DEFENCE ON FLEXIBLE LEGAL BASES: THE DIVERGENT CONSTITUTIONAL LIMITS OF EU DEFENCE INTEGRATION OUTSIDE THE CFSP*

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Abstract: Since 2025 the European Union has accelerated the pursuit of its defence objectives through flexible, non-CFSP bases of the TFEU. The practice is closely related to the Commission's ReArm Europe plan and became a point of contestation in relation to some of its most prominent elements. The SAFE loan instrument (Article 122 TFEU) is before the Court of Justice at the Parliament's suit, the European Defence Industry Programme (centred on Articles 114 and 173 TFEU) raises questions in doctrine, and the proposed Military Mobility Regulation [Articles 91 and 100(2) TFEU] is said to exceed the transport competence through its authorisation architecture, most prominently in its emergency mechanism. This article asks by what constitutional limits the practice is governed, and argues that they differ across its modalities. Tracing a vertical risk to Union competence and a horizontal risk to who decides, and distinguishing limits that operate at the choice of the legal basis from limits that apply beyond that choice, the article maps where each measure can be contested. What the three measures share is an origin and a gateway, consisting in a defence telos pursued on elastic sectoral bases, with the Treaties' defence-specific channel left unused for these measures, and a common exposure to established centre-of-gravity review. The specific constraints nonetheless lie in different places. In the fiscal modality the constraint is the Article 122 gateway, shadowed by a budgetary objection. In the industrial modality it is the interplay between characterisation and the contested reach of Article 41(2) TEU. In the territorial modality it is the reservation of Article 4(2) TEU, which sets the outer boundary of transport proceduralisation. Using comparative analysis, the article seeks to show what the common and some of the modality-specific limits of the "supranational turn" of EU defence policy are, and how they differ.

Keywords: supranational turn; defence mainstreaming; choice of legal basis; conferral; Article 122 TFEU; Article 41(2) TEU; Article 4(2) TEU; transport proceduralisation; deemed acceptance; SAFE; EDIP; military mobility

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1. INTRODUCTION

Since 2025 the European Union has accelerated the pursuit of its defence policy through flexible, non-CFSP legal bases of the TFEU. The practice itself, however, is older than its present frame. In March 2025 the Commission and the High Representative presented the White Paper for European Defence – Readiness 2030, the framework for the Commission's ReArm Europe plan. The plan's principal funding pillars included Union loans for defence investment (the future SAFE instrument), coordinated activation of the national escape clause of the Stability and Growth Pact, and the redirection of existing Union programmes towards defence-related investment.[1] EDIP gives legislative form to the 2024 European Defence Industrial Strategy, and the military-mobility package of November 2025 extends the agenda into transport regulation. The measures examined here are, in other words, the legal instruments of one declared programme, and the constitutional limits of their technique are therefore of programme-wide significance.

The approach chosen by the Union carries a constitutional risk on two fronts. There is a *vertical* risk that the Union exceeds the competence the chosen basis confers, and a *horizontal* risk that the decision-making rule and institutional configuration the Treaties would otherwise prescribe are displaced, such as the unanimity of the CFSP or the European Parliament's co-legislative role.[2] Neither risk is hypothetical. The SAFE loan instrument, adopted as a Council Regulation on Article 122 TFEU in May 2025, has been challenged by the European Parliament before the Court of Justice.[3] The European Defence Industry Programme (EDIP), proposed in March 2024 and adopted in December 2025 on a composite basis centred on Articles 173 and 114 TFEU, has met sustained doctrinal objection.[4] And the most recent of the three, the proposed Military Mobility

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1 Joint White Paper for European Defence – Readiness 2030, JOIN(2025) 120 final, 19. 3. 2025 (framing the ReArm Europe plan, with SAFE as its lending pillar); Regulation (EU) 2025/2653 of 19. 12. 2025 (redirecting Union programmes towards defence-related investment to implement the plan); A New European Defence Industrial Strategy, JOIN(2024) 10 final, 5. 3. 2024.

2 The vertical/horizontal vocabulary is established in the competence literature; in the same context of Article 122, CHAMON, M. The Non-Emergency Economic Policy Competence in Article 122(1) TFEU. *Common Market Law Review*. 2024, Vol. 61, No. 6, pp. 1501–1526.

3 Council Regulation (EU) 2025/1106 of 27 May 2025 Establishing the Security Action for Europe (SAFE) Through the Reinforcement of the European Defence Industry Instrument. OJ L, 2025/1106, 28. 5. 2025 (financial assistance of up to EUR 150 billion in loans). Challenged in Case C-560/25, *European Parliament v. Council*, action brought 20 August 2025, OJ C, C/2025/5209, 6. 10. 2025.

4 Proposal COM(2024) 150 final, 5. 3. 2024; adopted as Regulation (EU) 2025/2643 of the European Parliament and of the Council of 16 December 2025 Establishing the European Defence Industry Programme and a Framework of Measures to Ensure the Timely Availability and Supply of Defence Products ('EDIP Regulation'), OJ L, 2025/2643, 29. 12. 2025, on Articles 114(1), 173(3), 212(2) and 322(1) TFEU. For EDIP-specific contestation, CLAPP, S. *European Defence Industry Programme (EDIP)*. European Parliamentary Research Service. PE 762.320, 2026 [Article 173(3) TFEU "not without controversy"]; for the sustained doctrinal objection, MEERSHOEK, N. Why the EU Internal Market is Not the Correct Legal Basis for Regulating Military-Strategic Procurement. *European Law Review*. 2022, Vol. 47, No. 3, pp. 353–375; VROEGE, B. Strategic Autonomy in Military Production: The EDF and the Constitutional Limits to EU Defence-Industrial Spending Power. *European Foreign Affairs Review*. 2023, Vol. 28, No. 4, pp. 341–362; PEROTTO, G. The Legal Framework of the EU Defence Industry and the Pursuit of Strategic

Regulation, tabled in November 2025 on Articles 91 and 100(2) TFEU and carried by mid-2026 to a Council mandate and a Parliament committee report, has drawn the challenge that its authorisation architecture presses on the limits of the transport competence.[5] The three are not chosen because contestation is the article's subject. They are chosen because their contestation exposes the three techniques through which the same phenomenon meets its legal limits and tests: fiscal borrowing, defence-industrial regulation and territorial proceduralisation.[6]

This article asks by what constitutional limits this practice is governed across its fiscal, industrial and territorial modalities,[7] and it maps the pattern those limits form.

The doctrine has already pointed to the phenomenon, characterised as a "supranational turn" of EU defence policy, but has so far focused on mapping its instruments across industrial policy and the internal market, less on pairing each measure with the constraint that ultimately decides its contestation, and not on the pattern those constraints form across modalities.[8] This article therefore does not seek to describe

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Autonomy. *European Papers*. 2023, Vol. 8, No. 1, pp. 475–486; ŘÍHA, M. Do You Have EU Industrial Policy Legal Basis? And Can I See It? *Prague Law Working Papers Series*. 2026, No. 2026/I/4.

5 Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Establishing a Framework of Measures to Facilitate the Transport of Military Equipment, Goods and Personnel Across the Union, COM(2025) 847 final, 19. 11. 2025, with SWD(2025) 847 final; Council Negotiating Mandate, doc. 10730/26; and European Parliament Committee Report A10-0176/2026 (SEDE–TRAN) of June 2026. The challenge is developed most fully in LINZER, P. Defence by Transport Law? Constitutional Constraints of Military Transports Permissions and EMERS in the Proposed Military Mobility Regulation (COM(2025) 847). In: PETRAŠEVIĆ, T. – DUIĆ, D. – NOVOKMET, A. (eds.). *EU as a Global Player: Geopolitical Position of the EU in the New Global Order*. EU and Comparative Law Issues and Challenges Series (ECLIC), Vol. 10. Osijek: Josip Juraj Strossmayer University of Osijek, Faculty of Law Osijek, 2026, pp. 1084–1109; and in SNELL, J. *Opinion on the EU Military Mobility Package and the Appropriateness of the Legal Basis*. Expert opinion delivered to the Grand Committee of the Finnish Parliament in the framework of U 1/2026 vp, 24. 3. 2026, engaged here as doctrine; no chamber has issued a reasoned opinion against the proposal.

6 For the purposes of this article, the delimitation excludes instruments outside, antecedent to, or less constitutionally contested within the practice under study. The European Peace Facility figures below as the counter-architecture, not as a case; the EDF, ASAP and EDIRPA enter as EDIP's lineage; Regulation (EU) 2025/2653, the Defence Readiness Omnibus and "Readiness 2030" confirm the trend but have not drawn comparable constitutional contestation.

7 The three modalities are principal, not exhaustive: deregulatory simplification – the Defence Readiness Omnibus – is a further technique of the turn, outside this article's set because it has not, to date, drawn comparable constitutional contestation.

8 STEINBACH, A. The Supranational Turn of EU Defence Policy. *Common Market Law Review*. 2025, Vol. 62, No. 6, pp. 1635–1674. His declared frame is industrial policy, the internal market and technological-development policy; the analysis also identifies Article 346 TFEU and Article 41(2) TEU as the two intergovernmental prerogatives under supranational pressure (pp. 1650–1651) and extends to SAFE and Article 122 TFEU (pp. 1662–1663). Military mobility appears only as an object of infrastructure funding (p. 1648); the transport title as a regulatory vector is not analysed. Steinbach already pairs SAFE with Article 41(2) TEU (pp. 1662–1663). Catalogues of constraints exist: HORN, A. *European Defence Under the Treaties*. SIEPS European Policy Analysis 2025:12epa, 2025; GÁLIK, Z. Breaking the Unanimity Rule in EU Common Foreign and Security Policy: The Commission's New Approach, the Logic of Legal Basis Selection, and Legal Constraints. In: *EU Blog / Grotius* [online]. 12. 12. 2025 [cit. 2026-07-06]. Available at: https://eublog.grotius.hu/doc/pub/LZKHVM/2025-12-12_breaking_the_unanimity_rule_in_eu_cfsp.pdf; MOSER, C. Transforming Defence into an Asset for Safeguarding the EU's Normative Core.

another block of the phenomenon but it seeks to outline the blueprint of the building the blocks compose.

The competence-creep literature explains the structural enabler of indirect integration in politically sensitive fields,[9] and the fiscal and industrial modalities have each been probed on their own terms.[10] However, none of these works analyses instruments outside the economic or internal-market scope, such as military transit, nor maps, modality by modality, the constraint on which each measure ultimately stands or falls, distinguishing basis-level from exercise-level limits [a distinction the Treaties themselves draw in Article 5(1) TEU; see Section 2]. That comparative anatomy is the contribution this article aspires to make.

The comparison, not three parallel case studies, is therefore the tool of the analysis. The three measures are characterised along two axes, technique of use and modality-specific constraint, and none is adjudicated to a final validity verdict. The article defends readings of particular Treaty limits, but it does not pronounce on whether the measures ultimately satisfy them – each such verdict would require a study of its own, with the exception of military mobility, which the author has already analysed separately.[11] The thesis concerns which constraint governs which technique, and why they differ, not how any single dispute will be resolved.

The argument proceeds as follows. Section 2 sets out the logic of legal-basis review and shows why, at the gateway of legal-basis review, substance and procedure cannot be separated. Section 3 establishes in what aspects the three measures form one practice, Section 4 distinguishes what each does with its base. Section 5 pairs each technique with its modality-specific constraint, states the pattern and develops its territorial edge, with Section 6 concluding the argument.

2. THE TURN AND THE LOGIC OF LEGAL-BASIS REVIEW

The constitutional stakes of the turn follow from what the choice of a non-CFSP basis does, and this section argues that those stakes cannot be sorted into separate questions of competence and procedure. A Title-V CFSP basis entails Council unanimity as the default, a limited role for the Parliament under Article 36 TEU rather than co-legislation, and judicial review curtailed by Article 275 TFEU, subject to its carve-outs for Article 40 TEU and restrictive measures.[12] A sectoral TFEU basis generally brings qualified-majority voting, the Parliament as co-legislator, and full judicial

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Common Market Law Review. 2026, Vol. 63, No. 1, pp. 209–222, poses, without answering, the legal-basis question for military mobility (p. 217).

9 GARBEN, S. Competence Creep Revisited. *Journal of Common Market Studies*. 2019, Vol. 57, No. 2, pp. 205–222; GARBEN, S. From Sneaking to Striding: Combatting Competence Creep and Consolidating the EU Legislative Process. *European Law Journal*. 2020, Vol. 26, No. 5–6, pp. 429–447.

10 CHAMON, *c. d.*; MEERSHOEK, *c. d.*; VROEGE, *c. d.*; PEROTTO, *c. d.*

11 LINZER, *c. d.*

12 On the qualified-majority openings that exist within the CFSP itself, MOSER, *c. d.*, p. 218; GÁLIK, *c. d.*

review. Article 122 TFEU is an exception of a different kind. It leaves judicial review untouched but confers the power on the Council without a legislative role for the Parliament. The choice of basis therefore matters not only for whether the Union may act, but also for how it reallocates decisional power among the institutions and between the Union and the Member States.[13]

Treating the vertical and horizontal risks as independent questions, and building independent categories of review upon them, is tempting, but the case law forbids it. On the Court's settled approach, the choice of legal basis turns on objective factors amenable to judicial review, in particular the aim and content of the measure.[14] Where a measure pursues a twofold purpose and one is identifiable as predominant, the act must be founded on the predominant basis alone and only exceptionally may it rest on more than one basis, and never where the attached procedures are mutually incompatible.[15] The substantive question of what the act really is and mainly does, and the procedural question of which decision rule the Treaties attach to that characterisation, are thus answered in a single movement. Substance selects the basis, and the basis dictates the procedure. Article 40 TEU confirms the same from the CFSP side, as a rule of mutual non-affectation between the CFSP and the competences of Articles 3 to 6 TFEU, under which neither may encroach on the other, policed through the same centre-of-gravity method.[16]

SAFE is the paradigm of this inseparability at the gateway as the threshold test of legal-basis review. Article 122 permits the Council to act without the Parliament in a legislative role, and the Parliament's action pleads precisely that its conditions are not met.[17]

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[13] On the constitutional significance of the choice of legal basis, Case C-263/14, *Parliament v. Council*, EU:C:2016:435; Article 36 TEU on the Parliament's role in CFSP; ENGEL, A. The CJEU's Centre of Gravity Theory in Legal Basis Litigation: A Flawed Concept. In: LOXA, A. – LONARDO, L. (eds.). *The Reasoning of the Court of Justice of the EU: A Normative Assessment*. Oxford: Oxford University Press, 2026, ch. 10.

[14] Case C-300/89, *Commission v. Council* (Titanium dioxide), EU:C:1991:244, para. 10; Case C-130/10, *Parliament v. Council*, EU:C:2012:472, paras. 42–44. On the priority of basis over procedure, ibid., para. 80 (the applicable procedure follows from the correctly identified basis, not the reverse).

[15] Case C-36/98, *Spain v. Council*, EU:C:2001:64, para. 59; on the exceptional recourse to a dual basis, Case C-263/14, para. 44; Case C-300/89 (Titanium dioxide), paras. 17–21 (dual basis excluded where the attached procedures are incompatible). See CRAIG, P. *The Lisbon Treaty*. Oxford: Oxford University Press, 2010.

[16] WESSEL, R. A. Legality in EU Common Foreign and Security Policy: The Choice of the Appropriate Legal Basis. In: KILPATRICK, C. – SCOTT, J. (eds.). *Contemporary Challenges to EU Legality*. Oxford: Oxford University Press, 2021, pp. 71–99; Case C-244/17, *Commission v. Council* (Kazakhstan PCA), EU:C:2018:662, paras. 36–38 and 42–46; Case C-658/11, *Parliament v. Council*, EU:C:2014:2025, para. 43; Case C-263/14, *Parliament v. Council*, EU:C:2016:435, paras. 42–44 (para. 42 on the Court's task of policing the CFSP side; the mutuality follows from the two paragraphs of Article 40 TEU itself). The pre-Lisbon rule was asymmetrical, Case C-91/05, *Commission v. Council*, EU:C:2008:288, paras. 76–77.

[17] Case C-560/25, OJ C/2025/5209: first plea, that the act does not satisfy the conditions of Article 122 TFEU and concerns instead the Union's industrial policy in the field of defence (Article 173 TFEU); second plea, breach of the duty to state reasons (Article 296 TFEU) as regards that choice. The Parliament asks that the Regulation's effects be maintained until replacement.

Whether the Article 122 predicate is satisfied is not a secondary diagnostic of an institutional wrong. It is the competence question, and the Parliament's exclusion stands or falls with it. What the example does not prove is that every constitutional limit is absorbed by legal-basis review. What it does show is why the analysis must begin with the gateway before asking whether further reservations condition the exercise of a validly conferred competence.

Two further features of the Treaty architecture frame what follows. The Treaties also provide a defence-specific route – the progressive framing of a common Union defence policy under Article 42(2) TEU, leading to a common defence when the European Council, acting unanimously, so decides – together with an emergency mechanism embracing military means for terrorist attacks and disasters, the solidarity clause of Article 222 TFEU.[18] The Treaties themselves, moreover, distinguish the delimitation of competences (conferral) from the use of competences (subsidiarity and proportionality) in Article 5(1) TEU,[19] and the analysis below uses that distinction analytically for reservations and constraints that go beyond the choice of basis. Article 41(2) TEU caps what may be funded even on a validly chosen basis, while Article 4(2) TEU delimits how far a chosen sectoral basis reaches into a protected national domain. The lesson of the section is twofold. At the gateway, substance and procedure fuse. Beyond it, particular Treaty reservations may still structure what the Union may do under a validly chosen basis. Limits can therefore be compared across techniques, by asking which constraint ultimately decides in each. That is the method of Sections 3 to 5.

3. THE COMMON ORIGIN

Before the three measures diverge, they converge. What follows establishes the shared structure that makes them a single phenomenon worth comparing.

The first shared feature is the risk of a telos–base mismatch. In each case a defence purpose rides on one of the broad, non-defence competences of the TFEU – the emergency-and-economic-policy basis of Article 122, the internal-market and industrial-policy bases of Articles 114 and 173, or the transport bases of Articles 91 and 100(2). What unites these bases is not an economic character, for the transport title is not "economic". What unites them is their elasticity. Each is open-textured or far-reaching enough to be plausibly stretched toward a security telos, as has long been observed for the transport title,[20] and it is precisely this breadth that the competence-creep literature identifies as

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[18] For an overview of the defence-specific architecture of the Treaties, HORN, *c. d.*

[19] Article 5(1) TEU; KLAMERT, M. Commentary on Article 5 TEU. In: KELLERBAUER, M. – KLAMERT, M. – TOMKIN, J. (eds.). *The EU Treaties and the Charter of Fundamental Rights*. Oxford: Oxford University Press, 2019.

[20] For the breadth of the transport title, MAXIAN RUSCHE, T. Commentary on Article 91 TFEU. In: KELLERBAUER – KLAMERT – TOMKIN (eds.), *c. d.*, para. 4: the Court has clarified in several landmark cases that the common transport policy creates *"a very far-reaching competence"*, extending to social, environmental and consumer-protection rules.

the structural enabler of indirect integration.[21] The defence turn thus instantiates a wider pattern in which security has become a guiding objective pursued through pre-existing Treaty bases.[22]

The second shared feature is that these measures make no use of the defence-specific constitutional channel of the Treaties that other defence-focused frameworks still use, such as PESCO, the European Defence Agency and the off-budget European Peace Facility.[23] The point is about these three measures, which did not take it, and the choice has consequences for who decides, as the third feature shows. For military mobility the route not taken is the CFSP or an inter-State agreement. For EDIP it is the defence-industrial task of the European Defence Agency under Article 45(1)(e) TEU[24] and, with it, the budgetary discipline of Article 41(2) TEU,[25] both kept at bay by the measure's market and industrial characterisation. SAFE differs again, as a CFSP-funding alternative is foreclosed in practice by the budgetary bar discussed in Section 5, and the alternative the Parliament pleads is an ordinary-procedure TFEU basis. What all three share is that the specific decisional architecture of the Treaties – CFSP unanimity with its restricted review and its funding implication – does not govern them. The route is politically underwritten by repeated European Council endorsement, but that consensus has remained in conclusions and has never been formalised as an interpretative position on the use of sectoral bases for defence ends.[26]

A third feature follows. Each measure depends on the same vulnerable claim, that its centre of gravity is sectoral rather than defence, and each is therefore exposed to the same gateway review. The *horizontal* face of the risk nonetheless points in different directions, as the Parliament's grievance under Article 122 is its exclusion, while under the co-decided bases the grievance belongs to the Member States, as the loss of the CFSP veto. This heterogeneity is the first indication that, common elements notwithstanding, no single comprehensive defence-specific limit governs the turn. That the three measures form one practice is undone neither by the variable geometry of European defence cooperation nor by institutional readings of each grievance.[27]

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21 GARBEN, *Competence Creep Revisited*, pp. 206–208.

22 SCHAUPP, L. Legal Foundations of EU Economic Security: Shaping the Imaginable. *Utrecht Law Review*. 2025, Vol. 22, No. 1, pp. 63–81, at p. 63 (security as *"a guiding objective across a growing number of legislative fields"* pursued through pre-existing Treaty bases). The label *"telos-base mismatch"* is this article's; it builds on Schaupp's observation of *"a shift in the telos of legislative instruments"* pursued on pre-existing bases (p. 65), and on the author's earlier finding of a *"structural mismatch between the chosen legal basis and the substantive operation performed"* (LINZER, *c. d.*).

23 Council Decision (CFSP) 2021/509 Establishing the European Peace Facility, financed by Member States' contributions outside the Union budget.

24 VROEGE, *c. d.*, pp. 351–352.

25 MOSER, *c. d.*, pp. 218–219; STEINBACH, *c. d.*, pp. 1662–1663.

26 European Council Conclusions on European Defence, 6. 3. 2025; European Council Conclusions, 26. 6. 2025, EUCO 12/25.

27 VON SYDOW, G. – KREILINGER, V. (eds.). *Who Calls the Shots? Institutional and Political Dynamics in European Defence*. SIEPS 2026:1op, 2026 (variable geometry; the Article 122 instruments and the Parliament's position).

4. THREE TECHNIQUES OF USE

The first axis of comparison is the technique of deployment, that is, what each measure concretely does with its base. The three techniques differ in what they legally do, not merely in the policy field where they act, and that matters because each way of using a base collides with a different kind of limit (Section 5).

The fiscal technique is borrowing in common. SAFE mobilises Union borrowing of up to 150 billion EUR, on-lent to Member States for defence-related investment. The base is used to fund defence, which enters as the purpose of the spending rather than as the object of regulation.[28] What alternative the Parliament pleads is telling. Its first plea submits that the act fails the conditions of Article 122 TFEU and concerns instead the development of the Union's industrial policy in the field of defence under Article 173 TFEU, an ordinary-procedure basis, so that the dispute is in the first instance an intra-TFEU one, about the emergency route and the exclusion of the Parliament, rather than a CFSP/TFEU boundary dispute.[29] SAFE thus meets limits on two fronts. The pleaded front is whether the conditions of Article 122 are met, the Parliament's exclusion standing or falling with them. The doctrinal front is whether a budget-backed lending capacity for defence circumvents the funding prohibition of Article 41(2) TEU.

The industrial technique both regulates and funds. EDIP structures the defence-industrial market and channels Union funding subject to conditions. It does so on a combination of legal bases whose division of labour the Regulation itself spells out, assigning Article 114 to the security-of-supply framework, Article 173 to the funding of the European defence technological and industrial base and Article 212 to the Ukraine instrument, with Article 322(1) added for the financial provisions.[30] Here the alternative is not a rival base so much as a rival characterisation. Is the measure genuinely internal-market and industrial, or defence in market clothing?

The territorial technique is procedural. The proposed Military Mobility Regulation, resting on Articles 91 and 100(2) TFEU, standardises how Member States authorise cross-border military transport, from timelines and notification formats to categories and revocation grounds, and adds an emergency mechanism for extraordinary situations. The base is used to regulate the procedures conditioning physical access to territory and defence enters as the purpose of the regulated activity.[31] On the most developed objection, the authorisation architecture would require either a CFSP basis or inter-State

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[28] Regulation (EU) 2025/1106.

[29] Note 18 above (first plea, per the OJ notice). On the action generally, LESON, M. Moving Towards a SAFE Defense Policy in Europe. In: *Verfassungsblog* [online]. 12. 9. 2025 [cit. 2026-07-06]. Available at: https://verfassungsblog.de/moving-towards-a-safe-defense-policy-in-europe/; for the same alternative reached doctrinally, STEINBACH, *c. d.*, p. 1663.

[30] Regulation (EU) 2025/2643. Its crisis regime splits by product category: binding priority-rated orders only for crisis-relevant non-defence products (recital 98; Article 63); for defence products only a request the operator is "free to refuse" [Article 66(2)], obligations attaching upon express acceptance [Article 66(6) and (12)]. For the scale of the powers conferred on the Commission, BLOCKMANS, S. – FIOTT, D. *European Defence Projects of Common Interest: From Concept to Practice*. European Parliament, PE 775.284, 2026.

[31] COM(2025) 847 final.

agreement.[32] Neither route is hypothetical, as permissions have until now rested on voluntary EDA technical arrangements and bilateral practice, nor costless, as the inter-State route lies outside the Union's institutional and judicial frame.[33]

What distinguishes the territorial technique is already visible. Money and markets are the objects of the first two. The third operates on the procedures by which a Member State decides who may cross its territory, and that is what will bring it, and it alone, into direct contact with the reservation of Article 4(2) TEU.[34]

5. DIFFERENT LIMITS, ONE PATTERN

The second axis is the modality-specific constraint, and it carries the article's central focus, namely that in each modality a different constraint ultimately decides whether the measure stands. Candidates for a single comprehensive constraint are not lacking. The review of the chosen legal basis applies to all three measures, and it does limit their content, because a measure whose content goes beyond what its basis allows will fail. That review, however, has no single standard of its own. It measures each act only against the particular basis chosen for it, and it does not exhaustively cover all the limits that apply even after the basis has been chosen.[35] The funding prohibition of Article 41(2) TEU could be read as a general bar on defence spending from the Union budget and the reservation of essential State functions in Article 4(2) TEU could, on its face, cover the whole field of defence. What follows shows that neither reaches that far. Some limits operate at the choice of basis itself. Others go beyond that choice. They either cap what the Union may do or fund even on a validly chosen basis, as Article 41(2) TEU does, or they delimit how far the chosen sectoral basis itself reaches into a protected national domain, as Article 4(2) TEU does.[36] The distinction matters because the three modalities are constrained at different levels. Where one is stopped, if at all, at the choice of basis, another is constrained in what it may do or fund even after

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[32] SNELL, *c. d.*

[33] COM(2025) 847 final, Explanatory Memorandum (EDA Technical Arrangements and Their Incomplete Implementation); on intergovernmental action where Union competence is lacking, Case C-370/12, *Pringle*, EU:C:2012:756, para. 105.

[34] The reservation is not absent from the other fields – the Defence Procurement Directive opens by reiterating that national security remains the sole responsibility of each Member State (MEERSHOEK, *c. d.*) – but there it is recited as background. Only the territorial technique regulates the very decision the reservation protects. Directive 2009/43/EC likewise removed further transit authorisations for defence-related products, with an express public-security proviso [recital 17, Article 4(1)], a contrast that reinforces the significance of an express security exit.

[35] GARBEN, *From sneaking to striding*…, p. 436. On the inconsistent application of the aim-and-content criteria and the resulting procedural formalism of legal-basis review, ENGEL, *c. d.*

[36] Article 5(1) TEU. The extension to Article 4(2) TEU and Article 41(2) TEU is analytical, not textual. Article 41(2) is closest to a true exercise-level budgetary limit; Article 4(2), as used here, is a basis-linked reservation and proportionality constraint shaping the permissible scope of a sectoral basis. On the underlying existence/exercise frame, SCHÜTZE, R. EU Competences: Existence and Exercise. In: ARNULL, A. – CHALMERS, D. (eds.). *The Oxford Handbook of European Union Law*. Oxford: Oxford University Press, 2015.

that choice. A further common lens follows from the gateway itself. For each measure one may ask whether a defence-specific rival basis exists to which a lex specialis preference could attach. For SAFE the nominal defence-specific alternative would have been CFSP-based funding, but the budgetary bar of Article 41(2) TEU keeps that route off the Union budget, as the European Peace Facility architecture shows.[37] The pleaded rival is therefore another sectoral basis, and what the plea targets is the horizontal front, the exclusion of the Parliament as co-legislator. The defence-specific limit is instead pressed in doctrine, in the circumvention objection discussed below. For the industrial and territorial modalities the nearest rival is defence-specific, Article 45(1)(e) TEU for the industrial and the CFSP for the territorial, with the inter-State route outside the Treaties as a further alternative, which is one reason why the CFSP boundary and the Treaty's reservations enter there at all.[38]

In the fiscal modality the contested constraint that ultimately decides the actual dispute is internal to Article 122. That provision is not a single undifferentiated emergency clause. Paragraph 2 is the classic financial-assistance route, tied by *Pringle* to *ad hoc* assistance,[39] while the reach of paragraph 1 is contested between Chamon's non-emergency economic-policy reading and more restrictive crisis-law accounts.[40] SAFE's citation formula invokes Article 122 without specifying a paragraph, and its recitals blend the vocabularies of both paragraphs.[41] In case C-560/25 the gateway nonetheless stands alone. Both pleas concern the choice of basis, and as Section 2 showed, the same conditions of Article 122 settle both competence and the Parliament's exclusion. Steinbach's budgetary objection – the budget-backed lending capacity as a circumvention of Article 41(2) TEU – is serious and shows that SAFE shares this particular limitation with EDIP as well, but it is not the constraint on which the pending action is based.[42] A separate question, left open here, is how strictly the Court will police the gateway.[43]

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37 Council Decision (CFSP) 2021/509.

38 VROEGE, *c. d.*, pp. 351–352 (*lex specialis* and the defence-specific rival basis; for a broader application of lex specialis in legal-basis litigation, ENGEL, *c. d.*). Vroege argues that, if a lex specialis preference applied, the defence-specific Agency task of Article 45(1)(e) TEU would displace Article 173 for capability-development funding and render the EDF partly unconstitutional, a conclusion he ultimately resists while treating the industrial competence as politically subordinate to the CFSP (pp. 351–352 and 361–362).

39 Case C-370/12, *Pringle*, EU:C:2012:756, paras. 65 and 105.

40 CHAMON, *c. d.* [Article 122(1) as not exclusively an emergency basis]; Case C-370/12, *Pringle*, EU:C:2012:756, paras. 65 and 105 (*ad hoc* assistance; no permanent mechanism); CALLEJA, T. – MAXIAN RUSCHE, T. – SHIPLEY, O. EU Emergency – Call 122? On the Possibilities and Limits of Using Article 122 TFEU to Respond to Situations of Crisis. *Columbia Journal of European Law*. 2024, Vol. 29, No. 3, p. 520, at p. 531, note 57 [surveying the provision's possibilities and limits and reporting arguments that the conditions of Article 122(2) TFEU may be more flexible than *Pringle* suggests]; DE WITTE, B. Guest Editorial: EU Emergency Law and its Impact on the EU Legal Order. *Common Market Law Review*. 2022, Vol. 59, No. 1, pp. 3–18.

41 Regulation (EU) 2025/1106, citation formula ("Article 122 thereof") and recitals 8–11; LESON, *c. d.*

42 STEINBACH, *c. d.*, pp. 1662–1663, concluding that the budget-backed lending capacity *"amounts to a circumvention of the prohibition stipulated in Article 41(2) TEU"*, and observing that a purely industrial programme could instead have been founded on Article 173 TFEU.

43 By analogy, Case C-62/14, *Gauweiler and Others*, EU:C:2015:400, paras. 68–69 and 74–75 (broad discretion, review confined to manifest error and procedural guarantees).

In the fiscal modality, then, the litigation turns entirely on whether Article 122, paragraph 1 or paragraph 2, was available at all, a question that at once settles whether the Union could act and whether the Parliament could be left out. The further vertical question, what the Union budget may finance for defence, is for now pressed mainly in doctrine.

EDIP is the intermediate case. Whether any limit bites depends first on how the measure is characterised, as genuinely internal-market and industrial or as defence in market clothing. Article 114 requires a genuine internal-market objective under the *Tobacco Advertising* criteria. A further strain is built into the combination of bases. Article 173(3) expressly excludes harmonisation, Article 114 exists to harmonise, and an instrument resting on both must keep the two roles apart.[44] The budgetary question then enters, though not as a simple blanket prohibition. Article 41(2) TEU – by its terms a rule of the CFSP chapter – excludes from the Union budget expenditure arising from operations having military or defence implications, and off-budget instruments such as Athena and the European Peace Facility show the institutional weight of that rule.[45] Its reach into TFEU instruments accordingly runs through anti-circumvention rather than through its text. The better view from the sources is nonetheless that Article 41(2) cannot be treated as a general ban on every defence-related euro spent through the Union budget. Moser confines the provision to operational military activities, Steinbach and Wolff distinguish capability development from defence operations, and Vroege, while accepting the force of a defence-specific rival basis, ultimately treats the EDF's core research-and-development subsidy scheme as correctly adopted under a non-CFSP basis.[46] That does not empty Article 41(2). It changes the form of the question. Where an instrument crosses from industrial or research-and-development support into the purchase, transfer or operational financing of capability, the anti-circumvention reading becomes plausible. Where it does not, the issue collapses back into characterisation – genuinely industrial and market-making, or defence capability planning in industrial clothing? Steinbach reaches the same point from the fiscal side, describing the conflict with Article 41(2) TEU as inevitable where industrial defence policy goes in tandem with military capability planning.[47] How deep the problem runs is shown by Vroege's anatomy of the European Defence Fund, where a lex specialis preference for Article 45(1)(e) TEU

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[44] Case C-376/98, *Germany v. Parliament and Council* (Tobacco Advertising), EU:C:2000:544, paras. 83–84; on Article 173's exclusion of harmonisation and its deployment for defence-industrial financing, ŘÍHA, *c. d.*; MEERSHOEK, *c. d.* (the internal market as the wrong legal basis for military-strategic procurement). More generally on basis-bound limits and their circumvention through neighbouring bases, GARBEN, *From sneaking to striding*…, p. 436 (five forms of *"harmonisation by stealth"*).

[45] Article 41(2) TEU; Council Decision (CFSP) 2015/528 (Athena); Council Decision (CFSP) 2021/509. On PESCO, Council Decision (CFSP) 2017/2315; the European Defence Agency operates under Article 45 TEU.

[46] For the counter-position confining the prohibition, MOSER, *c. d.*, pp. 218–219 [blanket reading of Article 41(2) TEU *"overly restrictive"*; *"operations"* plausibly military deployments]; STEINBACH, A. – WOLFF, G. B. *Financing European Air Defence Through European Union Debt*. Bruegel Policy Brief 21/2024, distinguishing capability development from defence operations; VROEGE, *c. d.*, pp. 351–352.

[47] STEINBACH, *c. d.*, p. 1663 [*"a conflict with the prohibition under Article 41(2) TEU, which appears inevitable where industrial defence policy goes in tandem with military capability planning"*].

would render the Fund partly unconstitutional, a conclusion he resists while treating the industrial competence as politically subordinate to the CFSP.[48] EDIP's constitutional logic is therefore a conditional split. Characterisation is always decisive and the budgetary limit becomes decisive only on the anti-circumvention reading, or where particular provisions cross into the purchase, transfer or operational financing of capability. Article 346 TFEU sits alongside as a secondary limit. It allows a Member State to derogate from the Treaties for essential security interests connected with the production of or trade in arms, but the Court construes it strictly. The State must demonstrate that the derogation is necessary, and proportionality applies, so the provision shields specific national measures rather than removing the field from Union law, and in the vocabulary of this article it is a State-side derogation, not a limit on the Union legislator, which is why it cannot decide the characterisation question.[49]

For military mobility this article takes as its starting point the author's earlier analysis.[50] The ordinary authorisation regime for approval of the military transport is defensible on Articles 91 and 100(2) TFEU, as its operative content is recognisably transport-regulatory, and each receiving Member State retains an individual decision to grant or refuse permission, though inside a Union-set frame of mandatory categories, standing permissions and narrow revocation grounds. That frame is not costless, since permissions that persist until revoked operate as a ratchet and tight deadlines shrink the room for a refusal, but the sovereign decision survives. Snell's broader objection, that the whole authorisation system regulates entry rather than transport, is powerful but in the author's view too broad on this point. Nor is the drafting device itself the problem, as deemed acceptance is not alien to sectoral EU law, for the Services Directive provides that, absent a timely response, authorisation is deemed granted.[51] What matters is not the device alone but the character of the decision it displaces and whether an equivalent security exit survives.[52]

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[48] VROEGE, *c. d.*, pp. 351–352 and 361–362 (*lex specialis*; partial unconstitutionality prima facie, resisted; political subordination of the industrial competence); PEROTTO, *c. d.* On the on-budget financing of the EDF, Regulation (EU) 2021/697 of the European Parliament and of the Council of 29 April 2021 Establishing the European Defence Fund and Repealing Regulation (EU) 2018/1092.

[49] KELLERBAUER, M. Commentary on Article 346 TFEU. In: KELLERBAUER – KLAMERT – TOMKIN (eds.), *c. d.*; Case C-284/05, *Commission v. Finland*, EU:C:2009:778; Case C-615/10, *Insinööritoimisto InsTiimi*, EU:C:2012:324; RANDAZZO, V. *Article 346 and the Qualified Application of EU Law to Defence*. EUISS Brief, 2014.

[50] The basis-level assessment of the ordinary regime, including the C-43/12 analogy and the response to Snell's entry objection, is developed in the author's previous work (LINZER, *c. d.*).

[51] Directive 2006/123/EC on Services in the Internal Market, Article 13(4): failing a response within the set or extended time period, *"authorisation shall be deemed to have been granted"*, subject to different arrangements *"justified by overriding reasons relating to the public interest, including a legitimate interest of third parties"*.

[52] The nearest structural analogue cuts the other way: relocation decisions under Article 78(3) TFEU displaced individual decisions on the admission of persons and withstood annulment, Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v. Council*, EU:C:2017:631. Even so, the contested decision preserved an individual approval step [Article 5(4)] and each Member State's right to refuse an applicant on national-security or public-order grounds [Article 5(7)]; what withstood review was displacement with a security exit, which deemed acceptance does not provide. The distinction must therefore rest on the

The emergency mechanism is different in kind. Its deemed-acceptance rule no longer structures how the national decision is taken but replaces that decision with acceptance under a mechanism the Council activates by qualified majority, and its language leaves no clearly operative security exit.[53] That crosses the limit formulated in the author's earlier work, namely that a sectoral transport basis may regulate how a Member State decides on military transit, but it may not remove the decision itself.[54] The limit rests on Article 4(2) TEU read correctly. The reservation is no free-standing switch – a Member State cannot escape Union law by invoking national security in the abstract, and even the activities of the armed forces are not categorically excluded[55] – but it operates within EU law as a genuine constraint, shaping the permissible scope and intensity of transport proceduralisation. The Court itself articulated that structure in *Ministrstvo za obrambo*, requiring that the application of EU rules not hinder the proper performance of essential State functions. What this article adds is the application of that structure to the removal of the transit decision itself. Deeming an ordinary service authorisation granted displaces an administrative decision within a harmonised field but deeming military transit accepted displaces a decision within the core the reservation protects, the admission of foreign armed forces to national territory. The June 2026 mandates are consistent with that reading. The Council deleted the deemed-acceptance rule in favour of the liberty of the Member States to choose between two permission modalities before activation of the emergency mechanism itself, while the Parliament left Article 20 untouched.[56]

From this, the pattern can be stated. The gateway of legal-basis review is common to all three, yet it does not play the same role in each. In the fiscal modality the outcome of the actual litigation turns on the gateway alone. The industrial modality couples it to a contested budgetary constitution characterised by the confined reading of Article 41(2) TEU, an exercise-level limit on the broader anti-circumvention reading. And in the territorial modality the gateway holds for the measure's core only because the national decision survives, but where that decision is removed, Article 4(2) TEU marks the outer boundary of transport proceduralisation. Restated in the terms of Section 1, the horizontal risk materialises differently in each modality, as the Parliament's exclusion for SAFE and as the loss of the national veto for the co-decided measures, most sharply in the emergency military-transport regime. The vertical risk is policed by a different limit

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reserved character of the displaced decision – and on the absence of any equivalent exit – not on displacement as such.

53 LINZER, *c. d.*, developing the full analysis of the deemed-acceptance rule, the operational ambiguity of its saving clause in Article 20(1) of COM(2025) 847 and the accelerated-procedure alternative; SNELL, *c. d.* [reaching a converging conclusion on the emergency mechanism, likewise anchored in Article 4(2) TEU, while going further than the present article by objecting also to Articles 4–6].

54 LINZER, *c. d.*

55 Joined Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net and Others*, EU:C:2020:791, para. 99; Case C-623/17, *Privacy International*, EU:C:2020:790, para. 44; Case C-742/19, *Ministrstvo za obrambo*, EU:C:2021:597, paras. 35–46, in particular paras. 43–45 (the application of EU law must not hinder the proper performance of essential State functions).

56 Council doc. 10730/26, Article 20 as amended and the citation formula adding Article 172 TFEU; European Parliament. Report A10-0176/2026, 24. 6. 2026.

in each, namely the conditions for the use of the respective paragraphs of Article 122, the budgetary prohibition of Article 41(2) TEU and the reservation of Article 4(2) TEU. A second regularity cuts across the first. Article 41(2) TEU shadows both money-modalities, as a doctrinal circumvention objection to SAFE's budget-backed lending and as a live characterisation/budget question in EDIP. A Charter exposure, on the other hand, links the two regulatory modalities, for the priority-access provisions of the mobility proposal and the priority-rated mechanisms of EDIP's crisis regime each reach into operators' businesses,[57] while the loan instrument contains no comparable operator-level mechanism, and Article 4(2) TEU is engaged by the territorial modality alone, as a loan instrument predetermines no national decision on access and EDIP's fragility lies elsewhere, in characterisation and the budget. Nor does EU crisis law supply a single comprehensive answer,[58] as necessity, temporariness and proportionality recur across all three, but they do not decide the same legal question in each. Article 122 has its paragraph-specific predicate, EDIP's crisis regime is filtered through product categories and competence, the emergency military-transport regime turns on the survival of a Member State sovereign decision. There is, accordingly, no single comprehensive defence-specific constraint governing all the aspects of the turn. The divergence is nonetheless patterned. The modality-specific constraint tracks the Treaty-protected domain each technique penetrates, whether the emergency/economic gateway, the budgetary constitution, or the essential-state-functions core. However, none of this unsettles the common origin described in Section 3. What is shared is the gateway and the exposure, and what diverges are the modality-specific limits that ultimately decide.

6. CONCLUSION

This article asked by what constitutional limits the "supranational turn" of EU defence policy is governed. The answer has two parts, one common and one divided.

The common part is the entry test, the gateway of legal-basis review. All three measures stand on non-defence bases, so all three must show that their centre of gravity is genuinely sectoral, and each carries the same two-front risk, a vertical one, whether the Union may act at all, and a horizontal one, who decides. In the fiscal modality both fronts meet in a single place and each has its own challenger. The Parliament attacks

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[57] The priority-access regime of the military-mobility proposal mandates the interruption, postponement or cancellation of civilian services, without compensation for affected transport users [COM(2025) 847, Article 21(6) and (7)]; EDIP's priority-rated mechanisms bind operators for crisis-relevant non-defence products, the Regulation's own recitals framing them in terms of necessity and proportionality [recitals 97–99 and 102 and Article 63(9); note 30]. Both engage Articles 16 and 17 of the Charter and the proportionality requirement of Article 52(1) – for the mobility side, the author's study (LINZER, *c. d.*). The loan instrument, by contrast, contains no compulsory operator-level mechanism; contract modifications require the undertaking's prior agreement [Regulation (EU) 2025/1106, Article 18(1)].

[58] For the systematising ambition of that literature, KUKAVICA, J. The Constitutional Contours of EU Crisis Law. *European Journal of Risk Regulation*. 2026, Vol. 17, No. 1, pp. 1–19; DE WITTE, *c. d.*

the conditions of Article 122 in the pending action because its exclusion stands or falls with them, while doctrine questions what the Union budget may finance for defence under Article 41(2) TEU.

The divided part is where the ultimately decisive limit sits. The industrial modality is limited first by characterisation, which is always decisive, while Article 41(2) TEU becomes an independent budgetary limit only on the broader anti-circumvention reading or where particular provisions cross into the purchase, transfer or operational financing of capability.[59] The territorial modality is limited by Article 4(2) TEU, a reservation marking the outer boundary of transport proceduralisation. A Charter exposure at operator level, noted in Section 5, links the industrial and territorial modalities.[60] In that modality the comparison builds upon the limit taken from the author's earlier study, namely that a sectoral transport basis may regulate how a Member State decides on military transit but may not remove the decision itself, as what matters is not the drafting device but the reserved character of what it displaces and the absence of an equivalent security exit.

The article does not reach a final conclusion on the validity of SAFE or EDIP, as it treats neither exhaustively. The account is nonetheless robust to the movement of the field. Whichever way the Court resolves the SAFE action, the fiscal modality's limit remains the Article 122 gateway. Whatever the trilogue does to the emergency mechanism, the limit against which it is assessed is unchanged. The measures that were the focus of this comparison will evolve. The pattern they lay out, however, is clear, and it shows the tension between the Union's current political and practical needs and the constitutional framework set out by the Treaties.

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[59] See notes 46 and 48 above.
[60] See note 57 above.