JCMS Journal of Common Market Studies UACES
JCMS 2016 Volume 54. Number 2. pp. 444–462 DOI: 10.1111/jcms.12290

Original Article
Judicialized Law-Making and Opportunistic Enforcement: Explaining the EU's Challenge of National Defence Offsets*

MORITZ WEISS[1] and MICHAEL BLAUBERGER[2]
[1]LMU Munich, Geschwister-Scholl-Institute of Political Science (GSI). [2]University of Salzburg, Salzburg Centre of European Union Studies (SCEUS)

Abstract
This article seeks to explain how the European Union (EU) – by challenging national defence offsets – managed to move into a highly sensitive policy area under formerly exclusive Member State competence. Whereas major accounts of integration depict defence policy as a least likely case, our process-tracing analysis shows that the EU's recent challenge of defence offsets was a case of supranational self-empowerment. We theorize two consecutive strategies of judicial politics, which the Commission employed at different policy stages to overcome opposition from Member States and defence firms against domestic policy change: judicialized law-making and opportunistic enforcement. Both strategies depend on three scope conditions: expansive case law of the European Court of Justice (ECJ), its fit with policy priorities of the Commission and a credible threat of follow-up litigation.

Keywords: compliance, defence procurement, European Commission, European Court of Justice, judicial politics, Europeanization.

Introduction

The idea of offset arrangements might appear bizarre to someone who is not familiar with the peculiar practices of defence procurement:

> 'Imagine that Apple could sell iPhones in Brazil only if it ploughed 20% of its projected revenues there into local technology firms. That may sound absurd, but this is what happens when governments buy arms from foreign contractors'.[1]

Defence offsets are compensation agreements: a government imports military equipment under the condition that a share of the contract value is directed back into its own economy. Around the globe, these protectionist agreements are the standard operating procedure in defence procurement from foreign sources (US Department of Commerce, 2013).

In the European Union (EU), as in the rest of the world, offsets have traditionally been regarded as belonging to the politically sensitive realm of national security and EU Member

* We would like to thank our interview partners, three anonymous reviewers as well as Berthold Rittberger, Alexander Spencer and our colleagues in Munich and Salzburg for their great help in preparing this article. Moritz Weiss benefitted from a seed grant of the Stiftung Deutsch-Amerikanische Wissenschaftsbeziehungen (SDAW) and Michael Blauberger spent a wonderful semester at the Center for European Studies (CES) at Rutgers University during the course of this research. We deliberately reversed the alphabetical order of author names to underscore our equal contributions in writing this article.

[1] 'The defence industry: guns and sugar', *The Economist*, 25 May 2013.

States have been cautious not to delegate the regulation of offsets to the European level. Yet defence offsets are under challenge in the EU. Despite widespread Member State insistence on national sovereignty, the European Commission has proclaimed the goal of phasing out offsets and most EU governments have already changed their offset rules. This policy shift is puzzling – both empirically, as it goes against the global trend towards an increasing use of offsets, and theoretically, as it contradicts the shared insights of otherwise very diverse accounts of European integration.

Typically, defence policy is depicted as a least likely case for integration and strong arguments are provided for why little progress has been made in this area for decades (Moravcsik, 1993a; Stone Sweet and Sandholtz, 1997; Menon, 2014): these include governments' autonomy concerns in security-related affairs, vested and protectionist interests of national defence industries and governments and the absence of a strong transnational demand for integration in a highly fragmented market. In this article we explain the EU's recent challenge of defence offsets as an instance of supranational self-empowerment, combining expansive jurisprudence of the European Court of Justice (ECJ) and its strategic use by the European Commission. By applying two consecutive strategies of judicialized law-making and opportunistic enforcement, the Commission was able to autonomously promote EU legislation and domestic policy change.

This article makes an empirical as well as a theoretical contribution. By addressing the question why Member States are changing a firmly established practice of weapons acquisition, we add to the growing political science literature on EU defence–industrial integration, which so far focuses almost exclusively on institutional innovation at the European level (Mörth and Britz, 2004; Hoeffler, 2012; Blauberger and Weiss, 2013; Fiott, 2015). In solving the empirical puzzle, the process-tracing analysis also redirects attention to the Commission as the key driver behind the Europeanization of national defence procurement. More generally, we theorize two strategies of judicial politics, which explain the ability of the Commission to promote EU legislation and domestic reform against all odds, and we identify three scope conditions under which these strategies may also become effective in other policy domains.

The next section exposes the main puzzle: changes of national offset policies in the EU against the global trend. Section II theorizes the Commission's strategies of judicialized law-making and opportunistic enforcement. Using the method of process-tracing, section III provides a detailed analysis of the Commission's impact on national offset policies. Section IV takes issue with two major competing explanations, focusing on the integration preferences of powerful EU Member States and transnational firms, and the final section discusses the implications of the analysis.

I. Defence Offsets: EU Policy Change Against the Global Trend

Offset agreements are a pervasive feature of the defence–industrial sector, although they may come under different labels and in different forms. Some offsets are referred to as 'industrial participation' programmes or the '*juste retour*' principle, but the idea of requiring compensation for domestic industries in exchange for importing defence goods from abroad remains basically the same. Direct offsets are related to the imported defence good or service and typically aim at integrating domestic firms into the supply chain of large, foreign defence contractors. In contrast, indirect offsets are unrelated to

the imported defence item and may, for example, consist of an obligation to invest in the economy of the importing country. Offset requirements are usually incorporated in calls for tenders when governments issue large weapons acquisitions. Apart from original security concerns such as security of supply, most national offset policies explicitly aim at broader industrial policy goals such as attracting foreign direct investment, opening new export markets, technology transfer, employment or SME support (Eriksson, 2007).

From an economic perspective, offset obligations are often assessed critically for being costly, distorting competition and failing to meet their industrial policy objectives (Eriksson, 2007, pp. 39–43; Hartley, 2007), and yet they are widely used in global defence procurement. As a result, large prime contractors have to spend huge sums on compensations. According to the US Department of Commerce, US defence contractors in 2011 reported 'new offset agreements with 27 countries valued at $5.48 billion. The value of these agreements equaled 50.9 percent of the $10.76 billion in reported contracts for sales of defense articles and services to foreign entities with associated offset agreements' (US Department of Commerce, 2013, p. i). Large importers of defence equipment such as Saudi Arabia and rising economies with growing defence budgets such as India have developed extensive offset programmes. And even the US, which rarely procures foreign defence equipment and has long officially opposed offsets, in fact demands compensations from foreign suppliers, e.g. requiring them to 'buy American' from local producers of spare parts and to hire local subcontractors (Markusen, 2004, p. 84). Defence offsets are also largely sheltered from the liberalizing trade regime of the WTO (World Trade Organization). Although the GPA (Government Procurement Agreement) explicitly prohibits offset policies as severe market distortions, the first exemption in Article 23 concerns defence procurement. As a consequence, every country may argue that everyone else insists on offsets and, thus, offset practices have largely come to be regarded as a necessary evil of global arms trade (US Department of Commerce, 2013, p. 1).

Europe has been no exception to this global trend until recently: offset practices have been pervasive and were even gaining in importance (Markusen, 2004, p. 72; see also US Department of Commerce, 2013). For decades, offsets have been regarded as problematic in EU legal terms as they restrict free trade and discriminate on grounds of nationality (Eriksson, 2007, pp. 25ff.), but this did not limit their continual use by Member State governments, many of which even developed domestic rules and strategies on how to systematically use offsets in defence procurement (Heuninckx, 2014, pp. 47–48). The European Commission has been critical of Member State offset practices for some time, but did not challenge them as they were perceived a core area of national sovereignty. In 2009, when EU Member States adopted binding European legislation on defence procurement for the first time, the issue of offsets was left unaddressed. Instead, Member States simultaneously established a legally non-binding code of conduct on offsets within the inter-governmental setting of the EDA (European Defence Agency) in October 2008 (EDA, 2008; Fiott, 2015, pp. 551–2).

Yet, only a few years later, the picture has radically changed. In a communication of July 2013, the Commission announces the goal of a 'rapid phasing out of offsets' and applauds that 'all Member States have withdrawn or revised their national offset legislation' (European Commission, 2013, p. 6). Telling examples are covered by *Countertrade & Offsets*, a major publication of the global offset industry, regarding domestic reforms even in reluctant EU Member States: whereas 'Poland declare(d) War' on the

Commission in late 2011, 'Poland surrender(ed)!' just one year later.[2] While it is still too early to assess policy outcomes, our own empirical analysis presented later in this article, as well as first legal assessments (Trybus, 2014, p. 425), show significant changes to national defence procurement procedures and regulations, including those governing defence offsets. These national policy shifts not only challenge the conception of defence procurement as protected by national sovereignty, which is reflected in international and European trade agreements, but also deviate from the global trend towards an increasing worldwide use of offsets.

II. Theorizing Strategies of Judicial Politics

We explain the EU's challenge of national offsets as an instance of supranational self-empowerment, achieved through two consecutive strategies of judicial politics: judicialized law-making and opportunistic enforcement. By judicial politics, we do not refer to Court jurisprudence as such, but rather to its strategic usage through other, often non-judicial actors (cf. Alter and Meunier-Aitsahalia, 1994, pp. 555–8; Conant, 2007, p. 58). Our analysis focuses on the European Commission, which, by drawing on the case law of the ECJ, has been able to promote European legislation on defence procurement (Blauberger and Weiss, 2013) and to enforce domestically a particularly strict interpretation of the (in)admissibility of defence offsets against widespread EU Member State resistance. Neither an 'activist' Court nor an 'entrepreneurial' Commission could have set and enforced supranational rules alone. By stressing the combination of the Court's jurisprudence and the Commission's consecutive strategies of judicial politics, our approach provides an answer to the fundamental challenge of 'why, in an open confrontation between member states and supranational actors, the latter could ever be expected to prevail' (Pierson, 1996, p. 142).

Judicialized Law-Making

The independence of the ECJ and its ability to expansively interpret EU law even against Member State opposition are hardly questioned these days (Kelemen, 2012b). Yet there are at least two important caveats against overestimating the ECJ's role as an agent autonomously engaging in 'judicial lawmaking' (Wasserfallen, 2010, p. 1132). As is the case for courts in general, the ECJ depends on other actors to supply legal cases and, once decided, to render its judgments effective. Consequently, a broad literature on EU judicial politics has emerged which emphasizes the Court's interaction with national courts (Davies, 2012), private litigants (Cichowski, 2007; Kelemen, 2012a) and the Commission (Alter and Meunier-Aitsahalia, 1994; Nowak, 2010). Moreover, courts are inefficient legislators, because they can only develop their doctrine on a case-by-case basis. To overcome this judicial incrementalism, case law often has to be codified and systematized into genuine legislation (Wasserfallen, 2010, p. 1133).

Therefore, we suggest focusing not on 'judicial law-making' but on '*judicialized law-making*', i.e. on the promotion of EU legislation under the influence of actual or potential ECJ case law. Given its powers to bring cases to the ECJ and to propose new legislation, the Commission is institutionally privileged to engage in this kind

[2] *Countertrade & Offsets*, June 2011, Vol. 29, No. 12, p. 1 and September 2012, Vol. 30, No. 17, p. 2.

of EU judicial politics. According to the seminal argument of Susanne Schmidt (2000), the Commission may pursue a 'lesser evil' strategy to promote EU legislation – 'threaten(ing) governments with unilaterally bringing about a worst-case scenario' through ECJ litigation, in order to make 'the adoption of a proposal (…) preferable to the originally opposed governments' (Schmidt, 2000, p. 43). Compared to politically uncontrolled integration through case law, Member State governments can partly shape EU legislation and seek to pre-empt further litigation.

While endorsing the original 'lesser evil' argument, we contend that judicialized law-making promoted by the Commission may be even more pervasive, for two interrelated reasons. First, ECJ case law increasingly touches upon policies which were long perceived to be national prerogatives. It thereby empowers the Commission to interfere even in policy fields, in which Member State governments have not delegated competences to the supranational level (Genschel and Jachtenfuchs, 2014). Numerous examples could be given in which the Court held that 'in the areas in which the Community does not have competence, the Member States (…) must nevertheless exercise (their) competence consistently with Community law',[3] i.e. consistently with fundamental EU Treaty principles such as free movement, non-discrimination and undistorted competition. Second, while EU legislation may constitute the 'lesser evil' compared to an imminent threat of Court-driven integration, Member States' ability to keep the Court's jurisprudence under legislative control is ultimately limited. Given that the EU Treaties are legally superior to secondary law, Member States cannot legislatively 'override' the Court's Treaty interpretation and, albeit signalling their collective will through secondary legislation, cannot fully ensure Court deference in the future (Davies, 2014, p. 1583). Moreover, secondary legislation may give rise to new interpretive conflicts itself and trigger unanticipated legal consequences at the implementation stage.

In short, the Court's jurisprudence provides the Commission with opportunities to draw on specific cases in order to propose and promote general EU legislation. Once adopted, this legislation needs to be implemented by Member States with, again, a prominent enforcement role played by the European Commission.

Opportunistic Enforcement

Implementation and enforcement are the subjects of an increasingly sophisticated field of EU compliance research (Treib, 2014). On the one hand, many studies focus on the transposition and implementation of secondary legislation (Mastenbroek, 2005, p. 1104), and the 'stick' of bringing infringements to the ECJ is seen as one of the Commission's most important tools to ensure Member State compliance (Börzel, 2003, pp. 199, 204). On the other hand, a more recent literature has emerged which traces directly the implementation of ECJ jurisprudence at the domestic level, in particular regarding the interpretation of market freedoms in the EU Treaty (Treib, 2014, p. 13).

We combine insights from these literatures and move one step further in arguing that the Commission may use its enforcement powers opportunistically, not only to ensure correct transposition and implementation of EU secondary legislation but, in fact, as a continuation of policy-making by other means. Through *opportunistic enforcement*, the Commission may promote policy objectives at the stage of implementation which were politically not agreeable at the legislative stage. Opportunistic enforcement hereby refers to a

[3] Case C-341/05 *Laval*, No. 87 of the judgment.

strategy of judicial politics which embeds enforcement of secondary legislation within the larger opportunity structure defined by and evolving through ECJ Treaty (re-)interpretation. Essentially, the Commission may argue that every domestic policy that is not explicitly permitted under EU secondary law can be challenged and risks being prohibited as a restriction of market freedoms in the EU Treaty. As a result, once new EU secondary legislation is adopted, the Commission may not only monitor and sanction its incorrect transposition, but also revisit the compatibility of existing domestic policies with EU Treaty principles, ultimately threatening infringement action.

Understanding the judicial politics of opportunistic enforcement is important, as it allows taking seriously two recurrent findings of advanced EU compliance research. First, determining what actually constitutes 'compliance' and prosecuting 'non-compliance' are more than just legal exercises, but often involve highly political decision-making. There are strong reasons to regard the Commission's infringement decisions as not politically neutral (Hartlapp and Falkner, 2009, pp. 292–3) but partly depending on their fit with 'its broader political and institutional interests' (Conant, 2002, p. 74). Second, compliance with EU law often requires Member States not only to transpose positive EU policies, i.e. secondary legislation, but also to adjust or even abandon domestic policies in light of EU negative integration, i.e. the EU Treaty principles of free movement and undistorted competition (Töller, 2010, p. 430).

In sum, by resorting to opportunistic enforcement, the Commission goes beyond prosecuting incorrect implementation and actually promotes liberal domestic policy change in a more encompassing way. Analogous to the 'lesser evil' of adopting EU legislation, Member State governments may prefer to adjust domestic policies in order to anticipate and avoid further strategic litigation.

Scope Conditions of Judicialized Law-Making and Opportunistic Enforcement

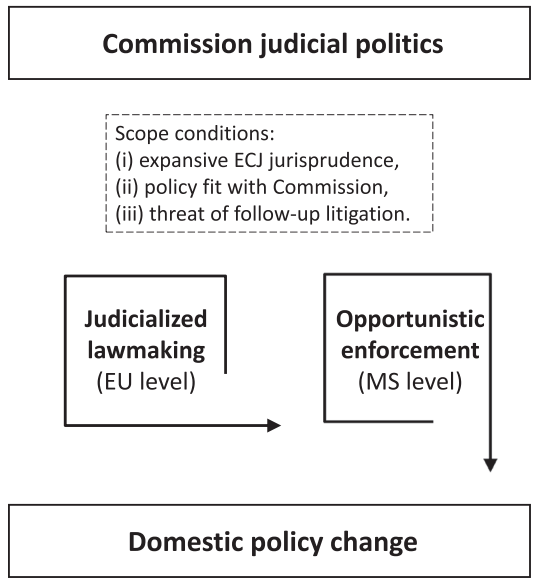
We do not want to suggest that the Commission is unconstrained to impose domestic policy reforms against Member State resistance. Rather, in light of the preceding discussion, we expect both judicialized law-making and opportunistic enforcement in the EU to be effective if three scope conditions are met.

First, the Court needs to get and take the opportunity to issue one or more innovative rulings, which reinterpret the boundary between the EU's internal market principles and previously exclusive national policies. This is what is usually referred to as 'judicial law-making' in the proper sense. Notably, the Court's initial steps into a new policy area need not result from strategic enforcement action on the part of the Commission, but can rather be the accidental side-effect of an individual conflict (Alter and Meunier-Aitsahalia, 1994, p. 538).

Second, the Court's expansive case law needs to be compatible with the Commission's own EU policy priorities. The greater this fit, the more likely the Commission will take up individual ECJ rulings in order to push for the adoption of EU legislation (Wasserfallen, 2010, p. 1135) and to promote domestic reforms through infringement proceedings (Conant, 2002, p. 74). This also implies that innovative Court rulings may have little impact for some time, whereas their full potential is only discovered and exploited once the Commission's policy position has aligned (Nowak, 2010).

The third scope condition for applying strategies of judicialized law-making and opportunistic enforcement is a credible threat of follow-up litigation. The higher the risk of

Figure 1: Theoretical framework



Member State governments losing cases in Court, the greater their incentive to compromise with the Commission in order to regain partial control over political outcomes. To build up such a credible threat, the Commission can either invest its own resources and target Member State infringements or it can try to encourage private litigation top-down, e.g. by informing firms and citizens about their new EU legal opportunities.

The following empirical analysis uses this theoretical framework – summarized in Figure 1 – and traces the EU's constraining impact on national offsets. The main focus will be on the European Commission and how it capitalizes on the emerging ECJ case law in the field through judicialized law-making and opportunistic enforcement.

III. Judicial Politics in Action: How the Commission is Challenging National Defence Offsets

By empirically analysing just a single case, the EU's challenge of national offsets, this study seeks to know 'more about less' rather than 'less about more' (Gerring, 2004, p. 348).[4] Although theory-building on the basis of a single case is necessarily limited, we employ two strategies to strengthen our analytical leverage. First, our examination of offset policies within the EU traces variation over time. We depart from the traditional position of national sovereignty in defence–industrial policy (the Commission 'staying outside'), explain the move towards European legislation in this area ('getting a foot in the door') and account for the challenge of national defence offsets ('stepping through the door'). Whereas the

[4] In addition to the official documents, media sources and secondary literature, which are cited throughout this text, our empirical analysis is based on a series of semi-structured interviews with senior officials from the Commission, Member State governments and industry. For reasons of confidentiality, we do not refer to specific conversations, but consistently backed up findings from the interviews with the best publicly available information.

conditions for Commission judicial politics have become increasingly favourable, the following section on alternative explanations will lay out in detail how competing theoretical determinants have remained largely constant over time. Second, we add a shadow case to our process-tracing analysis, which comes close to a *ceteris paribus* comparison: the inter-governmental adoption of the EDA's code of conduct on offsets.

Staying Outside: Don't Touch National Offsets!

For decades, defence policies were not considered part of the European integration project and, accordingly, the Commission was largely excluded from policy-making. After the early failure of a European Defence Community in 1954, it took numerous attempts for European governments to slowly build today's CDSP (Common Security and Defence Policy), based on unanimity and inter-governmental coordination rather than supranational integration (Weiss, 2012). A strong notion of national sovereignty is also reflected in Article 346 TFEU, allowing Member States to derogate from EU law whenever 'essential interests of security' are concerned (Eisenhut, 2010, p. 127). Based on this article, EU Member States largely disregarded European single market rules for most equipment acquisitions (EDA, 2005). As a result, Member States possessed not only exclusive autonomy in defence–industrial policy; the reference to the security exemption was also used to shield other domestic policies from European interference.

At the European level, the extensive use of the exemption was deplored regularly, but national sovereignty in this realm remained unchallenged. Although not being expressly prohibited in EU primary or secondary law, offsets were seen as discriminatory restrictions of the free movement of goods and services. The Commission, however, hesitated until the mid-1990s before making its first advances into the field of arms exports and arms procurement (Eisenhut, 2010, pp. 111–12). 'Many member states', it criticized, had interpreted the provision of Article 346 TFEU 'as embodying a general principle that all areas concerning national security are not covered by the Treaties. The Commission has always contested this approach' (Commission, 1996, p. 14). It thus acted as a supranational entrepreneur by setting defence–industrial issues on the agenda and by reframing them as economic issues (Mörth and Britz, 2004). Yet its ultimate impact on Member States' defence procurement policies was modest at best, as it never prosecuted Member State breaches of EU law by bringing infringements to the ECJ. Moreover, it deliberately acknowledged Member States' authority in defence policy by referring to the 'specific nature of the sector' and by proposing integration measures only within the inter-governmental pillar of the EU, where decisions require unanimity (Commission, 1996, p. 13). Partly as a consequence of the Commission's caution, the ECJ also had little occasion to express its view on defence matters and where it was asked, it exercised judicial self-restraint (Eisenhut, 2010, p. 184).

This situation began to change rather unexpectedly in 1998. The ECJ decided an infringement case of the Commission against Spain and ruled that the security exemption could only be relied upon in 'exceptional and clearly defined cases' and that Member States had to prove that their measures were 'necessary for the protection of the essential interests of … security' (Case C-414/97, No. 21–22). Looked upon retrospectively, the Court judgment fundamentally altered the sector's opportunity structure, because it (re)defined Article 346 TFEU narrowly – in striking contrast to the established practice – and shifted the burden of proof to Member State governments.

While the verdict's long-term impact can hardly be overestimated, it is important to note that the Court's re-interpretation of Article 346 TFEU was an accidental by-product of the Spanish case rather than any strategic action on part of the Commission. Initially, the Commission had sued Spain among other countries for violating a European directive on the harmonization of VAT (value added taxes). It was only at a later stage of the infringement procedure that Spain defended its domestic legislation with reference to the security exemption. The Commission, far from self-confident on that issue, tried to avoid any discussion about Article 346 TFEU during the Court proceedings by arguing that the Spanish government had failed to raise its point in time (Case C-414/97, No. 17–19). The ECJ did not accept this formalistic objection, scrutinized the Spanish argument substantively and, by refuting it, provided a much greater legal victory for the Commission than it had actually sought. Instead of maintaining its judicial self-restraint, the Court transferred its established internal market jurisprudence to the realm of defence procurement and, thus, expansively re-interpreted the boundary between internal market rules and national policy exemptions. As an unintended consequence from a taxation dispute, the Commission was now empowered to challenge Member States' defence procurement policies in the light of European single market rules, and a new authoritative actor had entered the scene: the ECJ.

Getting a Foot in the Door, but: Don't Mention Offsets!

Court jurisprudence provided the Commission with an unforeseen opportunity to promote EU legislation and, ultimately, domestic policy change. While the Court's legal interpretation resonated with the Commission's broader political agenda to gradually establish a competitive European defence equipment market, it took several years to turn the individual Court victory into a systematic political strategy of *judicialized law-making*. Given that the Court's activist ruling did not, by itself, exert a significant impact on national procurement practices, the Commission's engagement was required to push for systematic policy change.

In 2004, the Commission announced plans for an 'Interpretative Communication' regarding Article 346 TFEU, which was ultimately published in 2006. Whereas the official goal of the communication was framed gently to 'clarify the existing legal framework' and 'give contracting authorities some guidance' (Commission, 2006, p. 3), the main message to EU Member States was a more assertive one. The Commission was no longer prepared to tolerate 'abuse' of the security exemption and was determined to fulfil its role as 'guardian of the Treaties' also in the area of defence procurement (Commission, 2006, pp. 7–8). Explicit reference was also made to offsets, in particular non-military, indirect offsets which, according to the Commission, could in no way be justified with reference to the security exemption (Commission, 2006, p. 8).

In parallel to drafting the Interpretative Communication and as an unmistakable sign of its new resolve, the Commission sued Italy for violating European law. Italian authorities had tried rather audaciously to justify the non-competitive procurement of civilian helicopters with reference to Article 346 TFEU and the trial ended with a clear victory for the Commission (Case C-337/05). Ultimately, the Court confirmed the Commission's interpretation of Article 346 TFEU in a series of infringement proceedings against various EU Member States regarding military exports in 2009 and 2010 (Heuninckx, 2014, p. 39; Trybus, 2014, p. 109). This parallel action sent a strong

signal to EU Member States that, unless they wanted to be the next accused in Court, they could no longer disregard European law in the field of defence procurement by simply referring to the security exemption. Given their discriminatory nature, offsets requirements constituted one of the easiest targets for future legal attack. Member States were now confronted with a credible threat of prosecution and follow-up litigation.

Largely in response to the Court's case law and the Commission's judicialized law-making strategy, EU Member States adopted EU legislation, the defence procurement directive, in 2009 (Trybus, 2013). Faced with the threat of politically uncontrolled integration along the lines of general EU procurement rules, EU legislation tailored to the specific needs of defence and security was perceived as the lesser evil by most governments (Blauberger and Weiss, 2013, p. 1131).

Strikingly, offsets are nowhere mentioned in the directive, although they played an important role during negotiations. On the one side, the Commission's strategic considerations for not including offsets in the directive are well documented in its accompanying impact assessment. The first option, allowing certain offsets, was excluded: 'since offsets usually entail discrimination by their very nature, they stand in direct contrast to the Treaty' (Commission, 2007, p. 49). Given this incompatibility with EU Treaty law, any debate about explicitly prohibiting offsets in the directive (the second option) was regarded as counter-productive by indirectly implying that offsets had so far been lawful. Finally, not mentioning offsets was the preferred third option, because it facilitated overall agreement on the directive without undermining the Commission's strict interpretation of the EU Treaty.

On the other side, some EU Member States sought to amend the Commission's proposal in order to provide a legal basis for offsets (Trybus, 2014, pp. 418–19), but this plan was thwarted by their own legal advisors. One amendment would have allowed including direct as well as indirect offsets as award criteria in defence tenders. Another amendment would have mentioned offsets as a legal contract condition to assure security of supply. The Council's own legal service, however, voiced serious doubts regarding the compatibility of those amendments with EU Treaty law as interpreted by the ECJ: 'restrictive procurement measures designed to promote domestic industry do not comply with the general principles of the EC Treaty' and 'although security of supply is a legitimate ground for justification, industrial participation schemes are potentially discriminatory insofar as they have the aim and the effect of promoting national industry' (Council of the EU, 2008, pp. 4, 6). Hence, any permissive amendment regarding offsets seemed untenable.

As a result, the directive was adopted by EU Member States without mentioning offsets – but most importantly, from the perspective of the Commission, defence procurement was now 'formally recognised to be "different", but nevertheless part of the Single Market' (Schmitt, 2009, p. 6). The Commission had one foot in the door. Moreover, by remaining silent on offsets, Member States triggered unintended consequences, which would only become visible in the post-legislative stage: 'There is a general impression in the defence industry that Member States were not fully aware of the implications of what they were entering when they signed the Defence Procurement Directive'.[5]

[5] 'Special Report: Rigorous interpretation of EC directive leads to vigorous protests; Trade associations dispatch missive to EC; EDA sidelined', *Countertrade & Offsets*, November 2010, Vol. 28, No. 22, p. 2.

Stepping Through the Door: Don't Use Offsets!

Once the defence procurement directive had been successfully adopted, the Commission not only monitored domestic transposition but pursued additional objectives that Member States had opposed during the legislative process. Again, supranational judicial politics were crucial. The Commission applied a strategy of *opportunistic enforcement* and argued that now that the directive had positively defined the spectrum of legal defence procurement practices, Member States no longer needed to resort to the derogation of Article 346 TFEU so frequently. Hence, although secondary legislation cannot alter Treaty law, the directive can be regarded as de facto narrowing the applicability of the security derogation by providing Member States with 'tailor-made' rules and procedures (Trybus, 2013, p. 29) which respect the specific nature of the defence–industrial sector, and thereby making any general exemption 'more difficult to justify' (Heuninckx, 2014, p. 43; Trybus, 2013, p. 29). As a consequence, the Commission announced it would revisit and act against previously tolerated procurement practices such as national defence offsets.

As early as 2010 the Commission published a 'guidance note' on offsets, which shows the importance attributed to the issue and the strictness of its approach: first, even though offsets are not mentioned explicitly, the repeated reference to non-discrimination in the directive makes sufficiently clear for the Commission that offsets violate basic principles of EU law (Commission, 2010, p. 5). The Commission calls upon Member States not to rely on inherently discriminatory offsets, but to take the possibilities offered by the directive, e.g. by requiring prime contractors to open their supply chain to subcontractors (Commission, 2010, pp. 4–5; see also Commission, 2014, p. 4). Second, offsets can only be justified with reference to the derogation in Article 346 TFEU, which has to be interpreted strictly, i.e. Member States carry the burden of proof that their measure is proportionate and directly necessary for protecting an essential security interest. As a consequence, indirect offsets, which are by definition not linked to the subject matter, are in any case prohibited (Commission, 2010, p. 7). Third, any offset arrangement based on the security exemption can only be justified through a detailed case-by-case assessment. Consequently, national offset legislation, which provides for a general approach to offsets, is no longer tolerated by the Commission (Commission, 2010, pp. 7–8).

Despite harsh criticism on behalf of both the Member States and the defence industries, the Commission insisted on its strict interpretation. Although not explicitly mentioned in the defence procurement directive, the abandonment of offsets had become one of the Commission's main criteria for successful implementation (Commission, 2012, pp. 8–9). In parallel, the Commission built up a credible threat of Court litigation by prosecuting EU Member States for incomplete transposition of the directive as well as for violations of EU law in individual procurement cases:

> If Member States don't change their current offset practices and laws by then [i.e. August 2011], they will systematically infringe EU law. If EU laws are not complied with, then a 'harder' approach is taken. But at this stage, we are working with Member States to assess and, if necessary, revise in cooperation with our services their offset rules and practices.[6]

[6] 'Response by the European Commission to questions raised by CTO', *Countertrade & Offset*, November 2010, Vol. 28, No. 22, p. 7.

In total, 18 EU Member States had to change national offset legislation or administrative guidelines during the implementation process (see also Trybus, 2014, pp. 425–6).[7] Some countries, such as Sweden and Greece, completely abolished their offset rules; others, such as Finland, narrowed down the applicability of their offset rules only to those procurements which are still covered by the Treaty exemption. As a partial substitute for offsets permitted by the directive, Member States (e.g. Belgium, see Trybus, 2013, p. 26, footnote 212) may require prime contractors to open their supply chain through competitive subcontracting – yet they may not prescribe in any form that these subcontracts must be awarded to domestic firms.

Four Member States only complied with the Commission's requests after a 'harder' approach was adopted, i.e. after being referred to the ECJ.[8] Two further infringement proceedings against the Czech Republic and Greece regarding individual acquisitions were settled after the Commission's threat of an ECJ referral. Although these proceedings did not primarily target offset obligations, they contained an implicit offset dimension (Eisenhut, 2013, p. 397) and reflected 'opportunistic enforcement' in a particular effective form. Both cases even concerned national measures pre-dating the new directive, but the Commission only agreed to close its infringement proceedings in exchange for an unequivocal commitment to the prospective phasing out of offsets.[9]

In sum, not only did the Commission promote the adoption of EU defence procurement legislation through judicial politics, but since then it has opportunistically enforced the directive in a way that goes beyond Member States' explicit compliance obligations and systematically challenges national offsets. This is not to say that the Commission's tough stance has become universally accepted or even led to an outright ban of defence offsets. One might even speculate whether the new Commission, with a Polish Commissioner in charge, could partly weaken its stance on offsets and put greater emphasis on dialogue with Member States.[10] And yet, the change of domestic offset regulations has already been significant and changes of procurement practices are underway. At the regulatory level, the Commission noted that all Member States withdrew or revised their offset rules, but in some cases it detected further need for revision (Commission, 2013, p. 6; 2014, p. 4). In the run-up to the overall review of the defence procurement directive's effectiveness in 2016, the European Parliament pushes the Commission

[7] Until recently, EDA continuously monitored national offset rules and practices on its website: http://www.eda.europa.eu/offsets/. Old versions of the same synopsis are accessible via web.archive.org, e.g. for July 2009: http://web.archive.org/web/20090715021757/http://www.eda.europa.eu/offsets/.

[8] The referrals concerning Slovenia, Luxembourg and the Netherlands were withdrawn in March 2013; the case against Poland was closed in May 2013.

[9] Infringement proceedings CZ 2008/4656 and EL 2009/4607. According to the Commission, 'What matters is that in the future, all contracts will now be subject to appropriate EU rules': see Commission press release IP/11/1440. Other sources describe this compromise as 'blackmailing' the Czech government into compliance: see 'How the EC Blackmailed the Czech Republic', *Countertrade & Offsets*, December 2013, Vol. 31, No. 23, pp. 2–3.

[10] The Commission meets regularly with Member State representatives in its Expert Group on Defence and Security Procurement (E02389).

to maintain its strict stance against offsets.[11] Ongoing procurement projects, such as Denmark's US $5 billion F-16 fighter replacement programme, are adapted to the novel regulatory situation within the EU,[12] while other Member States, e.g. Poland, appear determined to uphold a more encompassing offset policy.[13] Once again, the remaining 'grey zone might lead to a "final battle" in the ECJ' (Trybus, 2013, p. 27).

IV. Alternative Explanations: Powerful Governments and Transnational Firms

The empirical record of the case study is less consistent with two main competing explanations regarding the interests of powerful governments or transnational firms in phasing out defence offsets.

Powerful Governments

From an inter-governmentalist perspective, national interests are either shaped by political concerns about autonomy or by the economic preferences of major domestic players. Against this background, supranational integration of defence–industrial policies should only become an option in the face of threats to essential geopolitical interests and survival (Menon, 2014, p. 79) or in response to powerful economic interests in liberalizing and/or harmonizing interdependent markets (Moravcsik, 1993b, p. 486).

Regarding defence procurement, the empirical record until the early 2000s confirms the liberal inter-governmentalist perspective. While autonomy concerns did not prevent Member States from entering various forms of inter-governmental cooperation, they broadly resisted any stronger involvement of supranational actors or even supranational regulation (Eisenhut, 2010, pp. 69ff). Commission proposals for reforming defence procurement rules were utterly rejected (Eisenhut, 2010, pp. 114–15). Still in 2005, when consulted on 'how to handle offsets' in the Commission's Green Paper, governments overwhelmingly argued in favour of defence offsets and even the most critical did not call for their EU legal prohibition: for example, the UK 'recognis[ed] that this would be difficult to achieve now', France did 'not encourag[e]' offsets while recognizing their underlying 'legitimate motivations', and Germany called for 'closer scrutiny' of offsets by the Commission, but generally opposed supranational legislation on defence procurement.

But what about the puzzling policy shift after 2009? Scholars have argued that EU governments liberalized their industrial policies in 'anticipation of future market constraints' and that large arms-producing states supported non-discriminatory rules as a means to expand business opportunities for their national champions (Hoeffler, 2012, p. 445). The policy shift could thus be regarded as a consistent implementation of national industrial policy preferences in an increasingly market-oriented

[11] See the own initiative of the European Parliament regarding the 'Impact of developments in European defence markets on the security and defence capabilities in Europe' (Procedure File 2015/2037(INI)), in particular the draft opinion of the Internal Market and Consumer Protection Committee (IMCO, Document PE549.296).

[12] Gerard O'Dwyer, 'Denmark Fights To Retain Defense Offset Rights', *Defense News*, 20 November 2013.

[13] 'Policy paper defines Poland's robust approach to the EC', *Countertrade & Offsets*, January 2014, Vol. 32, No. 1. See also: 'Poland snubs France on missile defense deal' by Jan Cienski, *Politico*, 21 April 2015. http://www.politico.eu/article/poland-snubs-france-on-missile-defense-deal/

environment. Powerful governments may have pushed the weaker rest of the EU to phase out offset obligations. In fact, the Council's failed attempts to include a legal basis for offsets into the defence procurement directive were largely driven by smaller Member States (Trybus, 2014, pp. 418–19) and, at times, representatives from small Member States still raise the issue at the EU level.[14] And yet, the overall development towards EU supranational regulation of defence procurement was not *driven* by large Member State governments, who lost the first landmark judgments in this field (Spain, Italy) and only hesitantly endorsed the idea of a supranational directive (France, Germany, UK). Hence, even though some powerful governments welcomed a tougher Commission stance on offsets, they were not the initiators behind the policy shift, but rather saw it as a potentially positive side-effect of an otherwise unanticipated development.[15]

A parallel outcome shows further limits of the 'powerful governments' explanation. As mentioned above, all EU Member States agreed on a code of conduct on offsets within the *inter-governmental* setting of the EDA in October 2008. If the Commission's tough stance on national offsets merely reflected the will of powerful Member State governments, we should basically observe the same approach in this inter-governmental setting. However, the code of conduct clearly deviates from the Commission's proclaimed goal of phasing out offsets and rather seeks to regulate the *appropriate* use of offsets through 'closer convergence of offset policies and practices and to gradually reduce the use of offsets' (EDA, 2008, p. 3). This variation has significant theoretical implications because, in both political processes, the potential drivers and obstacles behind the policy shift were identical – with just one crucial institutional difference: the code was decided within an inter-governmental setting with a prominent bargaining position for the most powerful governments, whereas the outright challenge of national offsets is promoted by Commission judicial politics in the context of ECJ case law.

Transnational Firms

Alternatively, one might explain the challenge of national offset policies as a response to a powerful demand raised by transnational defence contractors (Stone Sweet and Sandholtz, 1997, p. 300; Stone Sweet and Brunell, 1998). An increasing demand emerges when private actors engaged in transnational exchange respond to increasing interdependencies and request a liberalization of national rules (Stone Sweet and Brunell, 1998, p. 65). In contrast to an inter-governmentalist explanation, however, transnational interests are expected to target EU supranational organizations directly through litigation or lobbying and, thereby, undermine Member State governments' control of the political process. Once the supply side of integration is

[14] See, for example, the debate in the European Parliament's IMCO committee mentioned in footnote 11, in particular the proposed amendments of MEP Charanzova regarding the 'beneficial impacts of off-sets programmes', which seem to reflect less the position of her liberal party group (ALDE) than a specific national perspective (Document PE552.143, p. 19).

[15] For example, this position is reflected in a British House of Commons debate of January 2013 on the implementation of the directive, in which Minister for Defence Philip Dunne describes the Commission's defense taskforce as central in developing the EU's policy and argues that 'one of the attractions for the British Government in signing up to the directive is to remove offset in the EU'. Online: available at «http://www.publications.parliament.uk/pa/cm201213/cmgeneral/euro/130128/130128s01.htm»

activated, supranational rules and organizations develop their own dynamic (Stone Sweet and Sandholtz, 1997, p. 310).

Again, the lack of integration until the beginning of the 2000s is in line with this perspective: 'though some argue for the political benefits that CFSP would bring, few societal transactors find its absence costly. There is therefore minimal social demand for integration in that policy domain' (Stone Sweet and Sandholtz, 1997, p. 309). Little transnational demand led to little supply. To explain the recent policy shift from such a supranationalist perspective, one would have to show that transnational business challenged national offsets through litigation or lobbying.

First, however, the Court's landmark judgments against Spain and Italy, as well as the military export rulings against several Member States, resulted from infringement proceedings of the Commission rather than from preliminary references triggered by private litigation. Neither national nor transnational business were actively involved in the emergence of initial case law, but rather remained silent. When the legal dynamic gradually unfolded, the ECJ took one ruling against a Finnish defence procurement measure (Case C-615/10) in June 2012, which deviated from previous cases in one important respect: the Court case did not result from a Commission infringement procedure, but from a domestic lawsuit that was referred to the ECJ. Hence, private litigation was not the starting point of the overall challenge of defence offsets, but only occurred *after* the Commission had promoted the Court's strict interpretation of European Treaty law. Whereas private litigation clearly reinforced the Commission's threat of follow-up case law, supranational supply *pre*ceded transnational demand.

Second, defence industries were largely opposing the Commission's plans rather than lobbying for an EU-wide domestic policy shift. Despite an increasing number of transnational co-production projects and European-wide mergers and acquisitions after 1990, procurement remained strictly organized along national lines. Even strong transnational players, therefore, are caught between the desire to open up new markets and the wish to protect their privileges at home (Schmitt, 2005, p. 12). In contrast to 27 major weapon programmes in the United States, EU Member States today fund 89 different programmes with a much smaller budget (Menon, 2014, p. 69). Given this fragmentation along national lines, the low corporate demand for European regulation voiced during the Commission's pre-legislative consultations in 2005 comes as no surprise. Only two interest groups advocated an offset ban, while others rejected European regulation of defence procurement in general (e.g. UNICE) or challenges to national offsets in particular: not only did various industry representatives from smaller EU Member States defend offset practices (e.g. from Belgium, Denmark and the Netherlands), but even the British Defence Manufacturers Association (DMA) stressed how 'its Industry supply chain benefits significantly from the offset opportunities … created' in the context of weapons imports from the US. After the publication of its guidance note on offsets, with which the Commission declared offsets inadmissible under EU procurement rules and only narrowly justifiable under the derogation of Article 346 TFEU, the response was a transnationally organized association of representatives of national defence industries from 10 smaller EU Member States. They urged the Commission in a joint letter to withdraw its unilateral legal interpretation: 'Offsets deal with aspects closely related to national sovereignty and therefore the question of offsets in its entirety

is not within the Commission's purview'.[16] In short, transnational business even attempted to reverse the political outcome. Therefore, transnational demand – whether channelled through litigation or lobbying – cannot account for the policy shift of challenging defence offsets after 2010.

Conclusion

Until recently, an EU challenge to national defence offsets was inconceivable for practitioners and integration theorists alike. Most EU governments and arms producers defended offset practices and, today, some still condemn the Commission for its 'Taliban interpretation' of EU law.[17] Nevertheless, this analysis showed how the Commission managed to overcome widespread resistance by drawing on ECJ case law. The Court's ruling against Spain was an accidental but critical juncture as it opened the door for judicial politics. The Commission could now strategically use case law to promote legislation at the European level and, consecutively, the prohibition of offset regulations at the domestic level. Although the directive left offsets unaddressed, it brought the Commission to have one foot in the door of national defence procurement and, ultimately, enabled the Commission to move even one step further by making the phasing out of offsets an enforcement priority. Regulatory changes at Member State level show that the Commission is having a significant Europeanization effect.

This article has combined an empirical with a theoretical contribution. It examined the so far neglected *domestic effects* of EU defence–industrial integration and it provided an explanation of supranational self-empowerment, emphasizing the European Commission's *judicial politics*. The theoretical findings are relevant beyond the specific policy area. First, our analysis showed that the Commission's well-established strategy to push for EU legislation as the 'lesser evil' (Schmidt, 2000) compared to Court-driven integration also exists in a modified form at the post-legislative stage. The adoption of European legislation does not end political conflict and legal re-interpretation, but may enable the Commission to pursue previously contested policy goals through opportunistic enforcement. Second, given the Commission's ability to overcome great opposition to supranational integration in the area of defence once several scope conditions are fulfilled, the observed strategies of judicial politics may well prove applicable to other policy sectors with nationally fragmented markets that have long been sheltered by Member State governments, e.g. regarding social and healthcare services (Martinsen and Falkner, 2011).

Correspondence:
Michael Blauberger, University of Salzburg, Salzburg Centre of European Union Studies (SCEUS), Mönchsberg 2
A-5020 Salzburg
email:michael.blauberger@sbg.ac.at

[16] The letter is accessible online: «http://www.ipage.se/projekt/soff/2010/dec/Bil%201.pdfÆ.

[17] 'The defence industry: guns and sugar', *The Economist*, 25 May 2013.

References

Alter, K.J. and Meunier-Aitsahalia, S. (1994) 'Judicial Politics in the European Community. European Integration and the Pathbreaking Cassis de Dijon Decision'. *Comparative Political Studies*, Vol. 26, No. 4, pp. 535–61.

Blauberger, M. and Weiss, M. (2013) '"If you can't beat me, join me!" How the Commission Pushed and Pulled Member States into Legislating Defence Procurement'. *Journal of European Public Policy*, Vol. 20, No. 8, pp. 1120–38.

Börzel, T.A. (2003) 'Guarding the Treaty. The Compliance Strategies of the European Commission'. In Börzel, T.A. and Cichowski, R.A. (eds) *The State of the European Union VI: Law, Politics, and Society* (Oxford/New York: Oxford University Press).

Cichowski, R.A. (2007) *The European Court, Civil Society and European Integration* (Cambridge: Cambridge University Press).

Commission of the European Communities (1996) 'The challenges facing the European defence-related industry: A contribution for action at European level', *COM*(1996)10 (Brussels: 24 January 1996).

Commission of the European Communities (2006) 'Interpretative communication on the application of Article 296 of the treaty in the field of defence procurement', *COM(2006)779* (Brussels: 7 December 2006).

Commission of the European Communities (2007) 'Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of certain public works contracts, public supply contracts and public service contracts in the fields of defence and security', *COM*(2007)766 (Brussels: 5 December 2007).

Conant, L. (2002) *Justice Contained: Law and Politics in the European Union* (Ithaca, NY: Cornell University Press).

Conant, L. (2007) 'Review Article: The Politics of Legal Integration'. *JCMS*, Vol. 45, No. s1, pp. 45–66.

Council of the EU (2008) Opinion of the Legal Service. *Document 14875/08* (Brussels: 28 October 2008).

Davies, G. (2012) 'Activism Relocated. The Self-Restraint of the European Court of Justice in its National Context'. *Journal of European Public Policy*, Vol. 19, No. 1, pp. 76–91.

Davies, G. (2014) 'Legislative Control of the European Court of Justice'. *Common Market Law Review*, Vol. 51, No. 6, pp. 1579–608.

EDA (2005) *EDA Welcomes European Commission Move on Defence Procurement Rules, Press Release* (Brussels: 6 December 2005).

EDA (2008) *A Code of Conduct on Offsets. Agreed by the Member States Participating in the European Defence Agency* (Brussels: 24 October 2008).

Eisenhut, D. (2010) *Europäische Rüstungskooperation: Zwischen Binnenmarkt und zwischenstaatlicher Zusammenarbeit* (Baden-Baden: Nomos).

Eisenhut, D. (2013) 'Offsets in Defence Procurement: A Strange Animal at the Brink of Extinction?'. *European Law Review*, Vol. 38, No. 3, pp. 393–403.

Eriksson, E.A. (2007) 'Study on the Effects of Offsets on the Development of a European Defence Industry and Market.' (Brussels: EDA).

European Commission (2010) '*Guidance Note: Offsets*', (Brussels: 1 October 2010).

European Commission (2012) 'Report to the European Parliament and the European Council on transposition of directive 2009/81/ec on defence and security procurement', *COM*(2012) 565 (Brussels: 2 October 2012).

European Commission (2013) 'Towards a more competitive and efficient defence and security sector', *COM*(2013) 542 (Brussels: 24 July 2013).

European Commission (2014) 'Implementation roadmap: Towards a more competitive and efficient defence and security sector', *COM(2014)* 387 final (Brussels: 24 June 2014).

Fiott, D. (2015) 'The European Commission and the European Defence Agency: A Case of Rivalry?'. *JCMS*, Vol. 53, No. 3, pp. 542–57.

Genschel, P. and Jachtenfuchs, M. (eds) (2014) *The European Integration of Core State Powers* (Oxford: Oxford University Press).

Gerring, J. (2004) 'What Is a Case Study and What Is It Good For?'. *American Political Science Review*, Vol. 98, No. 2, pp. 341–54.

Hartlapp, M. and Falkner, G. (2009) 'Problems of Operationalization and Data in EU Compliance Research'. *European Union Politics*, Vol. 10, No. 2, pp. 281–304.

Hartley, K. (2007) 'The Arms Industry, Procurement and Industrial Policies'. In Sandler, T. and Hartley, K. (eds) *Handbook of Defense Economics, Volume 2. Defense in a Globalized World* (Amsterdam: Elsevier).

Heuninckx, B. (2014) 'Security of Supply and Offsets in Defence Procurement: What's New in the EU?'. *Public Procurement Law Review*, Vol. 23, No. 2, pp. 33–49.

Hoeffler, C. (2012) 'European Armament Co-operation and the Renewal of Industrial Policy Motives'. *Journal of European Public Policy*, Vol. 19, No. 3, pp. 435–51.

Kelemen, R.D. (2012a) 'Eurolegalism and Democracy'. *JCMS*, Vol. 50, No. s1, pp. 55–71.

Kelemen, R.D. (2012b) 'The Political Foundations of Judicial Independence in the European Union'. *Journal of European Public Policy*, Vol. 19, No. 1, pp. 43–58.

Markusen, A. (2004) 'Arms Trade as Illiberal Trade'. In Brauer, J. and Dunne, J.P. (eds) *Arms Trade and Economic Development: Theory, Policy, and Cases in Arms Trade Offsets* (London/New York: Routledge).

Martinsen, D.S. and Falkner, G. (2011) 'Social Policy: Problem-Solving Gaps, Partial Exits, and Court-Decision Traps'. In Falkner, G. (ed.) *The EU's Decision Traps. Comparing Policies* (Oxford: Oxford University Press).

Mastenbroek, E. (2005) 'EU Compliance: Still a 'Black Hole'?'. *Journal of European Public Policy*, Vol. 12, No. 6, pp. 1103–20.

Menon, A. (2014) 'Defence Policy and the Logic of 'High Politics''. In Jachtenfuchs, M. and Genschel, P. (eds) *Beyond the Regulatory Polity? The European Integration of Core State Powers* (Oxford: Oxford University Press).

Moravcsik, A. (1993a) 'Armaments Among Allies: European Weapons Collaboration, 1975-1985'. In Evans, P.B., Jacobson, H.K. and Putnam, R.D. (eds) *Double-Edged Diplomacy: International Bargaining and Domestic Politics* (Berkeley, CA: University of California Press).

Moravcsik, A. (1993b) 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach'. *JCMS*, Vol. 31, No. 4, pp. 473–524.

Mörth, U. and Britz, M. (2004) 'European Integration as Organizing: The Case of Armaments'. *JCMS*, Vol. 42, No. 5, pp. 957–73.

Nowak, T. (2010) 'Of Garbage Cans and Rulings: Judgments of the European Court of Justice in the EU Legislative Process'. *West European Politics*, Vol. 33, No. 4, pp. 753–69.

Pierson, P. (1996) 'The Path to European Integration: A Historical Institutionalist Perspective'. *Comparative Political Studies*, Vol. 29, No. 2, pp. 123–63.

Schmidt, S.K. (2000) 'Only an Agenda Setter? The European Commission's Power over the Council of Ministers'. *European Union Politics*, Vol. 1, No. 1, pp. 37–61.

Schmitt, B. (2005) *Defence Procurement in the European Union: The Current Debate* (Paris: EU Institute for Security Studies).

Schmitt, B. (2009) 'Adoption of New Directive Brings Defence and Security Procurement into the Single Market'. *Single Market News*, Vol. 2009, No. 1, pp. 6–7.

Stone Sweet, A. and Brunell, T.L. (1998) 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community'. *American Political Science Review*, Vol. 92, No. 1, pp. 63–81.

Stone Sweet, A. and Sandholtz, W. (1997) 'European Integration and Supranational Governance'. *Journal of European Public Policy*, Vol. 4, No. 3, pp. 297–317.

Töller, A.E. (2010) 'Measuring and Comparing the Europeanization of National Legislation: A Research Note'. *JCMS*, Vol. 48, No. 2, pp. 417–44.

Treib, O. (2014) 'Implementing and Complying with EU Governance Outputs'. *Living Reviews in European Governance*, Vol. 9, No. 1, pp. 1–47.

Trybus, M. (2013) 'The Tailor-made EU Defence and Security Procurement Directive: Limitation, Flexibility, Descriptiveness, and Substitution'. *European Law Review*, Vol. 38, No. 1, pp. 3–29.

Trybus, M. (2014) *Buying Defence and Security in Europe. The EU Defence and Security Procurement Directive in Context* (Oxford: Oxford University Press).

US Department of Commerce (2013) *Offsets in Defense Trade: Seventeenth Study Conducted Pursuant to Section 723 of the Defense Production Act of 1950, as Amended* (Washington, DC: US Department of Commerce).

Wasserfallen, F. (2010) 'The Judiciary as Legislator? How the European Court of Justice Shapes Policy-making in the European Union'. *Journal of European Public Policy*, Vol. 17, No. 8, pp. 1128–46.

Weiss, M. (2012) 'Transaction Costs and the Establishment of the European Security and Defense Policy'. *Security Studies*, Vol. 21, No. 4, pp. 654–82.