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RESEARCH ARTICLE

Security of Supply: A National or European Competence?

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Abstract
Security of supply refers to governmental policies that aim to secure the availability of critical products at all times. The COVID-19 pandemic brought to fore the importance of such policies, as suddenly there was an overwhelming need for critical medical supplies that the markets were not able to fulfil. Following the pandemic, the EU has started to construct its own security of supply policy, although lacking an explicit competence for it. This Article shows how competence on security of supply is actually split between the EU and the Member States, and highlights the consequences of this division.

Keywords: security of supply; competence; COVID-19; internal market; State aid law; competition law; public procurement law

I. Introduction

Security of supply refers to governmental policies that aim to secure the availability of critical products at all times. The COVID-19 pandemic brought to the fore the importance of such policies, as suddenly there was an overwhelming need for critical medical supplies such as personal protective equipment (PPE), respirators and vaccines that the markets were not able to fulfil.

Before the pandemic, the European Union's security of supply policy had focused almost exclusively on energy and security and defence. However, some Member States have had a broader understanding of security of supply, focusing on a wide array of policy areas and employing various types of mechanisms in an attempt to address such security concerns.[1]

Apart from the specific area of energy security,[2] and the related competence of Article 194 of the Treaty on the Functioning of the European Union ('TFEU'),[3] the European Union lacks a centralized security of supply policy and security of supply is not mentioned in the EU Treaties, neither as an objective nor as a competence of the European Union. Furthermore, according to Article 4(2) of the Treaty on European Union ('TEU'), national security remains the sole responsibility of each Member State. However, despite the lack of a centralized security of supply policy and a specific legal base in the EU Treaties, the European Union took several measures during the COVID-19 pandemic that strove to increase the availability of critical medical supplies and, arguably, attempted to foster security of supply. The taken measures utilised the flexibility of internal market law

[1]See H Vanhanen, 'COVID-19 and European Security of Supply: Growing in Importance' (2020) 19(2) *European View* 146.

[2]See K Talus, *EU Energy Law and Policy: A Critical Account* (Oxford University Press, 2013).

[3]Article 194 TFEU is ruled out from the scope of this study as it has already been analysed extensively elsewhere. See K Huhta, 'The Scope of State Sovereignty Under Article 194(2) TFEU and the Evolution of EU Competences in the Energy Sector' (2021) 70(4) *International and Comparative Law Quarterly* 991.

(competition law, State aid law and public procurement law) and the scope of Article 114 TFEU as a legal base.[4]

Following the lessons learnt during the pandemic, the European Commission has recently put forth a proposal for a Single Market Emergency Instrument.[5] The proposed instrument aims to increase the EU's capacity to respond to crises and to protect the functioning of the internal market. Moreover, it seeks a coordinated and coherent response to crises that also increases solidarity between the Member States. Specifically, the instrument aims to ensure smooth-running supply chains and the availability of goods and services. A few months prior to the Commission's proposal, the European Parliament decided to initiate an intergovernmental conference for the revision of the EU Treaties. One of the objectives of the proposed revision is to increase the EU's competences in the area of security.[6]

These developments give rise to ask, is security of supply a national or European competence. That is to say, how do the competences conferred to the European Union lend themselves to fostering a European security of supply policy and, conversely, how does this affect the Member States capacity to enact or keep in force their own security of supply policies? Previous research has shown that although the European Union's competences within a given policy area would *prima facie* seem completely absent or limited, this might not be the case after closer scrutiny. The Arctic[7] and the newly proposed European Health Union[8] serve as good examples. In a similar manner, our analysis contextualizes the current system of competences and the relevant internal market law from the perspective of security of supply. In other words, we show how the current system of competences and internal market law operates with regard to security of supply by way of analysing primary EU law and the doctrine of the Court of Justice of the European Union ('CJEU').

The answer to the question in the title of the article is simple: within the confines of the current Treaties, security of supply is both a national and European competence. Although the term security of supply is not used in the EU Treaties, and despite the reservation of Article 4(2) TEU on national security, EU law actually affects this policy area to a considerable degree. Moreover, these effects differ whether looked at from the perspective of the European Union or the Member States: on the one hand, what types of policies and legislation the European Union can adopt in order to purport security of supply in the European Union as a whole or to help Member States do this individually; on the other hand, how Member States can try to keep in place existing policies and legislation or adopt new ones that cater for their idiosyncratic preferences. This way EU law has a 'dual effect' on security of supply. Furthermore, the European Union seems to be creating its own security of supply policy step by step, although still lacking explicit competence for this. The current situation is problematic: in terms of democratic legitimacy, as policies are pursued without an explicit competence; in terms of policy coherence, as the lack of an explicit competence results in conflation of different policies and leaves the Member States with possibilities to pursue idiosyncratic national preferences; in substantive terms, as it forces the European Union to remain within the market-based paradigm to security of supply. Giving the European Union specific competence on security of supply would solve these problems. This would seem logical as the European Union is constantly faced with crises.

[4]See T Tuominen, M Salminen, and K-M Halonen, 'The European Union's Responses to the COVID-19 Crisis: How to Fight a Pandemic with the Internal Market' (2022) 29(4) *Maastricht Journal of European and Comparative Law* 451.

[5]COM(2022) 459 final, Regulation of the European Parliament and of the Council establishing a Single Market emergency instrument and repealing Council Regulation No (EC) 2679/98.

[6]European Parliament resolution of 9 June 2022 on the call for a Convention for the revision of the Treaties (2022/2705 (RSP).

[7]T Koivurova et al, 'The Present and Future Competence of the European Union in the Arctic' (2021) 48(4) *Polar Record* 361.

[8]K Purnhagen et al, 'More Competences than You Knew? The Web of Health Competence for European Union Action in Response to the COVID-19 Outbreak' (2020) 11(2) *European Journal of Risk Regulation* 297.

The Article proceeds as follows. Part II explains what security of supply is about so as to provide the necessary background information for the contextual analysis that follows. Parts III and IV detail the possibilities and constraints set by EU law for both the European Union and the Member States, respectively, to pursue security of supply policies. In both Parts the analysis proceeds through two parts. First, when it comes to legislative competence, for the European Union the question is what types of legislative measures the Union can adopt; whereas for the Member States the question is what types of national policies they can keep in place that breach EU law. Second, in relation to internal market law, the European Union (the Commission) can alter its interpretation of the content of competition law and State aid law so as to facilitate action by the Member States or undertakings operating on the markets that would normally not be allowed, and thereby attempt to foster security of supply; whereas for the Member States the question is, again, what do the various exceptions written into internal market law allow for when pursuing independent national security of supply policies. The analysed issues are connected to the themes of legitimacy, policy coherence, and the market-based paradigm. Part V concludes the discussion by reflecting on the consequences of the current division of competences.

II. What is Security of Supply?

No generally accepted definition of security of supply exists in the Member States. Indeed, the term as such is not even used in all Member States even though they would have in place policies that somehow resemble what is here referred to as security of supply. Furthermore, the particular situation of each Member State affects how they perceive security of supply and what they take to be its main component. These criteria include for example energy sufficiency, geographical and natural conditions, logistical solutions and economic structures.[9]

We can use Finland as an example, mainly because Finland boasts to have a broad understanding of the term as well as a highly developed security of supply policy. The central elements of Finland's security of supply policy include the following key characteristics: Cooperation between public and private sectors and the involvement of all functions of society (eg government, industry associations, and companies). The objective is that management relationships and responsibilities need to be clear during a crisis. Coordination of preparedness is sought through both market-based and regulatory-based means. Preparedness covers not just products as such, but also services and infrastructures. Companies take preparedness into consideration both due to contractual obligations to state purchasers and due to obligations stemming directly from national legislation. The objective of such obligations is to ensure that companies working in critical areas remain in function during a crisis and thus continue to produce critical supplies. While all areas of government and society are engaged in preparedness-related actions, the main coordinating body is the National Emergency Supply Agency (*Huoltovarmuuskeskus*). Its tasks give a good understanding of the extent of Finnish security of supply policy: '1) to coordinate preparedness cooperation between businesses and public administration, 2) to manage national emergency stockpiles, 3) to ensure the functioning of the necessary technical systems and security of the production of critical goods and services, and 4) to follow international developments and guidelines, as well as keeping in touch with foreign authorities and institutions'.[10] The breadth of the agency's actions are reflected well in the policy areas it lists as central: energy, food, finance, logistics, industry, healthcare, and information society.[11]

In EU law, the term security of supply is used in only two policy contexts: energy and security and defence. In the realm of energy, we may take as examples the Security of Supply

[9]See Vanhanen, note 1 above.

[10]Ibid, pp 149–150. See also T Iso-Markku, 'The EU and Finland's Security of Supply: A "Turn" in EU Thinking Provides New Opportunities, But Significant Differences Remain' (FIIA, 2022) Briefing Paper 330.

[11]See Huoltovarmuuskeskus, https://www.huoltovarmuuskeskus.fi/en.

Directive[12] and its successor the Risk Preparedness Regulation.[13] The Directive defined 'security of electricity supply' as 'the ability of an electricity system to supply final customers with electricity' (Article 2(1)(b)). A further definition can be inferred from the Directive's objectives: to safeguard security of electricity supply so as to ensure the proper functioning of the internal market for electricity and to ensure: (1) an adequate level of generation capacity; (2) an adequate balance between supply and demand; and (3) an appropriate level of interconnection between Member States for the development of the internal market (Article 1). In the new Regulation, 'security of electricity supply' means 'the ability of an electricity system to guarantee the supply of electricity to customers with a clearly established level of performance' (Article 2(1)(1)). Indication on the broader meaning of security of electricity supply can, likewise, be inferred from the objective of the Regulation: 'preventing, preparing for and managing electricity crises in a spirit of solidarity and transparency and in full regard for the requirements of a competitive internal market for electricity' (Article 1). In the literature, security of energy supply is nowadays defined as the uninterrupted availability of affordable energy.[14]

Conversely, within the realm of security and defence, we may first mention the Defence and Security Procurement Directive,[15] which explicitly uses the term security of supply and even has an article dedicated to the issue. Although the Directive does not contain an explicit definition of security of supply, it is evident that security of supply relates to, generally speaking, national security concerns and, more specifically, to the conditions on which such equipment are procured, the way subcontractors are used and supply chains managed.[16] Similar observations can be made from the Directive on Intra-EU-Transfers of Defence-Related Products.[17]

In conclusion, the European Union has so far had a narrow understanding of security of supply, focusing only on two policy areas. Furthermore, the internal market, or the markets more generally speaking, have been central in this policy. Indeed, this goes for both policy fields, energy and security and defence.[18] Conversely, Finland, as an example of a Member State, has construed security of supply from a broader policy perspective, covering various substantive policy sectors. Furthermore, while the markets are also central to Finland's security of supply policy, the markets are not the sole source of security. What is common to both market-based and state-based approaches to security of supply is that security is seen both as a matter of being prepared in advance (*ex ante*) as well as of having the capacity to act in case of a crisis (*ex post*).

III. The European Union's Perspective

A. Legislative Competences

1. Internal Market Competences

The first group of legislative competences concerns the internal market and the four fundamental freedoms. As the European Union does not currently have a competence specifically geared towards

[12]Directive 2005/89/EC concerning measures to safeguard security of electricity supply and infrastructure investment [2006] OJ L33/22.

[13]Regulation (EU) 2019/941 on risk-preparedness in the electricity sector and repealing Directive 2005/89/EC [2019] OJ L158/1.

[14]See K Huhta, 'Trust in the Invisible Hand? The Roles of the State and the Markets in EU Energy Law' (2020) 13(1) *The Journal of World Energy Law & Business* 1.

[15]Directive 2009/81/EC on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC [2009] OJ L216/76.

[16]Recitals 8, 9, and 44, and Article 23.

[17]Directive 2009/43/EC simplifying terms and conditions of transfers of defence-related products within the Community [2009] OJ L146/1.

[18]See Talus, note 2 above, pp 98–107, 285–286; K Talus, *Introduction to EU Energy Law* (Oxford University Press, 2016), pp 1–6; Huhta, note 14 above, pp 2–3.

security of supply as such, from the European Union's perspective the question is therefore what types of legislative instruments can the Union adopt by relying on internal market legal bases such Article 53 TFEU on freedom of establishment or Article 114 TFEU on the functioning of the internal market to pursue security of supply objectives. In other words, to what extent can objectives adjacent to the internal market, in this case security of supply, be pursued with internal market legal bases? We will here focus only on the two above mentioned internal market legal bases because they have already been utilised by the Union legislator for security of supply related concerns,[19] however the legal bases related to the other fundamental freedoms function in a similar manner.[20]

Article 53(1) TFEU makes it possible for the European Union to adopt directives through the ordinary legislative procedure for the purpose of ensuring the right of establishment within the internal market, and it is to be read together with Articles 56–62 TFEU on the freedom to provide services within the internal market. According to the doctrine of the CJEU, there are two conditions for recourse to Article 53(1) TFEU as a legal base. First, the adopted directive must have as its objective to make it easier to exercise the freedom of establishment. Second, and more importantly, the directive must also aim to ensure the protection of 'other fundamental interests that may be affected by that freedom'. With this expression the CJEU is referring to the requirements listed in Article 9 TFEU: the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training, and protection of human health. Thus, the European Union's internal market related actions need to be in balance with these other objectives.[21]

Considering these two criteria, it seems that Article 53(1) TFEU quite easily lends itself for the pursuit of security of supply related objectives. As the markets play a central role in security of supply policy in that security is sought from the markets (specifically from well-functioning markets), various kinds of measures aiming to purport security of supply can be imagined that would concurrently 'make it easier for persons to take up and pursue activities as self-employed persons'. Financial services is one policy area in which Article 53(1) TFEU has often been used as a legal basis.[22] By regulating for example prudential requirements or qualifications, the European Union can improve the functioning of the markets and reduce the risk of economic crises, thereby contributing to security of supply by making sure that functioning supply chains are not endangered by market turmoil.[23] Acting this way reasserts the market-based nature of security of supply as the adopted measures must serve the purpose of free movement.

The relevance of the second criteria is the same for security of supply related measures as it is for any other measure: were the Union to adopt a directive concerning the right of establishment that would simultaneously support a security of supply objective, this measure would need to take into consideration the objectives listed in Article 9 TFEU. However, as security of supply is not mentioned as an objective in Article 9 TFEU, nor anywhere else in the EU Treaties, this means that ensuring security of supply is not an objective that always needs to be considered when adopting legislative measures. In other words, the Union legislator does not need to consider whether the

[19]Eg the Defence and Security Procurement Directive is based on both Articles 53 and 114 TFEU. The proposed Critical Entities Regulation would be based on Article 114 TFEU. See COM(2020) 829 final, Directive of the European Parliament and of the Council on the Resilience of Critical Entities.

[20]Article 46 TFEU on the free movement of workers and Article 62 TFEU on the freedom to provide services.

[21]See *Poland v Parliament and Council*, C-626/18, EU:C:2020:1000, paras 46–53; *Hungary v Parliament and Council*, C-620/18, EU:C:2020:1001, paras 41–48.

[22]See eg Directive (EU) 2019/2034 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU [2019] OJ L314/64; Directive (EU) 2019/1160 amending Directives 2009/65/EC and 2011/61/EU with regard to cross-border distribution of collective investment undertakings [2019] OJ L188/106.

[23]While such a reading makes it possible to utilise Article 53 TFEU for almost anything since market turmoil affects most areas of society, it is not evidently contrary to the current doctrine by the CJEU.

proposed directive would be detrimental for security of supply—which contributes to a lack of horizontal policy coherence.

Article 114 TFEU makes it possible for the European Union to adopt directives and regulations that have as their objective the establishment and functioning of the internal market. Although the scope of Article 114 TFEU as a legal base is notoriously broad, there are certain conditions for its use.[24] First, as the wording of the Article already indicates, due to its residual nature this competence can only be used if none of the more specific internal market legal bases are applicable.[25] Second, only measures that aim to harmonize the Member States' laws can be adopted on the basis of Article 114 TFEU. What this means in practice is that Article 114 TFEU cannot be used to regulate something that is not already regulated by the Member States, as harmonization refers to creating harmony between already existing norms.[26] Third, the adopted measure must have as its objective 'the establishment and functioning of the internal market', which means that the measure needs to either eliminate obstacles to the use of the fundamental market freedoms or eliminate distortions of competition ensuing from diverging national legislation.[27]

The first criteria is of no relevance for the current analysis as the purpose of this Article is to discuss when Article 114 TFEU could be used to pursue security of supply related concerns, so we can thus assume that the measure at hand would be one that fulfils the first criteria (eg that it would not fall under Article 62 TFEU on freedom to provide services). When it comes to the second criteria, it is debatable how restrictive it is in practice when we think about the European Union's ability to utilise Article 114 TFEU as a legal basis for the adoption of an entirely new policy. Even if just a few Member States would have in place national legislation affecting the policy in question, this would still suffice the criteria of harmonizing the Member States' laws. What is not allowed is the adoption of a legislative act that leaves unchanged the different national laws already in existence even though the measure would introduce also new regulation that complements that national legislation already in force.[28] Furthermore, Article 114 TFEU also empowers the Union legislator to adopt measures 'relating to a specific product or class of products as well as, if necessary, individual measures concerning those products'.[29] The second criteria helps create vertical policy coherence.

The third criteria is perhaps the most complex, in that what exactly amounts to the elimination of obstacles to the use of the fundamental freedoms or distortions of competition is difficult to assess. The starting point is that the measure must 'actually and objectively' have as its objective to improve the conditions for the establishment and functioning of the internal market.[30] Although the mere existence of divergent national legislation does not suffice, a measure aimed at 'greater coordination and consistency between Member States' may be sufficient if the functioning of the markets is thereby improved.[31] Given that within the current paradigm the functioning of

[24]Generally, see C Barnard, *The Substantive Law of the EU: The Four Freedoms*, 6th ed (Oxford University Press, 2019), pp 561–568; J Snell, 'The Internal Market and the Philosophies of Market Integration' in C Barnard and S Peers (eds), *European Union Law*, 2nd ed (Oxford University Press, 2017), pp 329–334; A Rosas and L Armati, *EU Constitutional Law: An Introduction*, 3rd ed (Hart Publishing, 2018), pp 206–207; R Schütze, *European Union Law* (Cambridge University Press, 2015), pp 229–231; S Weatherill, 'The Competence to Harmonise and Its Limits' in P Koutrakos and J Snell (eds), *Research Handbook on the Law of the EU's Single Market* (Edward Elgar Publishing, 2017).

[25]See eg *Commission v Council*, C-533/03, EU:C:2006:64, para 45, on value added tax and Article 113 TFEU.

[26]See *Parliament v Council*, C-436/03, EU:C:2006:277, para 44.

[27]See *Germany v Parliament and Council (Tobacco Advertising I)*, C-376/98, EU:C:2000:544, para 84; *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*, C-491/01, EU:C:2002:741, para 60.

[28]*Parliament v Council*, EU:C:2006:277, para 44.

[29]*United Kingdom v Parliament and Council (ESMA)*, C-270/12, EU:C:2014:18, para 106.

[30]*United Kingdom v Parliament and Council (European Network and Information Security Agency)*, C-217/04, EU:C:2006:279, para 42.

[31]*United Kingdom v Parliament and Council (ESMA)*, EU:C:2014:18, para 114.

the markets and the availability and circulation of products is what security of supply aims at, neither does this criteria seem as an obstacle for the adoption of legislative measures on the basis of Article 114 TFEU. Yet, acting this way also reasserts the market-based approach to security of supply.

Weatherill has described the breadth of the reach of Article 114 TFEU by stating that 'for wherever the internal market stretches, so too stretches Article 114'.[32] In the orthodox literature this is usually seen as problematic from the perspective of democratic legitimacy.[33] However, when it comes to the viewpoint discussed here, the vice seems to turn into a virtue. That is to say—and assuming that security of supply is seen as something that the European Union should regulate—that Article 114 TFEU easily lends itself for the purpose of regulating security of supply. Here, the problems of democratic legitimacy and the market-based paradigm conjoin: the broad scope of Article 114 TFEU that allows for such actions both causes the legitimacy concern and reiterates the market-based paradigm by making sticking with it the easy option.

2. Crisis Competences

The second group of relevant competences are here referred to as 'crisis competences' since the European Union can only resort to these powers if exceptional events have occurred.[34] The most notable of such crisis competences is Article 122 TFEU, which actually contains two distinct competences. The Article's position in Title VIII of Part Three of the TFEU, specifically in Chapter 1 on economic policy, needs to be taken notice of when considering its scope.

Article 122(1) TFEU empowers the Council to decide 'upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy'. While the text of the Article mentions energy specifically, its scope is not limited to just that. Article 122(1) TFEU can be used for various forms of humanitarian support and financing of such support in case of a crisis. However, what is important to note is that it cannot be used for direct financial support, since such support is covered by Article 122(2) TFEU.

The scope of Article 122(1) TFEU was first addressed in *Pringle*, where the CJEU concluded that Article 122(1) TFEU does not constitute an appropriate legal basis for any financial assistance from the European Union to Member States who are experiencing, or are threatened by, severe financing problems.[35] This point has been further specified in *Anagnostakis*, where the CJEU ruled that Article 122(1) TFEU does not apply to measures whose main objective is to alleviate the severity of a Member State's financing difficulties.[36] What, then, does the Article facilitate?

So far Article 122(1) TFEU has been the legal basis for two legislative measures. After the adoption of the Oil Stock Directive of 2009[37] old measures dating back to the energy crisis of the 1970s that had as their objective to reduce oil consumption for security of supply reasons became redundant, and thus they were repealed with Council Decision (EU) 2015/632.[38] The second time Article 122(1) TFEU has been resorted to was Council Regulation (EU) 2016/369 that established the

[32]Weatherill, note 24 above, p 83.

[33]See eg G Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) 21(1) *European Law Journal* 2; T Tuominen, 'The European Banking Union: A Shift in the Internal Market Paradigm?' (2017) 54(5) *Common Market Law Review* 1359.

[34]The term 'emergency competences' is used by B de Witte, 'EU Emergency Law and Its Impact on the EU Legal Order' (2022) 59(1) *Common Market Law Review* 3.

[35]*Thomas Pringle v Government of Ireland*, C-370/12, EU:C:2012:756, para 116.

[36]*Anagnostakis v Commission*, C-589/15, EU:C:2017:663, para 70.

[37]Council Directive 2009/119/EC imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products [2009] OJ L265/9.

[38]Council Decision (EU) 2015/632 repealing Council Decision 77/706/EEC on the setting of a Community target for a reduction in the consumption of primary sources of energy in the event of difficulties in the supply of crude oil and petroleum products and Commission Decision 79/639/EEC laying down detailed rules for the implementation of Council Decision 77/706/EEC [2015] OJ L104/12.

Emergency Support Instrument ('ESI').[39] The ESI has proven critical during the COVID-19 pandemic. Indeed, the ESI was activated and amended already in April 2020,[40] and it has been utilised for various types of emergency financial assistance.[41] The most notable of these measures has been the use of ESI funds to secure safe and effective vaccines against COVID-19 through Advance Purchase Agreements with vaccine producers as part of the Commission's vaccine strategy.[42] These measures clearly highlight the relevance of Article 122(1) TFEU for security of supply policy.

As mentioned, Article 122(2) TFEU can be used for direct financial support if a Member State is facing 'difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control'. The Article was first utilised in the wake of the Eurozone financial and debt crisis for the adoption of the European Financial Stabilisation Mechanism,[43] which has since then been replaced by the substantially larger European Stability Mechanism.[44] The scope of Article 122(2) TFEU was also addressed by the CJEU in *Pringle*. The central points of that judgment were, that Article 122(2) TFEU solely concerns financial assistance granted by the European Union and not that granted by the Member States, and that granting financial assistance is not an exclusive competence of the European Union.[45]

Although the European Financial Stabilisation Mechanism was adopted as a reaction to the Eurozone financial and debt crisis that was foremost an economic crisis, Article 122(2) TFEU could clearly also be used to establish an assistance fund for financial assistance in other types of crises. Indeed, as stipulated in the wording of the Article, it may be used when a Member States is faced by difficulties caused 'by natural disasters or exceptional occurrences beyond its control'. The limiting factor, from the perspective of security of supply, is the fact that the Article can only be used to give assistance when there already is a crisis at hand. That is to say, that preparatory measures aiming to increase crisis preparedness *ex ante*—which are a central element of security of supply—are beyond its scope. This also applies, rather evidently, to Article 122(1) TFEU. Overall, as Article 122 TFEU is not entrenched in the market-based logic it therefore affords a different type of an approach to security of supply than the above discussed legal bases.

Another competence clause that falls under the ambit of crisis competences is that of Article 196 TFEU, which is located in Title XXIII of the Treaty, titled Civil Protection. The Article empowers the European Union to adopt legislative measures with the intent to 'improve the effectiveness of systems for preventing and protecting against natural or man-made disasters'. This aim is to be pursued not through legislative harmonization, which has been specifically ruled out of its scope, but rather through cooperation between the Member States.

Arguably the most important measures adopted on the basis of Article 196 TFEU concerns the establishment of the Union Civil Protection Mechanism.[46] In 2019, the European reserve of resources (the 'rescEU reserve') was established as part of the Civil Protection Mechanism.[47] This includes a fleet of firefighting planes and helicopters, medical evacuation planes, as well as a stockpile of medical items and field hospitals that can respond to health emergencies. These

[39]Council Regulation (EU) 2016/369 on the provision of emergency support within the Union [2016] OJ L70/1.

[40]Council Regulation (EU) 2020/521 activating the emergency support under Regulation (EU) 2016/369, and amending its provisions taking into account the COVID-19 outbreak [2020] OJ L117/3.

[41]See European Commission, Conditions for Requesting Support under the Emergency Support Instrument Mobility Package Following the Activation of Emergency Support Instrument in Response to the COVID-19 Pandemic – Version 2 (May 2021).

[42]See COM(2020) 245 final, EU Strategy for COVID-10 vaccines.

[43]Council Regulation (EU) No 407/2010 establishing a European financial stabilisation mechanism [2010] OJ L118/1.

[44]See T Tuominen, 'Mechanisms of Financial Stabilisation' in F Fabbrini and M Ventoruzzo (eds), *Research Handbook on EU Economic Law* (Edward Elgar Publishing, 2019).

[45]*Thomas Pringle v Government of Ireland*, EU:C:2012:756, paras 118–120.

[46]Decision No 1313/2013/EU on a Union Civil Protection Mechanism [2013] OJ L347/924.

[47]Decision (EU) 2019/420 amending Decision No 1313/2013/EU on a Union Civil Protection Mechanism [2019] OJ L77I/1.

reserves have been used in response to the COVID-19 pandemic and most recently also to help Ukraine.[48]

Article 196 TFEU was introduced with the Treaty of Lisbon and there is no case law on its use yet. Its wording and the two examples of its use show that it is readily usable for purposes of specific relevance in terms of security of supply. Yet, it is a 'soft' competence in that harmonization is excluded and thus it can only be of use if the Member States share the same objective and will as the Union legislator. For this reason, its relevance for creating coherence is only minor as it cannot oblige the Member States to anything. Similarly to Article 122 TFEU, Article 196 TFEU does not follow the market-based approach.

3. Substantive Policy Competences

The third group is formed by those competences that focus on policy specific issues, such as Article 168 TFEU on protection of human health,[49] or Article 192 TFEU on protection of the environment. The key question with such substantive policy competences is what is the relationship between the policy specific competence clause and the markets. As protection of human health or the environment are not, *prima facie*,[50] related to security of supply concerns, the extent to which they can be utilised to aid in promoting security of supply objectives hinges on the way in which they facilitate regulating the markets, from which security is then sought (at least within the current market-based paradigm and system of competences).

Although Article 168 TFEU (then Article 152 EC) was introduced already with the Treaty of Maastricht, it has not been used that often due to its limited scope. As stated in paragraph 5 of Article 168 TFEU, 'any harmonisation of the laws and regulations of the Member States' is prohibited, while paragraph 7 continues that 'Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organization and delivery of health services and medical care'.[51] The narrow scope of Article 168 TFEU, on the one hand, and the broad scope of Article 114 TFEU, on the other hand, have meant that the EU has relied heavily on the latter in regulating human health.[52] This has resulted in some criticism; namely, that such a market-based approach to human health fails to consider the non-market values, such as solidarity and dignity, that are usually associated with human health.[53]

A regulation was recently adopted for the purpose of reinforcing the role of the European Medicines Authority in crisis preparedness.[54] The regulation is based on Articles 114 and 168 TFEU. This seems both to attest to the criticism mentioned above (that the European Union regulates health through market-based measures) and to highlight that Article 168 TFEU as a substantive policy competence is not itself enough for the creation of a European security of supply policy.

Article 192 TFEU on the protection of the environment contains two different legal bases. Article 192(1) TFEU can be used to attain the objectives listed in Article 191, by utilising the ordinary legislative procedure. It is evident that Article 192(1) TFEU can be used to adopt legislative measures that affect the markets or that seek to produce effects through the markets: the current

[48]See European Commission, European Civil Protection and Humanitarian Aid Operations, https://ec.europa.eu/echo/what/civil-protection/resceu_en.

[49]Similarly, see Purnhagen et al, note 8 above, discussing eg the relevance of Article 168 TFEU on public health.

[50]Security of supply policies of course ultimately aim to protect humans but the 'human health' in Article 168 TFEU needs to be understood through an immediate health nexus.

[51]Further, see D Sindbjerg Martinsen, 'Governing EU Health Law and Policy – On Governance and Legislative Politics' in T Hervey, C Young and L Bishop (eds), *Research Handbook on EU Health Law and Policy* (Edward Elgar Publishing, 2017).

[52]See V Delhomme, 'Emancipating Health from the Internal Market: For a Stronger EU (Legislative) Competence in Public Health' (2020) 11(4) *European Journal of Risk Regulation* 747.

[53]See V Hatzopoulos, 'Healthcare in the Internal Market' in P Koutrakos and J Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar Publishing, 2017).

[54]Regulation (EU) 2022/123 on a reinforced role for the European Medicines Agency in crisis preparedness and management for medicinal products and medical devices [2022] OJ L20/1.

Emissions Trading System has been adopted on the basis of this Article.[55] As security of supply relates to the markets, measures adopted on the basis of Article 192(1) TFEU can therefore also be relevant from this perspective. Yet, as the choice of legal basis for a Union measure must rest on objective factors such as the aim and content of that measure,[56] the Article cannot be used for the adoption of measures that are primarily aimed at security of supply purposes. Thus, similarly to above examples, Article 192(1) TFEU is only relevant if staying within the market-based paradigm, and thereby the Article also perpetuates it. Article 192(2) TFEU, conversely, can be used to attain the objectives mentioned in it, by utilising the special legislative procedure. The 'quantitative management of water resources', mentioned in Article 192(2)(b) might be relevant in terms of security of supply. The unanimity requirement, however, makes its use highly unlikely.[57]

4. Article 352 TFEU as a Residual Competence

Lastly, short mention should be made of Article 352 TFEU, the catch-all competence clause that allows the European Union to legislate also on matters for which the EU Treaties do not provide a specific competence but the pursuit of which is 'necessary' in order to 'attain one of the objectives set out in the Treaties'. These objectives are found in Article 3 TEU and they are many. According to learned observes, 'the breadth of [the Union's] objectives makes it difficult to imagine areas where the Union clearly has no authority to go' on the basis of Article 352 TFEU.[58] Thus, it can rightly be assumed that Article 352 TFEU is also of relevance for security of supply. Out of the objectives listed in Article 3 TEU 'balanced economic growth and price stability' and 'a highly competitive social market economy' relate closely to security of supply: since security of supply is sought from the markets, well-functioning markets are therefore central for security of supply. Such use of Article 352 TFEU, too, would perpetuate the market-based nature of security of supply.

The only caveat is that recourse to Article 352 TFEU requires unanimity in the Council. Despite this, Article 308 EC, the predecessor of Article 352 TFEU, has been used in a policy context pertaining to security of supply: the Directive on Critical Infrastructure Protection was adopted on the basis of Article 308 EC.[59] The Directive establishes a procedure for the identification and designation of European critical infrastructures, and a common approach to the assessment of the need to improve the protection of such infrastructures in order to contribute to the protection of people.[60]

B. Creating Exceptions to Internal Market Law

1. Competition Law

In addition to legislative measures, the European Union may bring about more favourable market conditions or try to support Member States' actions related to security of supply, and thereby the management of crises, by creating exceptions to the rules in force. Indeed, creating flexibility within the internal market rules was commonplace during the COVID-19 crisis. The plethora of such measures will be analysed next. Common to all three (competition law, State aid law, and public procurement law) is, that they function within the market-based paradigm and therefore do not alter

[55]See Directive (EU) 2018/410 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814 [2018] OJ L76/3.

[56]*Poland v Parliament and Council*, C-5/16, EU:C:2018:483, para 38 and the case law cited therein.

[57]A search on EUR-Lex returns no legislative measures adopted on the basis of Article 192(2) TFEU.

[58]Rosas and Armati, note 24 above, p 26.

[59]Council Directive 2008/114/EC on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection [2008] OJ L345/75.

[60]See C Pursiainen, 'The Challenges for European Critical Infrastructure Protection' (2009) 31(6) *Journal of European Integration* 721.

the status quo. As using them means resorting to the markets, their usability or 'effectiveness' as policy tools stems from there being a market in the first place.

The basic format of how EU competition law functions is fairly simple: Articles 101 and 102 TFEU prohibit certain types of actions by 'undertakings', namely public or private persons engaged in economic activity. The content of these constitutional rules is then further specified in various EU regulations and directives, for example in the Merger Regulation[61] or the Vertical Block Exemption Regulation[62]. The Commission can issue 'Temporary Frameworks' in the form of Commission Communications, in which it specifies the criteria it uses when conducting assessments of possible breaches of EU competition law in a particular context. While amending the content of EU Treaties is considerably burdensome, and regulations within the field of competition law are also relatively long-lived, Temporary Frameworks provide an accessible manner for the Commission to react to unexpected situations and also to adjust its own policy without necessitating a change in the law.

Indeed, soon after the onset of the COVID-19 pandemic the Commission issued a Temporary Framework that aimed to make it possible for undertakings to cooperate in a manner that would normally breach Article 101 TFEU but which might nevertheless be desirable to secure the availability of essential products.[63] Furthermore, the Commission also reintroduced comfort letters into its arsenal.[64] Comfort letters refer to a practice whereby undertakings can *ex ante* ask the Commission's opinion on whether their practices are acceptable under Article 101 TFEU. For example, in March 2021 the Commission issued a comfort letter allowing cooperation between undertakings in order to upscale the production of COVID-19 vaccines.[65] Such dialogue between antitrust authorities and undertakings has been seen as a preferential way to develop competition law in the future.[66]

In this way the European Union can support the existence of such market conditions that are conducive to security of supply. This, then, creates for the Member States the possibility to acquire necessary products from the markets. What needs to be noted is that here the European Union engages in regulatory activity, following which undertakings hopefully change their method of operation so as to foster security of supply. A Member State can either try to 'push' or 'nudge' privately owned companies to exploit these new opportunities, or it can utilise them through state-owned companies operating on the markets.

2. State Aid Law

State aid law complements competition law by banning Member States from granting any form of aid from State resources to undertakings that distorts competition. The logic is again similar: the main rules are found in Articles 107–109 TFEU, the application of which by the Commission are then further specified in regulations,[67] in addition to which the Commission can also issue Temporary Frameworks when necessary.

[61]Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1.

[62]Commission Regulation (EU) No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1.

[63]See Communication from the Commission, Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak [2020] OJ C116I/7.

[64]See J Buhart and D Henry, 'COVID-20: The Comfort Letter Is Dead. Long Live the Comfort Letter?' (2020) 43(3) *World Competition* 305.

[65]See European Commission, Comfort letter: Cooperation at a Matchmaking Event – Towards COVID19 vaccines upscale production, COMP/E-1/GV/BV/nb (2021/034137).

[66]G De Stefano, 'Covid-19 and EU Competition Law: Bring the Informal Guidance On' (2020) 11(3–4) *Journal of European Competition Law & Practice* 121.

[67]See eg Commission Regulation (EC) No 794/2004 implementing Council Regulation (EC)No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2004] OJ L140/1.

Likewise, during the COVID-19 pandemic the Commission issued Temporary Frameworks detailing the terms on which Member States are allowed to grant aid to undertakings.[68] According to two observers, the result of this was, that State aid rules were 'practically suspended' to enable Member States to respond to the economic effects of the pandemic.[69] In addition to purely economic incentives, Member States want to give such aid also for security of supply reasons: aid can prevent critically important companies from going bankrupt, and thus helps in keeping supply chains up and running.[70] This way necessary supplies are available. State aid can also be given to strategic partners, such as national airline companies,[71] as the upkeep of functioning air-routes is a security of supply concern.[72]

In comparison to competition law, changes in how State aid law is interpreted and applied can be of either indirect or a direct relevance to security of supply: aid can be granted for more general economic purposes, which might also foster security of supply concerns since a functioning economy is conducive to security of supply; or, aid can also be granted for specific security of supply applications. Again, although as the regulator it is the Commission that enables certain kind of aid, it is ultimately the Member States that issue such aid, the giving of which is predicated on there existing undertakings to which such aid can be granted. The effects of the Commission's decisions (the Temporary Frameworks) are channelled to the markets in this way.

3. Public Procurement Law

Lastly, public procurement, quite understandably, is also a central regulatory area from the perspective of security of supply because governments acquire the necessary goods by procuring them from the markets. The rationale for the European Union to regulate public procurement is to make sure that the Member States do not interfere with the functioning of the markets when making such purchases. Public procurement is not regulated directly in the EU Treaties, although the principle of no discrimination based on nationality, enshrined in Article 18 TFEU, and the ban on national monopolies of Article 37 TFEU, have been seen to be at the background.[73] Several directives have been adopted for the purpose of regulating public procurement over a broad spectrum of policy areas. Above we have already mentioned the Defence Procurement Directive 2009/81/EC, in addition to which at least the general Public Procurement Directive 2014/24/EU[74] should be mentioned.

Although a central part of market regulation, and one which has great potential as a policy tool,[75] due to institutional reasons, the role of public procurement as a way for the European Union to

[68]Communication from the Commission, Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak [2020] OJ C91I/1 (hereinafter the '2020 Temporary Framework'). The use of these criteria has been prolonged on several occasions by the Commission. See Communication from the Commission, Sixth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance [2021] OJ C473/1.

[69]See A Biondi and O Stefan, 'EU Health Union and State Aid Policy: With Great(er) Power Comes Great Responsibility' (2020) 11(4) *European Journal of Risk Regulation* 894.

[70]See the 2020 Temporary Framework, note 68 above, paras 1–2.

[71]See European Commission, State aid: Commission approves around €350 million Finnish support to compensate Finnair for damages suffered due to coronavirus outbreak, https://ec.europa.eu/commission/presscorner/detail/en/IP_21_809.

[72]When giving State aid to Finnair, the national airline, the Finnish Government argued that the air-routes maintained by Finnair are crucial for Finland's security of supply. See Government Communications Department, Government plans to support Finnair with EUR 600 million State guarantee, https://valtioneuvosto.fi/en/-/10616/hallitus-tukee-finnairia-suunnitteilla-600-miljoonan-euron-valtiontakaus.

[73]See C Bovis, 'The Principles of Public Procurement Regulation' in C Bovis (ed), *Research Handbook on EU Public Procurement Law* (Edward Elgar Publishing, 2016).

[74]Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65.

[75]See eg K-M Halonen, 'Is Public Procurement Fit for Reaching Sustainability Goals? A Law and Economics Approach to Green Public Procurement' (2021) 28(4) *Maastricht Journal of European and Comparative Law* 535.

promote security of supply is not as significant as that of competition law or State aid law. The reason being that the Commission is not an executive body in procurement issues. Therefore, the Commission cannot adapt the rules it applies to public procurement in the same way as it can in the context of competition law or State aid. True, the Commission can and has issued Communications dealing with public procurement, but they do not result in a 'change' of the law or the Commission's praxis. Rather, their role is merely to give guidance to public buyers in the Member States.[76] Although the current Public Procurement Directive 2014/24/EU contains a lot of in-built flexibility that public buyers can utilise,[77] the only way that the European Union as such can 'use' public procurement for the creation of a security of supply policy would be to amend the existing directives or to adopt new directives that concern security of supply specifically.[78]

IV. The Member States' Perspective

A. Restrictive National Measures

Legislative acts adopted by the European Union can affect the Member States' possibilities to pursue their independent security of supply concerns. From their perspective the question is under which terms can a Member State derogate from EU law due to security of supply concerns. In other words, how do security of supply concerns restrict the four fundamental freedoms?[79] Out of the legal bases discussed above, only the internal market legal bases of Article 53 and Article 114 TFEU are addressed in this Section. What were above referred to as crisis competences and substantive competences do not function in the manner that Member States could keep in place national 'restrictive' measures. The key point with national derogations is that they reduce vertical policy coherence. Furthermore, as they are exceptions to the free movement rules, they can constitute a break from the market-based approach to security of supply; national derogations for the sake of security of supply are limitations to free movement and the functioning of the markets.

Article 52(1) TFEU creates an exception to Article 53(1) TFEU as it allows for special treatment for foreign nationals on grounds of 'public policy, public security or public health'. The general terms that such derogations must fulfil can be summarized in the following. First, Article 52(1) TFEU must be interpreted strictly and its scope cannot be defined unilaterally by a Member State but must be subject to review by the CJEU as a Union institution. This means that 'public policy and public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society'. Second, such derogations cannot serve merely economic interests. Third, persons affected by such derogations must have access to legal redress.[80] Furthermore, the possibility to derogate only exists in policy areas that have not been exhaustively harmonized by the Union legislator.[81] A broad range of issues has been accepted by the CJEU as falling under public policy and public security.[82] For the present purpose, worthy of mention are cases that have concerned, for example, the authorization of operating licenses,[83] the prevention of

[76]See Communication from the Commission, Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis [2020] OJ C108/1.

[77]See Section IV.B.3 below.

[78]The extent to which the legal bases facilitate something like this was discussed above, see Section III.A.

[79]Generally on restrictions, see Barnard, note 24 above, pp 145–198, 475–518, 579–581; C Barnard and J Snell, 'Free Movement of Legal Persons and the Provision of Services' in C Barnard and S Peers (eds), *European Union Law*, 2nd ed (Oxford University Press, 2017), pp 426–432.

[80]See *Association Eglise de scientologie de Paris and Scientology International Reserves Trust v The Prime Minister*, C-54/99, EU:C:2000:124, para 17.

[81]*Commission v Spain*, C-421/98, EU:C:2000:646, para 42.

[82]See Barnard and Snell, note 79 above, pp 427–428; Barnard, note 24 above, pp 476–491.

[83]*Commission v United Kingdom (Open Skies)*, C-466/98, EU:C:2002:624.

crime,[84] and transportation safety.[85] Security of supply concerns easily translate into such terms, for which reason such justifications are relevant for Member States wishing to pursue national security of supply concerns.

The public service exception of Article 51 TFEU provides a further opportunity for Member States to derogate from free movement law. Accordingly, the free movement rights do not apply to 'the exercise of official authority'. The primary reason for this exception is to reserve important governmental positions and similar jobs for only nationals of said Member State.[86] The CJEU has had several opportunities to rule on what constitutes 'the exercise of official authority'. According to Barnard's synthesis of the cases, the exception only covers actions that are 'directly and specifically connected with the exercise of official authority'. Auxiliary and preparatory tasks, or tasks resulting in non-binding decisions, are not subject to the derogation of Article 51 TFEU.[87] The public service exception allows for the limiting of access to government positions important for security of supply concerns to only nationals of the Member State, granted that the specific requirements on recourse to the limitation are met.

When it comes to Member States' possibilities to derogate from Union measures adopted on the basis of Article 114 TFEU, attention turns to paragraphs 4 and 5 of the Article, which provide for a special procedure for the approval of such national derogations.[88] Paragraph 4 applies to situations where the Member State already has in force a national law, which it sees as being contrary to a harmonization measure that the Union has adopted on the basis of Article 114, but which it wants to retain in force.[89] In these *ex ante* situations, the Member State may rely on the reasons listed in Article 36 TFEU[90] and reasons relating to the protection of the environment or the working environment. Conversely, paragraph 5 applies to situations where a Member State wants to introduce new restrictions after the Union has already adopted a legislative measure on the basis of Article 114. In these *ex post* situations, the Member State may only rely on 'new scientific evidence relating to the protection of the environment or the working environment'. The scope of possible derogations when the Union legislator has already acted is thus considerably narrower if compared to the situation where a Member State wants to retain in force national measures that are contrary to newly adopted EU law.

The derogation contained in paragraph 5 does not seem relevant for Member States in this respect, as it is difficult to fathom how the objective of protecting 'the natural environment and the working environment' relates to security of supply, nor how 'new scientific evidence' could justify derogations aiming to purport security of supply. Paragraph 4, however, seems very relevant since 'public policy and public security' clearly relates to security of supply. While there appears to be no case law on paragraph 4 concerning public policy and public security,[91] the case law on Article 36 TFEU as such is burgeoning. Snell and Aalto have concluded, that the CJEU's stance in such cases has been marked by 'deference towards the autonomy of Member

[84]*Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler*, C-275/92, EU:C:1994:119; *Jyske Bank Gibraltar Ltd v Administración del Estado*, C-212/11, EU:C:2013:270.

[85]*Van Schaik*, C-55/93, EU:C:1994:363; *Nadin-Lux SA and Jean-Pascal Durré*, C-151/04 and C-152/04, EU:C:2005:775; *Naftiliaki Etaireia Thasou AE*, C-128/10 and C-129/10, EU:C:2011:163; *IPTM v Navileme*, C-509/12, EU:C:2014:54.

[86]Barnard, note 24 above, p 497.

[87]Ibid, p 502.

[88]Generally, see I Maletić, 'Derogations from the Regulation of Free Movement: Article 114 TFEU' in P Koutrakos and J Snell (eds), *Research Handbook on the Law of the EU's Internal* Market (Edward Elgar Publishing, 2017).

[89]See *Denmark v Commission*, C-3/00, EU:C:2003:167, paras 57–59.

[90]The listed grounds are: 'public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property'.

[91]The only case seems to be *Germany v Commission*, T-198/12, EU:T:2014:251, but it concerned the safety of toys. Furthermore, a search in EUR-Lex returned only a few Commission decisions concerning national measures notified under Article 114(4) TFEU, out of which none concerned reasons of public policy or public security.

States'.[92] Two pertinent examples, with relevance to security of supply, suffice. Member States are free to adopt their own mechanisms in order to maintain energy security and are not complied to do so through joint measures.[93] Furthermore, Member States can set limits for the export of strategically important goods.[94]

Lastly, we need to mention Article 346 TFEU as a justification for national measures. First, according to this Article, no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security. Second, and more importantly, any Member State may take such measures it considers necessary for the protection of the essential interests of its security that are connected with the production of or trade in arms, munitions, and war material—as long as these measures do not affect the markets of other than military related products. Although the wording of the Article ('may take') might imply that within the material scope of the Article (military related products) its use is fairly unbound, the CJEU's doctrine indicates otherwise. As Article 346 TFEU concerns derogations to the fundamental freedoms, the scope of the derogations must be narrowly construed. In order to be able to rely on the exception provided for in Article 346 TFEU, the Member State must show that such a derogation is necessary in order to protect its essential security interests.[95] Moreover, such measures must also satisfy the proportionality test, that is that they must be appropriate and necessary in relation to the pursued objective.[96] Scholars have thus concluded that the derogation contained in Article 346 TFEU is rather narrow.[97] Furthermore, the material scope of the exception is relatively limited and thus it only covers a portion of the issues that can be envisioned to fall under security of supply.

B. Utilising Exceptions in Internal Market Law

1. Competition Law

Although national institutions have a central role in the application and enforcement of EU competition law rules,[98] their role is limited to just that: application and enforcement. As national institutions cannot change the scope or content of EU competition law, the relevance of competition law for Member States in pursuit of their own security of supplies policies seems negligible. As was explained above, Member States can only try to incentives companies to exploit the possibilities offered by EU competition law.[99]

2. State Aid Law

Member States have an incentive to give State aid to companies that they see as strategically important, whether it be to help them avert bankruptcy as such or to keep their functions within their own territory. Two of the criteria of Article 107(3) TFEU, under which aid may be compatible with the internal market, relate substantively to security of supply.

[92]See eg J Snell and E Aalto, 'Security and Integration in the Context of the Internal Market' in F Amtenbrink et al (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (Cambridge University Press, 2019), p 565.

[93]*Campus Oil*, C-72/83, EU:C:1984:256.

[94]*Richardt*, C-367/89, EU:C:1991:376.

[95]*Commission v Finland*, C-284/05, EU:C:2009:778, paras 46–49; *Insinööritoimisto InsTiimi Oy*, C-615/10, EU:C:2012:324, paras 35, 45.

[96]*Johnston*, C-222/84, EU:C:1986:206, para 38; *Albore*, C-423/98, EU:C:2000:401, para 19. For an example of a resent measure that did not pass the proportionality test, see *Commission v Greece*, C-93/17, EU:C:2018:903.

[97]See Snell and Aalto, above note 92, p 571; M Trybus, *Buying Defence and Security in Europe: The EU Defence and Security Procurement Directive in Context* (Cambridge University Press, 2014), pp 85–121.

[98]See eg Articles 5 and 6 of Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

[99]See Section III.B.1 above.

First, subparagraph (b) on 'aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State'. In practice, the subparagraph contains two distinct rules. The latter has been utilised by a Member State, and accepted by the General Court, as justification for a State guarantee on a loan to a national airline, the bankruptcy of which would, according to the Member State, threaten its 'supply chain security' and the 'security of supply of pharmaceutical products and medical equipment'.[100] While State aid law thus facilitates direct use of security of supply related arguments, this is only if related to the objectives mentioned in the subparagraph. In the mentioned case the State aid would help to remedy the 'serious disturbance' in the Member State's economy caused by the COVID-19 pandemic, thus bringing the aid within the scope of the exception of Article 107(3)(b) TFEU.

Due to the criteria of a 'serious disturbance', the exception of subparagraph (b) only caters for security of supply policies that aim to fix an already existing issue. But what about *ex ante* preparedness? Could subparagraph (c), on 'aid to facilitate the development of certain economic activities or of certain economic areas' be used in a proactive manner as part of a State's security of supply policy? Paragraph (c) is essentially about regional aid.[101] The acceptability of such aid can be based directly on the EU Treaty, the General Block Exemption Regulation,[102] the Regional Aid Guidelines,[103] or one of the sector-specific rules (on eg agriculture, forestry, aquaculture, fisheries, transport, and energy). The main forms of regional aid are investment aid and operating aid. Investment aid is easier to justify, as it promotes investment to the disadvantaged regions. Operating aid, however, can usually be justified only in exceptional circumstances; the paradigm case being a region suffering from depopulation, to which aid is granted for the purpose of making transportation possible there and thus maintaining economic activity.[104]

Article 107(3)(c) TFEU contains two criteria. First, the aid must be intended to facilitate the development of certain economic activities or of certain economic areas and, second, the aid must not adversely affect trading conditions to an extent contrary to the common interest. When it comes to the first criteria, security of supply concerns can be pursued to the extent that they can be instrumentalized as development of an economic activity or an economic area. In practice, this means the rules used for the acceptability of investment aid and operating aid, as specified in the Regional Aid Guidelines.[105] The second criteria entails weighing the positive effects of the planned aid and the negative effects that the aid may have on the internal market.[106] What this weighing involves is also explained in detail in the Regional Aid Guidelines.[107]

Lastly, brief mention must be made of the *de minimis* rule, stipulated in a separate regulation,[108] under which aid that falls below a defined threshold is therefore classified as to have no impact on competition and trade in the internal market, and therefore does not need to be notified to the Commission. Although only facilitating 200 000 € for a single undertaking over a three-year period, such *de minimis* aid could be useful in a very particular situation. It could, for example, facilitate the

[100] *Ryanair v Commission (Finnair)*, T-388/20, EU:T:2021:196, paras 37, 47.

[101] See R Ianus and M Francesco Orzan, 'Aid Subject to a Discretionary Assessment under Article 107(3) TFEU' in H Hofmann and C Micheau (eds), *State Aid Law of the European Union* (Oxford University Press, 2016).

[102] Commission Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L187/1.

[103] Communication from the Commission, Guidelines on regional State aid [2021] OJ C153/1 (hereinafter 'Regional Aid Guidelines 2021').

[104] See Ianus and Francesco Orzan, note 101 above, pp 244–247.

[105] Regional Aid Guidelines 2021, paras 24–38.

[106] See *Austria v Commission (Hinkley Point C)*, C-594/18 P, EU:C:2020:742, paras 19, 101.

[107] Regional Aid Guidelines 2021, note 103 above, paras 104–111.

[108] Commission Regulation (EU) No 1407/2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid [2013] OJ L352/1.

acquirement of a machine that could be used to produce some necessary item that is currently unavailable through domestic supply chains.

3. Public Procurement Law

Whilst it might seem that the European Union's public procurement framework just limits the ways in which national purchasing authorities can go about acquiring necessary products, the legal rules actually support *ex ante* preparedness and also facilitate reactions necessitated by crises situations. Indeed, the public procurement regime is designed to support long-term strategic purchasing activities of public authorities. Its features such as central purchasing units and other forms of joint purchasing, multi-provider framework agreements and dynamic purchasing systems contribute to the purpose of securing constant supply.[109] The purpose of joint purchasing and multi-provider agreements is to tackle the problems associated with non-professional public buyers and delivery failures of individual contractors.[110]

In addition to the nature of ensuring supply provision in general, the public procurement framework also contains rules for exceptional circumstances that can be activated during a crisis. For instance, Article 32(2)(c) of the Public Procurement Directive 2014/24/EU provides for the possibility to award a contract directly to an economic operator in the event of extreme urgency brought about by events unforeseeable by the contracting authority and not attributable to the contracting authority. Similarly, Article 72(1)(c) allows, under certain conditions, contract amendments in cases where the need for modification has been brought about by circumstances that a diligent contracting authority could not foresee.[111]

In conclusion, the Member States cannot actively 'use' competition law, State aid law, or public procurement law in their pursuit of security of supply as such; rather, these three legal frameworks contain in-built flexibility that leaves leeway for the Member States to pursue their own preferences. Whether this means operating within the market-based paradigm or not depends on the details and how one views the situation. For example, whilst utilising the flexibility of the public procurement rules a purchasing authority is still operating through the markets, while at the same time potentially causing a market disruption. Although we might talk about a specific Member State's State aid policy (ie what type of aid and in what circumstances they usually give), does this imply the lack of vertical policy coherence between the European Union and the Member States?

V. Concluding Remarks

The purpose of this Article was to assess whether security of supply is a national or European competence. Our answer is that within the confines of the current EU Treaties, security of supply is both a national and European competence. We have shown that EU law actually affects this policy area to a considerable degree despite security of supply as such not being mentioned in the Treaties and despite the reservation of Article 4(2) TEU on national security. These effects differ whether looked at from the perspective of the European Union or the Member States.

When it comes to the European Union's ability to adopt legislative measures aimed at creating a European security of supply policy, the legal bases in the EU Treaties seem to offer several alternatives for pursuing this. Furthermore, the European Union can also facilitate Member States' actions

[109]See L Farca and D Dragos, 'Resilience in Times Of Pandemic: Is the Public Procurement Legal Framework Fit for Purpose?' (2020) 16 *Transylvanian Review of Administrative Sciences* 60.

[110]See eg C Risvig Hamer, 'Regular Purchases and Aggregated Procurement: The Changes in the New Public Procurement Directive Regarding Framework Agreements, Dynamic Purchasing Systems and Central Purchasing Bodies' (2014) 4 *Public Procurement Law Review* 201; M Andrecka, 'Framework Agreements: Transparency in the Call-off Award Process' (2015) 10 (4) *European Procurement & Public Private Partnership Law Review* 231.

[111]See P Bogdanowicz, 'Article 72: Modification of Contracts during their Term' in R Caranta and A Sanchez-Graells (eds), *European Public Procurement: Commentary on Directive 2014/24/EU* (Edward Elgar Publishing, 2021), pp 786–787.

for creating national security of supply policies by way of interpreting the exceptions included in internal market law in a liberal manner. The same is true from the perspective of the Member States as 'public policy and public security' is vague enough yet closely linked to security of supply so as to allow for various restrictive measures by the Member States. When we think about reinforcing security of supply in the European Union, this 'dual effect' that EU law has can be a positive issue. Focus is not on either the European Union or the Member States but rather in the way in which actions on both levels of government can complement each other.

That EU law affects security of supply so closely is of course a result of the market-based paradigm currently prevalent in security of supply, and the fact that EU law regulates the markets so extensively. Conversely, were the security of supply paradigm different—based on something else than the markets as the primary source of security—the extent to which EU law would affect the issue would be different. Three discussion points arise from this.

First, democratic legitimacy, which is always a relevant point when discussing questions of competence. As was shown, the current system of competences seems to allow for extensive action by the Union legislator in pursuit of a European security of supply policy, despite security of supply not being mentioned as one of the Union's competences and Article 4(2) TEU pointing to a somewhat different conclusion. Should we thus be worried about possible competence creep by the European Union in this policy area? As for example the proposed Single Market Emergency Instrument,[112] the Critical Entities Regulation,[113] or the European Health Union[114] showcase, the European Union is indeed starting to adopt its own security of supply policy.[115] Whether the flexibility of the legal bases that facilitates this is a 'good' or a 'bad' thing ultimately depends on the viewpoint. Threats such as the COVID-19 pandemic seem to be legitimate reasons for Union action but the question remains to what extent is it legitimate for the Union to pursue such policies without an explicit competence for this in the EU Treaties. For this reason, the initiative to increase and clarify the European Union's competence in security issues is welcomed.[116]

Second, even though the current system of competences is flexible and thus offers a wide array of opportunities, for both the European Union and the Member States, can it actually facilitate an effective security of supply policy at the European level? Answering this would obviously require empirical analysis of the responses to the COVID-19 pandemic as well as counterfactual impact evaluation. Notwithstanding, let us just point out that while the current system facilitates for various forms of action at both levels, it is not optimal when it comes to creating policy coherence. This is true in both the horizontal and vertical relation. Since security of supply is only a secondary or corollary objective that can *also* be considered whilst adopting measures under the discussed legal bases, it will remain difficult to create a coherent security of supply policy for the Union. Pursuing security of supply objectives with the various legal bases discussed above results in a *mélange* between the related policy fields: security of supply, the functioning of the internal market, a high level of protection of human health and the environment, etc. While such conflation of policies is mundane nowadays,[117] the question remains to what extent is this effective since such objectives can and often are contrary to each other. With regard to the vertical relation, the whole purpose of national derogations is to allow for differences between the policies of individual Member States and the European Union as a whole. Such derogations ultimately undermine the effectiveness of European policies. What if the European Union's objectives do not align with an

[112]See note 5 above.

[113]COM(2020) 829 final, Directive of the European Parliament and of the Council on the resilience of critical entities.

[114]COM(2020) 724 final, Building a European Health Union: Reinforcing the EU's resilience for cross-border health threats.

[115]See Tuominen, Salminen, and Halonen, note 4 above.

[116]See note 6 above.

[117]See eg already B de Witte, 'Non-Market Values in Internal Market Legislation' in N Nic Shuibhne (ed), *Regulating the Internal Market* (Edward Elgar Publishing, 2006).

individual Member State's policy preference? The dependence of certain Member States on Russian gas and how they might thus have differing views on how to react to Russia's invasion of Ukraine already shows that such differences can and do exist. Formally speaking, the Union's legislative procedure of course contains the means through which to reconcile policy differences, and the CJEU is the ultimate arbiter of such disputes. However, the ambivalent nature of the competence on security of supply increases the potential for these types of political and constitutional conflicts. In both relations, vertical and horizontal, coherence could be increased by giving the European Union stronger competence on security of supply.

Third, the current system of competences also means that the European Union can pursue security of supply mainly within the market-based paradigm as the majority of the options the Union legislator has relate to the internal market. Increasing the European Union's competences could also facilitate a different type of approach to crisis management than one relying mainly on the markets.

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