

Legal Issues Relating to the Establishment of a European Defence Fund

Prof. Dr. Andreas Fischer-Lescano, LL.M. (EUI)
Law Department
University of Bremen



Vereinte Europäische Linke • Nordische Grüne Linke

FRAKTION IM EUROPÄISCHEN PARLAMENT



GUE/NGL
www.guengl.eu

www.sabine-loesing.de

Legal Issues Relating to the Establishment of a European Defence Fund (EDF)
Expert Report for the GUE/NGL Parliamentary Group in the EP

Executive Summary:

- (1) **Articles 173(3), 182(4), 183 and 188(2) TFEU, cited by the European Commission, do not constitute a sufficient legal basis for the establishment of the European Defence Fund (EDF).** This assessment applies irrespective of whether the predominant aim of the EDF is the promotion of defence capabilities or the strategic defence autonomy of the EU – as suggested by the EDF Regulation’s Explanatory Memorandum – or whether one assumes the aim stated in the Regulation of an integrated support of the industry and of RTD measures in the defence sector, or whether a combination of three predominant aims (fostering defence, industry and RTD) is used as a basis. In no case does the stated legal basis support the establishment of the EDF.
- (2) **Article 42(3)(2) and 45(1)(d) and (e) TEU are the *leges speciales* for the specific promotion of the European defence industry as well as RTD measures in the defence sector.** Only in line with these *leges speciales* can specific funding programmes be established which aim at an integrated support of the defence industry and of defence-related RTD measures and that give this funding its own institutional structure.
- (3) Since the specific provisions of the TEU assign the tasks envisaged for the EDF to the European Defence Agency, **Article 40 TEU bars recourse to legal bases from the TFEU for the specific support of the defence industry and of defence-related RTD measures as well as the establishment of a comitology committee for this purpose.**
- (4) Financing defence-related funding measures from the general budget of the EU is not possible. The operative tasks in relation to the implementation of the CFSP that would, in the case of the EDF, arise due to measures relating to the military or to defence policy, are generally **to be borne by the Member States in accordance with the GDP key, pursuant to Article 41(2)(1) TEU.**
- (5) Against the establishment of the EDF without a proper legal basis, **recourse may be had to the CJEU as well as to the German Federal Constitutional Court.** The CJEU may be seized with an **action for annulment** under Article 263 TFEU by privileged plaintiffs (EP, Council, COM, Member States) without having to show a specific concern. Non-privileged plaintiffs – such as individual enterprises, possibly research institutions and individuals otherwise affected by funding measures – will have to show an individual concern. In addition, a **subsidiarity action** – designed as a subset of the annulment action pursuant to Article 8 of the Subsidiarity Protocol – can be brought to the CJEU. The preconditions are found in domestic law (in Germany, Article 23(1a), clause 2 of the Basic Law, in conjunction with section 12 IntVG). Since the establishment of the EDF evidently violates key competence provisions in EU law and thereby the principle of conferral of powers in Article 23 of the Basic Law, the Federal Constitutional Court can also be seized with an **ultra vires objection** by way of a **dispute between organs of the state or a constitutional complaint.** Summary proceedings are also possible before the Federal Constitutional Court, aiming at obliging the German representation in the Council to reject the proposal for a regulation and to take further measures against the establishment of an EDF.

Table of Contents

A. Facts and Question	2
B. Legal Expert Report	4
I. Compatibility of the Establishment of the EDF with EU Law	4
1. Aims of the EDF	5
a) Industry and Research Aims	5
b) Defence and Security Purposes.....	6
c) Main and Secondary Aims	7
aa) Main Aim: Defence.....	8
bb) Main Aim: Support of Industry and Research.....	9
cc) Conclusion: Main and Secondary Aims.....	10
2. Legal Bases for Establishing the EDF	10
a) Competence for Joint Main Aims of Defence and Support of Industry and Research	10
b) Competence for the Main Aim Defence Policy.....	13
aa) No Competence for Establishing a Fund in the CFSP Provisions.....	13
bb) Scope of the Financing Ban under Article 41(2)(2) TEU.....	13
cc) Conclusion	16
c) Competence for the Main Aim Industry and RTD Support in the Defence Sector	16
aa) Concentrating Function of Art. 182(1) cl. 1 TFEU	16
bb) Art. 42 (3)(2) and 45(1)(d) and (e) TEU as <i>leges speciales</i> ?	17
(1) Wording: Possibility to Base RTD Measures Relating to CFSP Policy Areas on Article 179(1) TFEU.....	20
(2) History: Relationship between CFSP and TFEU	23
(3) Telos: Differentiated Participation in the European Defence Agency	25
(4) Context: Tasks of the European Defence Agency	27
(5) Conclusion	28
3. Consequences of Categorising the EDF Regulation as a CFSP Measure.....	28
a) Precluding Effect of Article 40 TEU	28
b) Financing Ban from Art. 41(2) TEU	29
II. Legal Means of Enforcement	29
1. CJEU.....	29
2. German Federal Constitutional Court.....	30

A. Facts and Question

1. The establishment of a European Defence Fund (EDF) was first suggested by the European Commission in the Proposal for a European Defence Action Plan of 30 November 2016.¹ In the implementation of this project, in a first step, a total of 90 million euros were set allocated for defence research until the end of 2019. In addition, on 18 July 2018, the Council and the European Parliament (EP) passed the proposal for a “Regulation establishing the European Defence Industrial Development Programme aiming at supporting the competitiveness and innovative

¹ Commission, European Defence Action Plan, 30 Nov. 2016, COM(2016) 950 final.

capacity of the EU defence industry” (EDIDP) and endowed this programme with 50 million euros for the years 2019–2020.²

2. The proposal for a Regulation of the European Parliament and of the Council establishing the European Defence Fund (EDF Regulation)³ presented now is the most recent effort to expand the EU’s capacities in the area of defence policy. In the years 2021–2027, 13 billion euros are to be allocated to the Fund from the budget of the EU. As legal basis for passing the EDF Regulation, the proposal cites combined competence titles in the TFEU. It relies on an integrated comprehensive competence from the titles ‘Industry’ and ‘Research and technological development and space’. The Commission phrases it as follows: ‘The European Defence Fund [...] is based on the Treaty on the Functioning of the European Union (TFEU) Titles “Industry” and “Research and technological development and space” (Articles 173, 182, 183 and 188). [...] As the European Defence Fund aims at fostering the competitiveness and innovativeness of the EU’s defence technological and industrial base by supporting defence-oriented R&D activities, its aim and its content justify the choice of 173 TFEU as legal basis. Defence-oriented research actions also form an integral part of the European Defence Fund. Their aim and content also justify Article 182 TFEU as an additional legal basis.’⁴
3. In relation to the ability of EU law to support the establishment of the EDF, the question arises whether the provisions on the CFSP bar recourse to the legal bases in the TFEU cited in the proposed Regulation, in the concrete case of the final proposal on the establishment of the EDF. It is this question of the relationship between the provisions of the Common Foreign and Security Policy (CFSP) – in particular Articles 42 and 45 TEU – and Articles 173, 182, 183 and 188 TFEU, so far not examined in appropriate detail, that the present report addresses. Two interrelated questions will be examined: (1) *Do the CFSP provisions, namely Articles 42 and 45 TEU, bar recourse to Articles 173, 182, 183 and 188 TFEU in relation to the establishment of the EDF?* (2) *If the EU competence for establishing*

² OJ 2018 L 200/30.

³ Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the European Defence Fund, 13 June 2018, COM(2018) 476 final.

⁴ *Ibid.*, p. 5–6.

the EDF as planned is lacking, is there a way to challenge the EDF in court and, if so, for whom or for which organ?

B. Legal Expert Report

I. Compatibility of the Establishment of the EDF with EU Law

4. In accordance with settled case law, the CJEU insists that the choice of a legal basis for a measure must be based on objective factors which are amenable to judicial review. The aim and content of the measure are of crucial significance in this respect: 'According to settled case-law, the choice of the legal basis for a Community measure must rest on objective factors amenable to judicial review, which include the aim and content of that measure'.⁵ One of the functions of the obligation provided in Article 296(2) TFEU to state reasons for legislative measures is to enable a review of the choice of the legal basis. In this, 'it follows from the case-law of the Court that observance of the obligation to state reasons must be evaluated not only according to the wording of the contested act, but also according to its context and the circumstances of each case, in particular the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations'.⁶

5. The choice of the legal basis depends on the aim of the measure. Where a legal measure has several aims and concerns several possible legal bases, recourse must be had to the legal basis corresponding to the main aim. Thus, when reviewing the Framework Agreement on Partnership and Cooperation between the European Union and the Republic of the Philippines in the area of Development Cooperation under Article 208 TFEU and Article 21 TEU, the CJEU decided that, 'even if a measure contributes to the economic and social development of developing countries, it does not fall within development cooperation policy if it has as its main purpose the implementation of another policy'.⁷

⁵ CJEU, judgment of 6 Nov. 2008 – Case C-155/07 (Parliament v. Council), para. 34.

⁶ CJEU, judgment of 18 June 2015 – Case C-508/13 (Estonia v. Parliament and Council), para. 61.

⁷ CJEU, judgment of 11 June 2014 – Case C-377/12 (COM v. Council), para. 44.

6. Apart from the objective and reviewable determination of the main aim that determines the choice of legal basis, the *lex specialis* principle applies. This principle is a corollary of the principle of conferral in Article 5 TEU and serves to preserve the competence order established by the Treaties. Mixing issue areas in contravention of the Treaties therefore constitutes a violation of the principle of conferral.⁸
7. In order to preserve the competence order and to avoid overlaps in breach of competences, a general legal competence cannot be used where the specific aim is specifically provided for in the Treaty. In the words of the CJEU: 'In addition, where the Treaty contains a more specific provision that is capable of constituting the legal basis for the measure in question, the measure must be founded on that provision'.⁹

1. Aims of the EDF

8. In order to assess the legality of the choice of legal basis for the EDF Regulation, it must therefore first be determined which are the aims of the EDF Regulation (a) and how, insofar as the Regulation pursues several aims, these aims are to be weighed (b).

a) Industry and Research Aims

9. In accordance with Article 3(1) EDF Regulation, '[t]he general objective of the Fund is to foster the competitiveness, efficiency and innovation capacity of the European defence industry, by supporting collaborative actions and cross-border cooperation between legal entities throughout the Union, including SMEs and mid-caps as well as fostering the better exploitation of the industrial potential of innovation, research and technological development, at each stage of the industrial life cycle, thus contributing to the Union strategic autonomy'.

⁸ See Lindner, *Die Europäisierung des Wissenschaftsrechts*, Tübingen 2009, p. 66

⁹ CJEU, judgment of 6 Nov. 2008 – Case C-155/07 (Parliament v. Council), para. 34.

10. The text of the EDF Regulation thus integrates two different purposes. On the one hand, by allocating funds for enterprises for *'testing'*, *'qualification'* and *'certification'* of defence products, components and technologies, it aims to support the industrial development in the defence sector. On the other hand, the EDF Regulation provides for a number of measures that would be classified as research and technological development (RTD) support, since they provide for the support of defence-specific research and related technological development. The measures eligible for funding listed in Article 11 EDF Regulation especially serve to support research and technological development in the defence sector in this way. The aims of supporting the industry and RTD measures in the area of defence are intertwined. Neither of these aims takes precedence over the other. The EDF Regulation serves both of them equally.

b) Defence and Security Purposes

11. In addition, the EDF Regulation also serves European defence. The Fund already carries the reference to defence in its name. Pursuant to Article 1 of the EDF Regulation, it is not a European Fund for the Support of Industry and Research that is being established, but a 'European Defense Fund'. The support of industry and RTD envisaged in the framework of the EDF serves a specific purpose, namely support in the area of defence. Thus, Article 2 no. 11 EDF Regulation defines as 'research action' eligible for funding 'any action consisting of research activities with an exclusive focus on defence applications'. And Article 2 no. 4 EDF Regulation defines 'disruptive technology for defence' eligible for funding as 'a technology the application of which can radically change the concepts and conduct of defence affairs'.

12. These defence-related aims of the EDF Regulation also result from the substantive content of the EDF Regulation. According to Article 3(1) EDF Regulation, the Fund is supposed to be 'contributing to the Union strategic autonomy'. And Article 3(2)(b) EDF Regulation specifies in a factual manner that this relates to a strategic autonomy in the defence sector. For Article 3(2)(b) EDF Regulation makes clear that the Fund is supposed to contribute to the Union autonomy by supporting collaborative projects 'consistent with defence capability priorities commonly

agreed by Member States within the framework of the Common Foreign and Security Policy’.

13. In addition, Article 14(3)(a) EDF Regulation prefers measures in the framework of PESCO by a so-called ‘PESCO bonus’ and again ties EDF funding to the defence aims by stating: ‘[For] an action developed in the context of the Permanent Structured Cooperation as established by Council Decision (CFSP) 2017/2315 of 11 December 2017, it may benefit from a funding rate increased by an additional 10 percentage points.’ The Commission does nothing to obscure this close link: ‘There will be’, it writes in the Explanatory Memorandum, ‘close links between the Fund and projects implemented in the framework of permanent structured cooperation in defence (PESCO). Once assessed as eligible, a “PESCO bonus”, in the form of a higher funding rate, will be granted to eligible PESCO projects.’¹⁰

14. An interlocking of the Fund with defence aims is also achieved by the design of the funding eligibility criteria. Through these, the industry and RTD support are linked back to defence interests. Thus, pursuant to Article 13(1)(d) EDF Regulation, an eligibility criterion for EDF funding is whether the proposed action makes a ‘contribution to the security and defence interests of the Union’.

15. Article 13(2) EDF Regulation equally establishes a connection to the security and defence interests of the Union by specifying, in relation to the eligibility criteria ‘contribution to the security and defence interests of the Union’, that ‘regional and international priorities may be taken into account, in particular to avoid unnecessary duplication, provided they serve the Union's security and defence interests and do not exclude the participation of any Member State.’

c) Main and Secondary Aims

16. This raises the question of how these aims – integrated industry and RTD related aims in the defence sector on the one hand and supporting defence itself on the

¹⁰ Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the European Defence Fund, 13 June 2018, COM(2018) 476 final, p. 4.

other hand – should be weighed. The EDF Regulation, the reasons for the Regulation and the context of its drafting offer a contradictory picture:

aa) Main Aim: Defence

17. Thus, on the one hand, much is to be said for considering the support of defence as the final aim of the EDF. The name of the fund ('Defence Fund') already accentuates defence and not industry and RTD support. The strong substantive links of eligible actions to strategic defence interests also supports this finding. Overall, the proposed Regulation clearly reveals that the development of key technologies for defence policy is not an aim in itself. It is not about growth in the Union industry, in order to increase global competitiveness, to create jobs or to increase the attractiveness of a business location, as it is usually the case for measures under Article 173(3) TFEU. It is also not about supporting RTD measures as such, but about research for specific purposes, where, for example, Article 2 no. 11 EDF Regulation clarifies as mentioned that eligible research actions comprise 'any action consisting of research activities with an exclusive focus on defence applications'.

18. Furthermore, the reasons for the EDF Regulation are tellingly phrased when they state that the measures to support the industry and RTD are not the aim but a means to achieve this aim. In the words of the Commission, in the Explanatory Memorandum to the proposed EDF Regulation: 'In today's world, guaranteeing security means dealing with threats that transcend borders. No single country can address these alone. The Union will need to take greater responsibility for protecting its interests, values and the European way of life, in complementarity and in cooperation with NATO. Efforts to meet the Union's level of ambition in security and defence (as endorsed by the European Council in 2016) will contribute to this objective. To be ready to face tomorrow's threats and to protect its citizens, the Union needs to enhance its strategic autonomy. *This requires* the development of key technologies in critical areas and strategic capabilities to ensure technological leadership.'¹¹ This shows that the development of key technologies is not the main aim, but rather a means to an aim, at best an interim aim, a

¹¹ Ibid., p. 5 (emphasis added).

precondition for the actual aim ('this requires') which the Commission itself sees in the fact that '[t]o be ready to face tomorrow's threats and to protect its citizens, the Union needs to enhance its strategic autonomy'.¹²

19. Consequently, in the Explanatory Memorandum, the section on the proposal's fundamental rights impact does not point out that these rights are promoted by supporting the industry and RTD measures, but names defence purposes as the actual *ratio* of the EDF Regulation, stating quite upfront: 'Enhancing the security of EU citizens safeguards their fundamental rights.'¹³

20. In the Legislative Financial Statement, too, the costs arising in the framework of the EDF are not allocated to the policy areas industry or RTD, but as follows: '1.2 Policy area(s) concerned (Programme cluster) Security and Defence'.¹⁴

21. In short: Both in the content of and in the Explanatory Memorandum to the proposed EDF Regulation, there is clear indication that the support of industry and research governed by the Regulation are only a means to the real end of defence support and that the main aim of the EDF Regulation is to guarantee the strategic autonomy of the EU in the area of defence.

bb) Main Aim: Support of Industry and Research

22. Despite these clear and objective indications that the main aim of the EDF Regulation concerns the area of defence, the Commission claims that the aim stated in the Regulation – supporting the industry and RTD measures in the defence sector – is authentic and constitutes the final main aim of the Regulation. Following this opinion, the support of the industry and RTD, which are inseparably linked, constitute the main aim of the EDF Regulation, not defence purposes.

¹² Ibid.

¹³ Ibid., p. 11.

¹⁴ Ibid., Legislative Financial Statement, p. 2.

cc) Conclusion: Main and Secondary Aims

23. There is clear indication in both the content of and the reasons given for the EDF Regulation that the main aim of the Regulation is not the support of the industry and RTD, but defence support. At the same time, there are legal opinions that consider that the industry and RTD components prevail.
24. This issue need not be decided if it remains without legal effects whether (a) defence constitutes a second main aim next to the main aims of industry and RTD support, or (b) defence constitutes the sole main aim of the EDF Regulation, or (c) the Commission is right to consider the support of the industry and RTD in the defence sector the sole, integrated main aims.

2. Legal Bases for Establishing the EDF

25. In the following, it will therefore be examined whether the legal assessment of the establishment of the EDF depends on which main aim the Regulation pursues. First, this requires (a) an examination of whether the Regulation can be based on the dual legal bases of the CFSP provisions (Articles 41, 42 and 45 TEU) and of the TFEU (Articles 173(3), 182(4), 183 and 188(2) TFEU). The second question is (b) whether EU law also provides a competence for the establishment of the EDF Regulation in case its main aim is located in the CFSP sector. Third (c), the competence situation will be considered in case the EDF's main aim really is the promotion of the competitiveness, efficiency and innovation capacity of the European defence industry and the support of RTD measures in the defence area.

a) Competence for Joint Main Aims of Defence and Support of Industry and Research

26. If the EDF Regulation is to be considered to join a total of three main aims in such a way that none of these aims constitutes the main aim, the Regulation could possibly be based both on the legal basis cited by the Commission for the integrated support of industry and RTD, Articles 173(3), 182(4), 183 and 188(2) TFEU, as well as those on defence, namely Articles 41, 42 and 45 TEU. This

presupposes that such a combination of different legal bases is possible at all and permissible in the concrete case.

27. That it is possible to combine legal bases is settled CJEU case law.¹⁵ This is also what the proposal for a Regulation does, when it combines, in Article 173(3) TFEU, a legal basis on industry support, with legal bases from Title XIX TFEU, on research and technical development. According to the jurisprudence of the CJEU, ‘such a combination requires that the respective act, ‘from the point of view of its content and aim, [...] has components which are inseparably linked, [...] without it being possible to identify a main or predominant aim or component’.¹⁶

28. Presupposing in respect to the EDF Regulation that such an inseparable link between the three aims of defence, industry and RTD exists, the question is in the second instance whether the combination of legal bases is permissible in the concrete case. The CJEU considers that ‘no such dual basis is possible where the procedures laid down for each legal basis are incompatible with each other’.¹⁷ It therefore needs to be examined whether the legislative procedures are compatible with each other.

29. Measures pursuant to Articles 41, 42 and 45 TEU require unanimous Council decisions. In accordance with Article 42(4) TEU, unanimity is required for the entire area of CFSP in general and for the substantive work of the European Defence Agency, while a mere qualified majority is required for decisions defining the Agency’s statute, seat and operational rules, Article 45(2) TEU – as in Council Decision (CFSP) 2015/1835 of 12 October 2015. If the EDF Regulation falls within the scope of the CFSP and does not merely concern technical issues of the establishment of the Defence Agency, the decision on the EDF Regulation would therefore have to be adopted unanimously by the Council, while each Member State retains the possibility of a ‘constructive abstention’ under Article 31(1)(2) TEU.

¹⁵ CJEU, judgment of 25 Feb. 1999 – Case C-164–165/97 (Parliament v. Council), para. 14; in that sense, see also CJEU, judgment of 6 Nov. 2008 – Case C-155/07 (Parliament/Council), para. 72.

¹⁶ CJEU, judgment of 6 Nov. 2008 – Case C-155/07 (Parliament v. Council), para. 72.

¹⁷ CJEU, judgment of 25 Feb. 1999 – Case C-164–165/97 (Parliament v. Council), para. 14; in that sense, see also CJEU, judgment of 6 Nov. 2008 – Case C-155/07 (Parliament v. Council), para. 72.

30. On the other hand, Article 173(3) and Article 183 in conjunction with Article 188(2) TFEU provide for the ordinary legislative procedure. Article 182(4) TFEU provides for yet another procedure, namely the special legislative procedure, requiring a mere consultation of the European Parliament. With respect to the Council, in accordance with the basic rule of Article 16(3) TEU, a decision with a qualified majority is required.
31. Regarding the compatibility of the ordinary legislative procedure under Article 173(3) and Articles 183 and 188(2) TFEU on the one hand and the application of the special legislative procedure pursuant to Article 182(4) TFEU on the other hand, one could consider applying the strict requirements of Article 173(3) and Articles 183 and 188(2) TFEU (approval by the European Parliament), in order to achieve a compatibility of the procedures in the case of the EDF Regulation.
32. However, such a combination is not possible for measures that are based both on the CFSP and on TFEU provisions. Due to the principled separation of TFEU and CFSP, which is also expressed in the incompatibility provision of Article 40 TEU, a combination of these two competence bases is impermissible. There may not be, as a German commentary puts it, “mixed acts” that are at once based on a competence in the framework of the CFSP and on another Union policy [...]. Consequently, the financing must also be clearly allocated.¹⁸
33. A dual legal basis that joins Articles 173(3), 182(4), 183 and 188(2) TFEU with the CFSP is impermissible, because the respective procedural requirements are incompatible. The procedural provisions of CFSP and TFEU are, as the CJEU’s case law confirms, incompatible.¹⁹ CFSP measures cannot be passed as TFEU measures and vice versa.²⁰
34. Even supposing that the EDF Regulation pursues several aims at once, encompassing several components (support of defence, industry and RTD) that are

¹⁸ Cremer, in: Calliess and Ruffert, EUV/AEUV, 5th edition 2016, Art. 41 EUV para. 8 (my translation).

¹⁹ CJEU, judgment of 19 July 2012 – Case C-130/10 (Parliament v. Council), paras. 42 ff.

²⁰ CJEU, judgment of 20 May 2008 – Case C-91/05 (Commission v. Council), para. 77.

inseparably linked, without one of them being secondary to the others, the differences between the procedures applying under Articles 173(3), 182(4), 183 and 188(2) TFEU on the one hand and under Articles 41, 42 and 45 TEU on the other hand prevent these provisions from being cumulated in order to serve as a dual legal basis for a legislative measure such as the EDF Regulation.²¹

b) Competence for the Main Aim Defence Policy

35. The EDF Regulation could, however, be based on the CFSP provisions alone – supposing that defence constitutes its main aim. This would require that the EDF Regulation is compatible with the substantive requirements of Articles 41, 42 and 45 TEU.

aa) No Competence for Establishing a Fund in the CFSP Provisions

36. From an institutional point of view, it is problematic that Article 42(3)(3) in conjunction with Article 45(1)(d) and (e) TEU assign the task of supporting the industrial and technological basis of the defence sector and of research in the field of defence technology to the European Defence Agency.²² Article 41(3) TEU does provide for a start-up fund for military measures. But within the CFSP provisions, there is no legal basis for establishing a Fund with a parallel task description to that of the European Defence Agency.

bb) Scope of the Financing Ban under Article 41(2)(2) TEU

37. The financing structure provided for in the EDF Regulation could also be incompatible with the requirements of Article 41(2)(1) TEU. The funding sum of 13 billion euros provided for in Article 4 EDF Regulation is taken from the Union budget. According to Article 8(1) EDF Regulation, the Fund is supposed to be implemented in direct management in accordance with the Financial Regulation of the Commission.

²¹ See the argument in CJEU, judgment of 19 July 2012 – Case C-130/10 (Parliament v. Council), para. 49.

²² See, in detail, Eisenhut, *Europäische Rüstungskoooperation*, Baden-Baden 2010, pp. 288 ff.

38. This could be incompatible with the financing provisions for the CFSP. According to Article 41(2)(1) TEU, the ‘operating expenditure’ related to the CFSP is charged to the Union budget, except for ‘expenditure arising from operations having military or defence implications’ which is charged to the Member State budgets. The question therefore is whether defence-related operative expenditure is to be understood to only cover military measures in the sense of Articles 42 and 43 TEU or whether this term covers all measures taken under Title V Chapter 2 TEU that are related to military or defence policy.
39. Firstly, the term ‘measure’ is problematic. Thus, it is claimed that Article 41(2)(1) TEU only concerns ‘measures’ in connection to military operations because in connection to measures in Article 42(1) TEU reference is made to civil and military crisis management operations. This would mean that only those measures, which are supposed to be different from CFSP activities not constituting measures, can be considered ‘measures’ within Article 41 TEU.²³ This opinion, however, finds no basis in the wording of the Treaties. It is already incorrect that Article 42(1) TEU concerns ‘measures’ – the term used is ‘operations’ – and it is also not true that ‘measures’ are not referred to in other CFSP provisions. In fact, the term ‘measure’ is used in the very task allocation in Article 42(3) TEU to the European Defence Agency, which is also empowered to take ‘measures’ (the exact term used) to support research and industry. Undoubtedly, measures of the European Defence Agency therefore constitute measures within Article 41(2)(1) TEU.
40. Secondly, the question is whether such expenditure also constitutes ‘operating expenditure’. Article 41 TEU regulates the CFSP expenditure not just partially, but comprehensively. The provision differentiates, on the first level, administrative and operating expenditure and, on the second level, between expenditure of the latter kind ‘having military or defence implications’ and other expenditure. Administrative expenditure differs from operating expenditure in that it does not concern the implementation of the measures themselves, but the administrative cost arising

²³ Thus Brauneck, EU-Verteidigungsbinnenmarkt durch mehr EU-weite Rüstungsausschreibungen?, DVBI 2017, 1257 ff. (1259), who, without reasons of his own, simply points to an Opinion of the Research Service of the German *Bundestag*, WD 4-3000-090/15 of 16 June 2015.

from them. The EDF funding amount of 13 billion euros provided for in Article 4 EDF Regulation is the amount allocated 'for the implementation' (Art. 4(1) EDF Regulation). It therefore clearly constitutes operative expenditure.

41. This operative expenditure for measures in the CFSP framework would finally have to constitute measures 'having military or defence implications'. If that is the case, Article 41(2)(1) TEU bars financing from the Union budget. The Treaties do not define military and defence implications in the sense of Article 41(2)(1) TEU. Both 'implications' are, however, explicitly invoked in the tasks description of the European Defence Agency, in that Articles 42(3) and 45 TEU determine that the Agency supports the optimisation of 'military capabilities' and the strengthening of the 'base of the defence sector'. The Agency's measures therefore also have 'military and defence implications', for 'implications' refers to a connection that is quite loose. A military or defence-related main aim of the measure is not required, it is enough for it to have 'implications' for this area. This is obviously the case for measures of the Defence Agency. That the parties to the TEU also assumed that operative measures within Article 45 TEU constitute measures 'having defence implications' also results from Article 5(1) cl. 1 of the Protocol on the Position of Denmark, which clarifies in relation to the task allocation to the European Defence Agency in Article 45 TEU that 'Denmark does not participate in the elaboration and the implementation of decisions and actions of the Union which have defence implications'.

42. The barrier effect of Article 41(2)(1) TEU is not limited to the operating expenditure under Articles 42 and 43 TEU but applies to all CFSP measures that have military or defence implications. Also measures that serve to support the industry and RTD measures in the defence sector under Article 45(1)(d) and (e) TEU are 'operative expenditure having defence implications' in the sense of Article 41(2)(1) TEU.²⁴

43. Operative expenditure, insofar as it has military or defence implications, is borne by the Member States in accordance with the GDP key. The Member States are

²⁴ See Cremer, in: Calliess and Ruffert, EUV/AEUUV, 5th ed. 2016, Art. 41 EUV para. 5: 'The provision on the financing of operative expenditure (para. 2) is in line with the prior situation. Operative expenditure is that which arises from the implementation of a measure adopted in accordance with Title V Chapter 2' (my translation).

free to decide on another distribution key. This requires a unanimous decision pursuant to Article 41(2)(2) TEU in conjunction with Article 31(1) TEU. But a financing of such measures from the Union budget is barred by Article 41 TEU.

cc) Conclusion

44. Even supposing that the EDF Regulation exclusively pursues the main aim of defence, the EDF Regulation cannot be based on Article 41, 42 and 45 TEU because these provisions do not permit the establishment of a Fund with a parallel task description to that of the European Defence Agency and financing of its operating expenditure from the Union budget.

c) Competence for the Main Aim Industry and RTD Support in the Defence Sector

45. Finally, we need to ask how the competence situation presents itself in case the EDF's main aim really is to increase the competitiveness, efficiency and innovation capacity of the European defence industry and to support RTD measures in the defence sector, as claimed by the Commission. For this case, the Commission names Articles 173(3), 182(4), 183 and 188(2) TFEU as the joint legal basis. The question is whether (aa) applying this joint legal basis to the EDF Regulation complies with the requirements of the TFEU and (bb) whether Articles 42(3)(2) and 45(1)(d) and (e) TEU constitute *leges speciales*, barring recourse to the general industry and RTD related provisions of the TFEU.

aa) Concentrating Function of Art. 182(1) cl. 1 TFEU

46. The following will proceed from the assumption that Articles 173(3), 182(4), 183 and 188(2) TFEU form the joint legal basis for the EDF despite the different legislative procedures indicated by these provisions and that they are not only able to support the institutional establishment of a fund but also combine two different policy fields – the industry with Article 173 TFEU and RTD support with Title XIX – in a joint legal basis because the EDF Regulation constitutes an inseparable link.²⁵

²⁵ These questions are beyond the scope of the present expert report.

This, however, presupposes that in accordance with Article 182(1) cl. 1 TFEU, the European Parliament and the Council have to adopt a multiannual framework programme, ‘setting out all the activities of the Union’.

47. The concentration maxim thus stipulated in the TFEU requires that the Research Framework Programme (FP) contains all measures in the area of research support. In that sense, the EDF Regulation would be a supplementary programme in the form of an implementation programme pursuant to Article 184 TFEU. So far, this has not been paid any attention, neither in the EDF Regulation nor in the draft FP, which in Article 5(2) specifically provides for the non-inclusion of the EDF in the FP: ‘This Regulation does not apply to the specific programme referred to in Article 1(3)(b), with the exception of this Article, Article 1(1) and (3) and Article 9(1).’²⁶

48. The basic characteristics of the EDF are therefore not sufficiently contained in the FP. The EDF Regulation can therefore – supposing it is compatible with the CFSP provisions – only be based on the legal basis chosen by the Commission if its aims are included in the FP Regulation. The recommendation of the German *Bundesrat* in relation to the EDF to keep the funding lines ‘Horizon Europe’ and EDF separate²⁷ is therefore not realisable as long as the chosen legal basis and the proposed financing and institutional structure of the EDF remain. Rather, the chosen legal basis compels compliance with the concentration maxim in Article 182(1) cl. 1 TFEU.

bb) Art. 42 (3)(2) and 45(1)(d) and (e) TEU as *leges speciales*?

49. Setting out the specific support of defence-related RTD measures in the Research Framework Programme as part of the measures under Title XIX TFEU in accordance with Article 182(2) cl. 1 TFEU requires, in turn, that the Treaties permit

²⁶ Proposal for a Regulation establishing Horizon Europe – the Framework Programme for Research and Innovation, laying down its rules for participation and dissemination, COM(2018) 435 final.

²⁷ German *Bundesrat*, Recommendations, 292/1/18 of 8 Oct. 2018, para. 4: ‘The Bundesrat recommends that, due to its special sensitivity and its special requirements and aims, defence-oriented research is strictly separated from “Horizon Europe” and that the endowment of respective funding lines should not be effected at the expense of the Specific Programme of “Horizon Europe”, and it calls upon the Commission to realise this.’ The ‘strict separation’ demanded here is precisely not possible within Title XIX TFEU. The strict separation can only be realised in the implementation of defence-related RTD support under the CFSP rules.

an inclusion of the specific support of industry and RTD support measures in the defence sector at all. It is particularly problematic that Article 42(3)(2) in conjunction with Article 45(1)(d) and (e) TEU allocate the task of supporting the industrial and technological base of the defence sector and of research in the area of defence technology to the European Defence Agency.²⁸ These provisions of the TEU could be considered *lex specialis* in relation to measures under Article 173(3) TFEU (industry support) and Title XIX TFEU (RTD support), as a result barring recourse to the TFEU in the case of the EDF Regulation. For according to the CJEU, the applicability of a *lex specialis* means that no recourse may be had to general competence principles, that ‘the underlying general principles are [...] inapplicable’.²⁹

50. The Union courts tend to reject the existence of a *lex specialis* where two autonomous legal areas overlap in relation to a legal measure and both contain abstract general provisions for the concrete situation. Thus, the Court of First Instance has rejected a *lex specialis* situation in the relation between tax harmonisation and state aids in the abstract, since the two areas were ‘two autonomous bodies of rules and [...] the first cannot be regarded as *lex specialis* in relation to the second’.³⁰

51. Applied to the establishment of the EDF, it can be observed that in an abstract manner, the CFSP provisions and the TFEU rules form two autonomous bodies of rules with different procedures and preconditions. However, in relation to the EDF, there are not just two abstract bodies of rules overlapping; rather, with Article 42(3)(2) in conjunction with Article 45(1)(d) and (e) TEU, there are quite special provisions for the area of *specifically* defence-related industry and RTD support. Their *lex specialis* character can only be denied under one condition: that the Treaties set it aside.

²⁸ Art. 45(1)(d) and (e) TEU say: ‘(d) support defence technology research, and coordinate and plan joint research activities and the study of technical solutions meeting future operational needs; (e) contribute to identifying and, if necessary, implementing any useful measure for strengthening the industrial and technological base of the defence sector and for improving the effectiveness of military expenditure.’

²⁹ CJEU, judgment of 30 April 2014 – Case C-280/13 (Barclays Bank), para. 44.

³⁰ CFI, order of 7 Dec. 2017 – Case C-323/16 P (Eurallumina v. COM), para. 56.

52. It would appear possible that such an override of the *lex specialis* principle can be found in the support obligation in Article 179(1) TFEU in conjunction with the exclusivity provision of Article 179(3) TFEU. Article 179(3) TFEU requires that all EU activities ‘under the Treaties’ in the area of RTD, including demonstration projects, shall be decided on and implemented in accordance with the provisions of this Title. The phrase ‘under the Treaties’ could be taken to mean that research-related activities in the defence sector and also specific defence research support measures fall within the scope of Article 179(3) TFEU; that would mean that Articles 42(3)(2) and 45(1)(d) and (e) TEU are not *leges speciales* for defence-related activities. In that respect, scholars assume that there is ‘currently an unresolved conflict’ between the exclusivity of the Union competence under Article 179(3) TFEU and the CFSP provisions (Article 42(3)(2) in conjunction with Article 45(1)(d) and (e) TEU).³¹

53. Of course this conflict can only exist within the scope of Article 179(3) TFEU, that is, to the extent that RTD measures are concerned. Insofar as the EDF Regulation also covers measures that do not fall within the scope of Title XIX, but are based on Article 173(3) TFEU,³² Article 179(3) TFEU is not applicable in the first place and can therefore also not convey a counter-exception to the *lex specialis* principle. This is because Article 173(3) TFEU does not have such a claim to exclusivity. Rather, in Article 173(1) TFEU, it contains a horizontal clause, according to which the Union contributes to the achievement of the objectives set out in Article 173(1) TFEU, that is, supporting industry competitiveness, through the policies and activities it pursues under other provisions of the Treaties. The CFSP therefore has a supportive function (also) for the industrial policy, but a CFSP measure that (also) constitutes an industrial policy cannot be based on Article 173(3) TFEU. The areas of the EDF Regulation that are aimed at the testing of products (Article 11(3)(f) EDF Regulation), the qualification of products (Article 11(3)(g) EDF Regulation) or the certification of products (Article 11(3)(h) EDF Regulation) are part of industry support and not covered by Title XIX. For these parts of the EDF Regulation, Articles 42(3)(2) and 45(1)(d) and (e) TEU undoubtedly constitute *leges speciales*.

³¹ Groeben, in: von der Groeben, Schwarze and Hilf, 7th ed., 2015, AEUV Art. 179 para. 58 (my translation); see also Eikenberg, in: Grabitz, Hilf and Nettesheim, 64th update, May 2018, AEUV, Art. 179 para. 128, who speaks of a ‘need for clarification’ relating to Art. 45 TEU (my translation).

³² On the substantive relation of both areas, see above paras. 9–10.

In other words: ‘The mentioned horizontal character of industrial policy innately leads to overlaps of industrial policy with other policy fields. Thus, for example, among the tasks of the European Defence Agency in Articles 42(3)(2) and 45(1)(e) TEU there is also the identification and implementation of measures needed to strengthen the industrial base of the defence sector. Therefore, the TEU provisions constitute a *lex specialis*, since this area of industry support has not been “communitised”.’³³ A recourse to Article 173(1) TFEU is therefore excluded with respect to the industry-related contents of the EDF Regulation.

54. However, one might ask whether Article 179(3) TFEU is able to provide a counter-exception to the *lex specialis* principle at least for those parts of the EDF Regulation that are based on Articles 182(4), 183 and 188(2) TFEU. To this end, the provision must be analysed with respect to its wording, its history, its object and purpose (*telos*) and its context:

(1) Wording: Possibility to Base RTD Measures Relating to CFSP Policy Areas on Article 179(1) TFEU

55. If Article 179(3) TFEU extends the exclusivity function of Title XIX TFEU to ‘all Union activities under the Treaties in the area of research and technological development’, the provision explicitly includes the TEU as part of the ‘Treaties’. The term ‘Treaties’ is defined in Article 1(2) TFEU and comprises both the TEU and the TFEU. The separation principle between CFSP and supranational Union law, as it is expressed also in Article 40 TEU, is apparently once more broken by Article 179(1) TFEU by obliging the Union to ‘promot[e] all the research activities deemed necessary by virtue of other Chapters of the Treaties’. The reference to ‘other Chapters’ of the ‘Treaties’ is also a reference to the CFSP. Structurally, ‘Chapters’ in the Treaties are one level below the ‘Parts’. In the TEU, only Part V contains two Chapters – both relate to the CFSP, namely ‘Chapter 1: General Provisions on the Common Foreign and Security Policy’ and ‘Chapter 2: Specific Provisions on the Common Foreign and Security Policy’. By referencing the ‘Chapters’ of the

³³ Lock, § 6 Industrie-, Technologie- und Forschungspolitik, in: Wegener (ed.), Europäische Querschnittpolitiken, Baden-Baden 2014, para. 70 (my translation).

'Treaties', Article 179(1) TFEU also refers to the general and specific provisions on the CFSP.

56. Unlike the horizontal provision of article 173(3) TFEU, the obligation to support in Article 179(1) TFEU is not conceptualised as an immanent obligation within the corresponding policy field but related to research activities that are 'deemed necessary by virtue of other Chapters of the Treaties'. Research necessity is based on utility considerations emanating from the policy field. In the CFSP, various research questions are conceivable. Thus one possible question is: How could Articles 23 ff. TEU in the CFSP Chapter be implemented in a way that realises the principles of Chapter 1, namely Articles 21 and 22 TEU, on democracy and human rights?

57. In fact, such research activities are already taking place. The Framework Programme is using the RTD competence title and its exclusivity claim in relation to the CFSP Chapters by supporting RTD activities also in CFSP policy areas. In that respect, research is 'integrated into five clusters ("health"; "inclusive and secure society"; "digital and industry"; "climate, energy and mobility"; and "food and natural resources"), aligned with Union and global policy priorities (the Sustainable Development Goals) and having cooperation and competitiveness as key drivers'.³⁴

58. Such cross-references and overlaps are also possible according to the wording of Article 179(3) TFEU. For the norm also ties in with the CFSP Chapters in an abstract manner. Research policy under Title XIX TFEU can therefore support all CFSP policies, and the exclusivity provision of Article 179(3) TFEU refers to all activities conducted on the basis of the TFEU. The provision's text, however, says nothing about whether these competences from Title XIX TFEU also comprise specific defence research or whether Articles 42(3)(3) and 45(1)(d) and (e) TFEU have to be considered *leges speciales* here. For this differentiation, the general rules continue to apply.

³⁴ Proposal for a Regulation establishing Horizon Europe – the Framework Programme for Research and Innovation, laying down its rules for participation and dissemination, COM(2018) 435 final, p. 10.

59. For their interpretation it is relevant that the wording of Article 45(2) cl. 4 TEU itself gives a hint as to how the Treaties define the role of the European Defence Agency in the institutional setup with respect to its task to ‘support defence technology research, and coordinate and plan joint research activities and the study of technical solutions meeting future operational needs’ (thus Article 45(1)(d) TEU). For Article 45(2) cl. 4 TEU is worded as follows: ‘The Agency shall carry out its tasks in liaison with the Commission where necessary.’ In this way, the Treaties are reacting to the need for coordination between the tasks of the Defence Agency and the TFEU measures by enabling the European Defence Agency to work with the Commission where necessary.³⁵ The wording of the provision already excludes implementing an institutional structure via the TFEU that takes on the tasks of the European Defence Agency and in whose decision processes the European Defence Agency is not included in such a way that the Defence Agency can ‘carry out its tasks’.

60. Furthermore, Article 179(1) TFEU also does not enable the implementation of specific support activities or even the establishment of competing institutions and funds in the defence research sector, but reduces the task of the Commission in Title XIX TFEU to ‘supporting research activities’. The activities under Article 179(1) TFEU therefore have a supporting function, insofar as they concern ‘other Chapters of the Treaties’. This does not confer the competence to install separate procedures and decision-making bodies that enter into a competition with the agencies and institutions established in other Chapters.

61. This textual finding on Article 179 TFEU and Article 42(3)(2) in conjunction with Articles 45(1)(d) and (e) and 45(4) TEU means overall that the observer status of the European Defence Agency within the EDF, provided for in Article 28 EDF Regulation, obviously does not satisfy the conditions contained in Article 45(2) cl. 4 TEU. The position of the Commission in the EDF Regulation by far exceeds the supporting function which Article 179(1) TFEU foresees for measures under Title XIX TFEU in the area of other chapters of the Treaties. And finally, Article 179(3) TFEU does not lead to a different result, because measures under Article 42(3)(2) in conjunction with Article 45(1)(d) and (e) TEU are exempt from the exclusivity

³⁵ Cremer, in: Calliess and Ruffert, EUV/AEUV, 5th ed. 2016, Art. 45 para. 4.

claim of Article 179(3) TFEU. The tasks of the European Defence Agency are carried out independently of Title XIX TFEU, also because the decision procedures in relation to research programmes within the framework of the CFSP differ from those of the TFEU and mixed acts are prohibited in this respect.³⁶

62. To conclude the textual interpretation: The inclusion of the European Defence Agency in the work of the European Defence Fund is insufficient in the EDF Regulation. The task division provided there is incompatible with the competence order of the Treaties. The role assigned to the European Defence Agency in the EDF Regulation as an observer in the programme committee does not satisfy the requirements of EU law. This is because it does not adequately reflect the competence delegated to the Agency, namely to contribute to identifying measures to strengthen the industrial and technological base of the defence sector, if the Defence Agency functions as a mere observer under the supervision of the Commission in the framework of the committee procedures. The textual interpretation of Article 179 TFEU in conjunction with Article 42(3)(2) and Article 45(1)(d) and (e) TEU therefore leads to the conclusion that the establishment of the EDF in the EDF Regulation is not compatible with the *lex specialis* for the area of defence research in the CFSP.

(2) History: Relationship between CFSP and TFEU

63. A historical interpretation confirms that, in relation to the competences of the European Defence Agency, the EDF Regulation exceeds the boundaries of what is possible under the Treaties by establishing a fund with parallel tasks.

64. The extension of the support obligation to research activities arising in the framework of the CFSP was only achieved with the Treaty of Lisbon. Where Article 179(1) TFEU now sets out a support obligation for 'other Chapters of the Treaties', the old Article 130f(1) TEC in the version of the Treaty of Maastricht provided that all research activities must be supported that 'are deemed necessary by virtue of other Chapters of this Treaty'. The same picture for Article 179(3) TFEU: While in

³⁶ See *supra*, paras. 29–33, and *infra*, para. 66.

the Treaty of Lisbon the provision requires that all 'Union activities under the Treaties' in the area of RTD including demonstration projects, shall be decided on and implemented in accordance with the provisions of this Title, Article 130f(3) TEC (Maastricht) referred to 'all Community activities under this Treaty'.

65. The editorial replacement of 'Treaty' with 'Treaties' has the background that the Treaty of Lisbon superseded the pillar structure of the Treaty of Maastricht with a new treaty architecture. In it, the TEU has essential contents of its own and is no longer limited to a merely auxiliary function. As a result, Article 40 TEU now also provides for a mutual incommensurability of TFEU and TEU and thereby emphasises the autonomy of the TEU and thereby of the CFSP in relation to the TFEU. Unlike the old version of Article 47 TEU, which, in case of a dual purpose, established the primacy of Community law if in doubt, Article 40 TEU provides for a mutual incompatibility in case of overlaps. For the *lex specialis* question, it is relevant in relation to the historical argument that the expansion to 'the Treaties' in Article 179 TFEU occurred in the context of elevating the CFSP to the level of an autonomous policy area in the Treaty of Lisbon. With respect to the old version of Article 47 TEU, the CJEU had still decided that the Union is precluded 'from adopting, on the basis of the EU Treaty, a measure which could properly be adopted on the basis of the EC Treaty'. The Union 'cannot have recourse to a legal basis falling within the CFSP in order to adopt provisions which also fall within a competence conferred by the EC Treaty on the Community'.³⁷

66. Such an automatic precedence of supranational law of the TFEU no longer exists after the introduction of Article 40 TEU. A measure which, as in the present case, has a component that both comes within the scope of Title XIX TFEU and of Article 42(3)(3) in conjunction with Article 45(1)(d) and (e) TEU as part of CFSP is not to be based on the TFEU provisions simply because they generally take precedence over the TEU. Certainly, a 'parallel competence constellation is also imaginable today. But it cannot be resolved in a parallel fashion. Rather, Article 40 requires a clear answer to the question on which competences a measure is to be based and pursuant to which procedure it is to be adopted. Therefore it is precluded to base a

³⁷ CJEU, judgment of 20 May 2008 – Case C-91/05 (Commission v. Council), para. 77.

measure at once on competences from the CFSP area and from another Union policy.’³⁸

67. For the relationship between Article 179 TFEU and Article 42(3)(3) in conjunction with Article 45(1)(d) and (e) TEU, this means two things: (1) The support obligation now extended in Article 179(1) TFEU to the ‘Treaties’ has an auxiliary function. Measures under Title XIX TFEU do not replace measures under other Chapters, they support the institutions established there in the execution of their tasks. (2) The exclusivity claim of Article 179(3) TFEU, which in the course of an editorial adaptation to the new Treaty structure now also arises with respect to CFSP measures, cannot include measures allocated to the European Defence Agency. For those measures, the Treaty of Lisbon simultaneously with this editorial adaptation created a specific solution in Article 179 TFEU. Confirmed by the historical interpretation, Articles 42(3)(3) and 45(1)(d) and (e) TEU constitute *leges speciales* to the general rule of Article 179 TFEU.

(3) Telos: Differentiated Participation in the European Defence Agency

68. This interpretation is also in line with the *telos* of the arrangement of Article 179 TFEU and Article 42(3)(3) in conjunction with Article 45(1)(d) and (e) TEU. The concentration effect of research support with the exclusivity claim in Title XIX TFEU has the important function of protecting research support from a sectorial parcelling. This was already the starting point in Article 130f TEC (Maastricht), which was then taken over by the editorial adaptation in Article 179 TFEU and expanded to the Treaties and thereby the TEU, including the CFSP. At the same time, with the Treaty of Lisbon, the TEU and, with it, the CFSP was strengthened as an autonomous area. A specific provision on the support of specific research in the defence sector was also introduced, which differentiates and thereby also separates this area from other CFSP areas.

³⁸ Cremer, in: Callies and Ruffert, EUV/AEUV, 5th ed. 2016, Art. 40 para. 11 (my translation).

69. The main reason for this is to enable a differentiated participation in the European Defence Agency.³⁹ In accordance with Article 5 of the Protocol on the Position of Denmark, Denmark does not take part in the activities of the European Defence Agency; moreover, the Member States are free to take part or not in individual activities of the Agency.⁴⁰ The provisions of Article 42(3)(3) in conjunction with Article 45(1)(d) and (e) TEU react to this situation. By not communitising specific defence research but placing it in the framework of the CFSP, it was possible to comply with the national differentiation wishes. At the same time, including defence research within the framework of the European Defence Agency makes it possible to take into account the specifics of research in the defence sector with respect to confidentiality and security interests.⁴¹

70. The aim of the provisions in Article 42(3)(3) in conjunction with Article 45(1)(d) and (e) TEU is overall to exempt this area of specific defence research from the general framework conditions. Unlike Article 346(1)(b) TFEU, which enables a Member State within the Treaties to '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', Article 42(3)(3) in conjunction with Article 45(1)(d) and (e) TEU exclude specific defence research from the scope of the general research rules both institutionally and substantively as *lex specialis*.⁴² In terms of legislative design, endowing the European Defence Agency with the task of supporting specific defence research does this. The Commission receives a substantively and institutionally supportive role in Article 179(1) TFEU. The European Defence Agency, where the task of supporting defence research is located, is called upon to work with the Commission supporting it, where necessary, Article 45(2) cl. 4 TEU. The EDF Regulation contravenes these

³⁹ On the background, see para. 64 ff. of the Final Report of the Working Group VIII 'Defence' of the European Convention, CONV 461/02, 16 Dec. 2002.

⁴⁰ See, in details, Eisenhut, Europäische Rüstungskoooperation, Baden-Baden 2010, pp. 288 ff.

⁴¹ The desideratum of the German *Bundesrat*, mentioned *supra* note 27, of a strict separation of civil research in the framework of the 'Horizon' Program and ('given their particular sensitivity as well as their specific requirements and aims') defence-related research in the framework of the EDF is not realisable under the regime of Title XIX TFEU for the ED – but it is in line with the legal design that, among others, for this very reason allocates specifically defence-oriented research of the European Defence Agency to the CFSP rules.

⁴² See also Lock on the *lex specialis* character in relation to Art. 173 TFEU: Lock, § 6 Industrie-, Technologie- und Forschungspolitik, in: Wegener (ed.), Europäische Querschnittpolitiken, Baden-Baden 2014, para. 70.

principles and is incompatible with the telos of the competence distribution in the Treaties relating to defence research.

(4) Context: Tasks of the European Defence Agency

71. Text, history and telos of the conjunction of Article 179 TFEU and Articles 42(3)(2) and 45(1)(d) and (e) TEU indicate the systematic conclusion: As *lex specialis*, Article 42(3)(3) in conjunction with Article 45(1)(d) and (e) TEU are the starting provisions for an inquiry into the possibilities of a defence research support based on the TFEU. Accordingly, connections to CFSP areas are possible in the framework of implementing the framework programmes, also on defence policy issues. But a *specific* programme to support RTD measures in the defence sector is impermissible. The *lex specialis* precludes provisions such as Article 28 EDF Regulation that, by setting up a comitology committee, lead to competing support organisations in the area of defence research and to parallel structures for specific defence research on the basis of general competence titles. The Commission may only have an auxiliary function in this context, assisting the European Defence Agency in the fulfilment of its tasks. It cannot take on these tasks itself and thereby supplant the European Defence Agency in the internal market with its own structures, reducing the Agency to an observer function. But this is exactly what is happening if, in Article 8 EDF Regulation, the EDF is subjected to budget administration by the Commission who, pursuant to Article 58(1)(c) of the Financial Rules, manages the Fund and has the decisions prepared by a comitology committee in which the European Defence Agency has a mere observer status in accordance with Article 28 EDF Regulation.

72. According to the Treaties, the European Defence Agency is not merely an observer of measures to support defence research, but it is the authoritative institution for the implementation of these measures, because Article 42(3)(3) in conjunction with Article 45(1)(d) and (e) TEU are *lex specialis* to the general provisions on research support. As such, these provisions take precedence over the general competence titles from Title XIX TFEU because what the CJEU put abstractly applies to them concretely, namely ‘that, in accordance with the principle *lex specialis derogat legi*

generali, special provisions prevail over general rules in situations which they specifically seek to regulate'.⁴³

(5) Conclusion

73. Article 42(3)(3) in conjunction with Article 45(1)(d) and (e) TEU is *lex specialis* for those substantive matters of the EDF Regulation which the Commission subsumes under the competence title for industry support in Article 173(3) TFEU.⁴⁴ But also for those parts of the EDF Regulation that constitute RTD measures, Article 42(3)(3) in conjunction with Article 45(1)(d) and (e) TEU are *lex specialis* because the exclusivity claim in Article 179(3) TFEU does not apply to specific defence research.

74. The EDF Regulation is incompatible with Article 42(3)(3) in conjunction with Article 45(1)(d) and (e) TEU. Even supposing that the main aim of the EDF Regulation consists, as stated by the Commission, in the support of industry and RTD measures in the defence sector, the EDF Regulation cannot be based on Article 173(3) TFEU and the provisions of Title XIX TFEU.

3. Consequences of Categorising the EDF Regulation as a CFSP Measure

a) Precluding Effect of Article 40 TEU

75. Since the specific provisions of the TEU assign the tasks intended for EDF to the European Defence Agency, Article 40(2) TEU precludes reliance on competence titles from the TFEU for the support of defence industry and defence-related RTD measures. This is irrespective of whether one (a) assumes that the EDF Regulation inseparably connects the aims of defence, industry support (in the defence sector) and RTD support (in the defence sector) or (b) sees the EDF's main aim in the support of the defence capacity and strategic defence autonomy of the Union – as the Explanatory Memorandum for the proposed Regulation indicates – or

⁴³ CJEU (EGC), judgment of 22 April 2016 – Cases T-60/06 RENV II and T-62/06 RENV II (Italian Republic v. Commission), para. 81.

⁴⁴ See *supra*, para. 53.

(c) supposes the aim mentioned in the Regulation of an integrated support of industry and RTD measures in the defence sector as the authentic main aim of the EDF.

b) Financing Ban from Art. 41(2) TEU

76. Financing defence policy support measures from the general Union budget is precluded due to the CFSP financing rules. The operative expenditure in relation to the implementation of the CFSP, which in the case of the EDF arises due to measures having military or defence implications,⁴⁵ is generally borne by the Member States in accordance with the GDP key pursuant to Article 41(2)(1) TEU. Therefore, another financing structure for CFSP measures is precluded.

77. This does not mean that measures based on a competence title beyond the scope of CFSP cannot have a financing structure differing from Article 41(2)(1) TEU. But since Article 42(3)(3) in conjunction with Article 45(1)(d) and (e) TEU as *lex specialis* for specific industry and RTD support in the defence sector bar recourse to general TFEU competence titles for such support, a financing of such tasks independent of CFSP financing is not possible either. In that respect the maxim applies: 'Competence determines the source of financing.'⁴⁶

II. Legal Means of Enforcement

78. Against the establishment of the EDF in the EDF Regulation incompatible with competences, recourse may be had to the CJEU and to the German Federal Constitutional Court.

1. CJEU

79. The CJEU may be seized with an action for annulment under Article 263 TFEU by privileged plaintiffs (European Parliament, Council, Commission, Member States)

⁴⁵ See *supra* paras. 37–43.

⁴⁶ Council of the European Union, 'I' Item Note of 24 Nov. 1999 on General criteria for the exercise of either Community powers or the European Union's powers under the CFSP (13314/99), Annex, II. A.

without having to show a specific concern. Non-privileged plaintiffs – such as individual enterprises, possibly research institutions and individuals otherwise affected by funding measures – will have to show an individual concern. While CFSP provisions are exempt from review by the CJEU, Article 24(1)(2) TEU makes a counter-exception in relation to article 30 TEU. This means that the Court has jurisdiction over the legal question at issue here, whether the mutual incompatibility of TFEU and CFSP provisions was respected.

80. In addition, a subsidiarity action – designed as a subset of the annulment action pursuant to Article 8 of the Subsidiarity Protocol – can be brought to the CJEU. The concrete preconditions are governed by domestic law (in Germany, Article 23(1a), cl. 2 of the Basic Law, in conjunction with section 12 IntVG), which may not, however, limit the effectiveness of the procedure established by Union law. The time limit for such actions is two months. In Germany, in accordance with section 12 IntV, a quarter of the members of the *Bundestag* may initiate a subsidiarity action; the *Bundestag* may also do so. The action does not depend on a prior subsidiarity complaint. The Court's scope of review not only extends to the compatibility of the legal measure with the subsidiarity principle; in a subsidiarity action, the Court reviews the triad of limits in Article 5 TEU comprehensively, in particular including the principle of conferral concerned in the present case.⁴⁷

2. German Federal Constitutional Court

81. Since the establishment of the EDF evidently violates key competence provisions in Union law and thereby the principle of conferral of powers in Article 23 of the Basic Law, the Federal Constitutional Court can also be seized with an *ultra vires* objection by way of a dispute between organs of the state or a constitutional complaint. Summary proceedings are also possible before the Federal Constitutional Court, aiming at obliging the German representation in the Council to reject the proposal for a regulation and – if this is not promising, because unanimity in the Council is not required by the legal bases chosen by the Commission – to take further measures against the establishment of an EDF.

⁴⁷ On the conditions for a subsidiarity action, see Calliess, in: Calliess and Ruffert, EUV/AEUV, 5th ed. 2016, Art. 12 EUV, paras. 27–38.

82. The Federal Constitutional Court has reduced the *ultra vires* complaint to manifest and qualified violations of essential legal principles.⁴⁸ The EDF Regulation – should it be adopted as proposed – constitutes a qualified and manifest violation of essential principles of the Treaties. In its Lisbon decision, the Federal Constitutional Court has emphasised the clear separation of CFSP and supranational law as a central principle of the architecture of the Treaties, by noting: ‘Even after the entry into force of the Treaty of Lisbon, the Common Foreign and Security Policy, including the Common Security and Defence Policy, will not fall under supranational law (see Article 24.1, Article 40 Lisbon TEU; Article 2.4 TFEU and Declaration no. 14 Concerning the Common Foreign and Security Policy annexed to the Final Act of the Treaty of Lisbon).’⁴⁹ The EDF Regulation is incompatible with these essential principles. This violation is also of considerable weight, manifest and therefore sufficiently qualified within the jurisprudence of the Federal Constitutional Court.

83. The re-declaration of competences that the Commission is attempting in the case of the EDF Regulation in order to base a legal instrument evidently falling under the CFSP on supranational law is a qualified violation of the principle of conferral of powers. The Commission is evidently and illegally circumventing a differentiated CFSP rule in order to supranationalise an area that the Treaties have deliberately not supranationalised. Permitting this would mean creating the possibility for ‘an arbitrary cross-sectoral interchange of competence titles in the sense of competence shifting [...] – as a result, the principle of conferral would factually become obsolete, because in a complex and networked world, everything is somehow connected to everything else’.⁵⁰

⁴⁸ Federal Constitutional Court, decision of 6 July 2010 – 2 BvR 2661/06 (Honeywell), ECLI:DE:BVerfG:2010:rs20100706.2bvr266106, para. 61 (official translation): ‘A breach of the principle of conferral is only manifest if the European bodies and institutions have transgressed the boundaries of their competences in a manner specifically violating the principle of conferral (Article 23.1 of the Basic Law), the breach of competences is in other words sufficiently qualified [...]. This means that the act of the authority of the European Union must be manifestly in violation of competences and that the impugned act is highly significant in the structure of competences between the Member States and the Union with regard to the principle of conferral and to the binding nature of the statute under the rule of law.’

⁴⁹ Federal Constitutional Court, judgment of 30 June 2009 – 2 BvE 2/80 (Lisbon), ECLI:DE:BVerfG:2009:es20090630.2bve000208, para. 390

⁵⁰ Lindner, Die Europäisierung des Wissenschaftsrechts, Tübingen 2009, p. 42 (my translation).