceptional measures therefore do not automatically produce irregular conduct. They

[13]European Commission and High Representative of the Union for Foreign Affairs and Security Policy, European Defence Industrial Strategy (EDIS), JOIN (2024) 10 final, Brussels, 5 March 2024. Available at https://defence-industry-space.ec.europa.eu (accessed May 2026).
[14]TRYBUS, Martin. Buying Defence and Security in Europe: The EU Defence and Security Procurement Directive in Context. Cambridge University Press, Cambridge, 2014. DOI: https://doi.org/10.1017/CBO9780511751462.
[15]OECD, Integrity in Public Procurement: Good Practice from A to Z, OECD Publishing, Paris, 2007, pp. 50-53. DOI: https://doi.org/10.1787/9789264027510-en.

can, however, alter the system's opportunity structure. Less competition, less publicity or weaker external oversight do not create wrongdoing in themselves, but they weaken some of the barriers that make it more difficult. The greater the discretion afforded by the exception, the more important the quality of traceability, control and accountability becomes.

The practical challenge is to preserve the flexibility needed to protect essential security interests without eroding the controls that support the integrity of the system. Achieving that balance will be one of the central challenges for defence procurement in the coming years.

The current debate on the future of Article 346 TFEU

Views on the future of Article 346 TFEU remain divided. For some, excessively broad use of the exception slows the integration of the European defence market and makes common industrial programmes more difficult. From that perspective, greater harmonisation could improve efficiency, competition and the scale of joint projects.

Others argue the opposite: the deterioration of the international environment shows that Member States need to retain room for manoeuvre. The protection of critical technologies, the resilience of supply chains and the immediate availability of strategic capabilities continue to underpin that position.

In March 2026, the debate became explicit within the European institutions. Resolution P10_TA (2026) 0079 of 11 March called on the Commission to issue a recommendation on the interpretation of Article 346 TFEU that would promote a more harmonised application across the Union while preserving its exceptional character[16]. Report A10-0017/2026 moved in the same direction: it expressed concern about disproportionate use of the exemption and called for an ambitious revision of Directive 2009/81/EC[17]. This institutional movement does not challenge the existence of Article 346, but it does shift the debate towards the conditions governing its application. Cañas's intervention at the procurement conference should also be situated in that context: he was not describing a

[16]European Parliament, Resolution on removing obstacles to the single market for defence, P10_TA (2026) 0079, adopted on 11 March 2026, para. 18. Available at https://www.europarl.europa.eu (accessed May 2026).
[17]European Parliament, Report on removing obstacles to the single market for defence, A10-0017/2026, rapporteur Tobias Cremer. Available at https://www.europarl.europa.eu (accessed May 2026).

change that had already taken place, but a debate that had been formally opened. Indeed, the reform of the general public procurement framework presented on 9 September does not itself implement such a delimitation: it expressly preserves Article 346 TFEU and keeps the specific defence procurement regime outside its scope.

Both positions capture part of the problem. The issue is no longer simply to choose between European integration and national sovereignty, but to find arrangements capable of reconciling objectives that do not always coincide.

Many recent European initiatives reflect precisely that search for balance. The European Defence Fund, the European Defence Industrial Strategy and the new joint-production programmes seek to increase cooperation and industrial scale without completely removing the ability of Member States to protect essential security interests.[18]

The criminological dimension reappears here. If defence expenditure increases and in consequence the recourse to exceptional mechanisms, control becomes more important. Institutional integrity does not compete with strategic security; it is part of it. A system that loses traceability, transparency or accountability ultimately generates vulnerabilities of its own.

Conclusions

The debate over Article 346 TFEU is often presented as a clash between two logics: a European framework based on competition and transparency, and Member States which consider certain defence capabilities to require specific protection.

The case law of the Court of Justice, Directive 2009/81/EC and the most recent European initiatives show that this balance remains unsettled. Ukraine has also reminded Europe that economic efficiency and strategic security do not always coincide.

Article 346 TFEU is not only an exception to the rules of the internal market. It also performs an adaptive function: it recognises that there are areas in which uniform application of the general rules may prove insufficient.

Accepting that function does not require ignoring its risks. Rather, it requires greater precision as to when Article 346 TFEU may be used and stronger requirements for

[18]European Commission and High Representative, European Defence Industrial Strategy (EDIS), JOIN (2024) 10 final, cited in note 13.

justification, traceability and oversight. Exceptional measures may be necessary; absence of control is not.

There is also an institutional-integrity dimension that deserves equal weight. It is not enough to decide when an exception is available. It is necessary to ensure that it remains subject to controls capable of preserving transparency and public confidence.

Developments in 2026 do not require this interpretation to be abandoned, but they do require it to be refined. The European debate increasingly focuses less on the existence of Article 346 TFEU and more on the conditions governing its use. Parliament has called for a more harmonised interpretation that preserves its exceptional nature, while reform of defence procurement continues along a separate track: the current proposal does not amend Directive 2009/81/EC, whose review is being pursued separately.[19]

The change, therefore, does not arise from a curtailment of Article 346, which the proposal expressly preserves. It arises from the strengthening of the common regime: as that regime acquires more tools to protect supply, resilience and sensitive information, it reinforces the approach of exhausting less intrusive measures before invoking a security exception. This approach may guide the debate and a future revision of Directive 2009/81/EC. That shift, from the existence of the exception to how rigorously its use is justified and overseen, may shape an important part of the future of defence procurement in Europe.

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[19]European Commission, Directorate-General for Defence Industry and Space, Simplifying EU rules for defence and sensitive security procurement, 25 November 2025. Available at https://defence-industry-space.ec.europa.eu (accessed May 2026).