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Van Bael & Bellis

Public procurement rules being set aside in European defence deals

Courts in several EU Member States have upheld the use of Article 346(1)(b) of the Treaty on the Functioning of the European Union (***TFEU***) to justify the award of long-term defence contracts without competitive public procurement procedures.

- Earlier this year, the Belgian Council of State upheld the legality of Belgium's long-term multinational strategic partnership with FN Herstal NV/SA (***FN Herstal***) for the provision of light weapons systems, concluded without a competitive public procurement procedure.
- Similar rulings have been delivered in Denmark, Finland and Sweden.
- These judgments are of direct relevance to defence industry participants, both those benefitting from direct awards and those excluded from them.
- These judgments confirm broad Member State discretion in invoking Article 346(1)(b) TFEU, while underscoring that excluded competitors may still challenge such awards and that strategic monitoring of defence procurement decisions remains essential.

Convergent case law across the EU

Courts across several EU Member States have delivered judgments concerning the legitimate use of Article 346 TFEU to award long-term defence contracts without competitive public procurement procedures. In Finland, for example, the Finnish Supreme Court rendered a judgment on 3 February 2026 following a claim brought by the German weapons manufacturer Heckler & Koch GmbH (***Heckler & Koch***). The Finnish Supreme Court held that the application of Article 346 TFEU was lawful, reasoning in essence along the same lines as those subsequently adopted by the Belgian Council of State in its judgment of 16 February 2026 (discussed below). Other judgments on the application of Article 346 TFEU in national public procurement procedures have been handed down by courts in Denmark and Sweden.

Against the backdrop of an evolving geopolitical landscape and increasing emphasis on European defence cooperation, this body of case law illustrates how Article 346 TFEU can be used to structure long-term, strategic partnerships with national industry players, even where such arrangements extend beyond straightforward procurement. While the restrictive interpretation developed in EU case law remains relevant, these judgments underscore the significant margin of discretion retained by EU Member States and the largely deferential approach adopted by their national courts in reviewing defence-related measures.

At the same time, this case law highlights the broader implications of bypassing competitive public procurement procedures. While often justified on security grounds, such approaches may lead to higher costs for public authorities and increased interoperability risks within the European defence ecosystem. This underscores the importance of a measured and well-substantiated reliance on Article 346 TFEU, as well as the potential value of robust judicial scrutiny. The Belgian Council of State judgment discussed below provides a detailed illustration of how these considerations play out in practice.

The Belgian Council of State judgment

A prominent example of the aforementioned trend is the judgment of the Belgian Council of State of 16 February 2026.

In 2024, the Belgian Ministry of Defence concluded a 20-year multinational strategic partnership (***MSP***) with the Belgian entity FN Herstal covering a broad range of activities relating to light weapons systems. These include maintaining the existing weapons inventory, research and development, leasing of weapons, and procurement of the corresponding ammunition. The MSP, open to participation by other EU Member States, aims to ensure operational readiness by safeguarding security of supply and national strategic autonomy.

To justify its recourse to a negotiated procedure without prior publication with only FN Herstal being invited to participate, thereby excluding the German weapons manufacturer Heckler & Koch from participating in the envisaged partnership, the Belgian State – represented by its Minister of Defence – relied on Article 346(1)(b) TFEU. While that provision allows EU Member States to take such measures as they consider necessary to protect the essential interests of their security that are connected with the production of or trade in arms, munitions, and war material, it does not permit these measures to adversely affect the conditions of competition in the internal market for products that are not intended for specific military purposes.

Heckler & Koch contested the use of Article 346(1)(b) TFEU by the Belgian State to conclude its MSP with FN Herstal. However, based on extensive reasoning detailed in its judgment of 16 February 2026, the Belgian Council of State confirmed that the conditions for invoking Article 346(1)(b) TFEU had been satisfied.

The Council of State reasoned, among other things, that the weapons concerned are included in the EU Common Military List and therefore serve a specific military purpose. Consequently, the arrangement does not adversely affect the conditions of competition in the internal market for products that are not intended for specific military purposes.

Additionally, the Council of State found that the Belgian State had adequately demonstrated that the MSP is necessary to safeguard Belgium's essential security interests. The Council of State accepted that these interests could be compromised if standard defence public procurement rules were applied. Referring to established EU case law, the Council of State emphasised that national authorities enjoy *"particularly broad discretionary powers"* in this domain. Judicial review is therefore limited, with the Council of State refraining from substituting its own assessment for that of the administration regarding the necessity of specific defence measures. The Council of State also endorsed the Belgian State's position on security of supply, notably the need to partner with a domestically established supplier to mitigate the risk of export restrictions imposed by other EU Member States.

Key takeaways for defence industry participants

For private entities active in the defence sector, the recent case law from across several EU Member States confirms both the opportunities and the limitations inherent in Article 346 TFEU:

- **Broad State discretion confirmed**. There is a demonstrated willingness of EU Member State courts to accept far-reaching justifications for direct awards in the name of essential national security interests. However, this does not preclude scrutiny of such decisions by government institutions.
- **Challenges remain possible**. Entities excluded from similar defence public procurement procedures should nevertheless consider the legal robustness of an EU Member State's reliance on Article 346 TFEU in selecting a supplier without a competitive process. As confirmed by the case law of the Court of Justice of the European Union, the application of Article 346 TFEU remains subject to strict conditions and must be interpreted narrowly. Therefore, in appropriate cases, there may be grounds to challenge decisions that unduly restrict market access, especially where the link between the measure and the protection of essential national security interests is not sufficiently substantiated.
- **Strategic monitoring is essential**. From a commercial perspective, it is critical that entities active in the field of defence closely monitor public procurement strategies, anticipate the use of security-based exemptions, and proactively evaluate potential legal remedies where access to key defence public contracts and projects is being restricted.

Looking ahead

The trend towards long-term strategic partnerships in the defence sector in Europe is expected to continue as EU Member States seek to strengthen their defence capabilities. While national case law on Article 346 TFEU has emerged mostly in northern EU Member States, it is expected that southern EU Member States will face similar legal issues in the future.

Industry participants should monitor developments in national public procurement practice and any further judicial clarification of the scope of Article 346 TFEU. Companies that may be affected by direct award decisions, whether as beneficiaries or excluded parties, should ensure they have a clear understanding of the applicable legal framework and consider seeking legal advice at an early stage to assess their options.

VBB is ideally placed to assist you in navigating the implications of this topic, and we invite you to get in touch with the author below, a member of our [Defence and Security core team] or your usual VBB contact, to discuss how this impacts your organisation.

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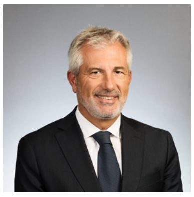

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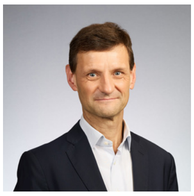

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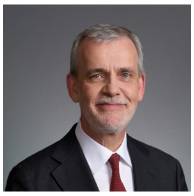

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