



PRIV-WAR Report – European Union

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**The Regulatory context of private military and security services
at the European Union level**

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PRIV-WAR

Regulating privatisation of “war”: the role of the EU in assuring the compliance
with international humanitarian law and human rights

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The Regulatory context of private military and security services at the European Union level

1. Introduction¹

This report on existing European Union² legislation with respect to private military and security services is delivered pursuant to WP 7.1 sub b (“The existing regulatory context for private military and security services at the national and EU level, report on the existing regulatory regime at the EU level”) of the project *Regulating Privatization of “War”: the role of the EU in assuring compliance with international humanitarian law and human rights* (PRIV-WAR).

2. Scope of the report

At the EU level there are as yet no specific laws or regulations with respect to the private military and security industry, as can be concluded from several studies.³ The working hypothesis for this report suggests that the EU role is currently unsatisfactory (Research Proposal PRIV-WAR, p. 26). Considering the focus of the PRIV-WAR project, the main question is how the EU can contribute to ensuring compliance with international humanitarian law (IHL) and human rights law by PMCs/PSCs (-employees). In that respect, it is suggested here that the biggest challenges to IHL and human rights law arise in the area of PMC/PSC services which fulfill the following criteria:

- (1) The legal relationship between the hiring entity and the PMC/PSC is contractual;

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² This includes regulation at the level of the European Community (EC), unless specified otherwise in this report.

³ See, e.g., A. Bailes & C. Holmqvist, The increasing role of private military and security companies, European Union DG External Policies study, October 2007; C. Holmqvist, Private Security Companies, the case for regulation, SIPRI policy paper 9, January 2005; E. Krahmman, Regulating Military and Security Services in the European Union, in: M. Caparini & A. Brayden (eds.), Private Actors and Security Governance, DCAF 2006, p. 189-212; J. Hagmann & M. Kartas, International Organizations and the Governance of Private Security, in: M. Caparini & A. Brayden (eds.), Private Actors and Security Governance, DCAF 2006, p. 285-304; H. Born, M. Caparini & E. Cole, ‘Regulating private security in Europe: status and prospects’, DCAF Policy Paper 20, 2007, p. 7-8.

(2) The PMC/PSC is hired to operate in a situation of international armed conflict or non-international armed conflict or post-conflict buildup (e.g., demobilizing warrior groups); and

(3) The services provided by the PMC/PSC include (i) the carrying and potential use of (fire-) arms or (ii) contact with prisoners other than for medical purposes only (e.g. interrogation, prisoner detention).

Within the EU Member States, there are, almost without exception, extensive domestic laws and regulations concerning private security services (corporate security and domestic private policing in particular). These involve registration and licensing for relevant companies, minimum standards for personnel selection and training, regulation of the use of firearms, and so on.⁴ At the European level, laws and regulations of the Member States concerning the private security sector are subject to the Treaty establishing the European Community (TEC). At the European level, specific harmonizing regulation of services provided by the private security sector or awarding of public contracts in the security and defense sectors is being contemplated out of economic considerations - competition law in particular. There seems to be no need for European regulation from the perspective of protection of IHL and human rights law within the Internal Market.

Still, the existing regulations with respect to the Internal Market may offer valuable insights for the regulation of the export of private (military and) security services from the EU Member States to third countries. Moreover, such regulations concerning export to third countries may have effects within the Internal Market, and *vice versa*. In fact, the potential EC and EU (CFSP) overlap is one of the problems of the regulation of security services at the European level. Therefore, this report will give an overview of the existing regulatory framework at the EU level, including product-related rules and rules of the Internal Market (EC), in order to analyze to what extent these rules are directly relevant to the offering and delivery of private military and security services in armed conflict areas abroad.⁵ For the same reason mentioned, the subject-matter of the regulations rather than the 'pillar' from which they originate has been chosen to structure this report.

In addition to an analysis of existing regulations and case-law with respect to security services, security related export controls and defense procurement, this report briefly examines the EU position with respect to IHL and the regulatory context of EU crisis management operations. Conclusions and observations appear at the end. First, this report touches upon the choice of legal basis for regulatory measures at the European level.

⁴ See Confederation of European Security Services (CoESS) 'Panoramic Overview of Private Security Industry in the 25 Member States of the European Union' (2004), and see A. Bailes & C. Holmqvist, The increasing role of private military and security companies, European Union DG External Policies study, October 2007, p. 19.

⁵ This report does not examine measures, if any, in the field of civil and criminal liability of (legal) persons or with respect to company law at the European level. Such matters are essentially covered by national laws and there seems to be no reason why PMCs/PSCs should be regarded as a distinct category with respect to contract law, tort law or criminal law.

3. Choice of legal basis (Internal market and CFSP)

As long as the Treaty of Lisbon (2007) has not entered into force – and after the Irish ‘no’ on 12 June 2008 this may take time⁶ – the European Union keeps its well-known pillar structure, with the TEC (Rome 1957, as amended) on the Internal Market as the ‘first pillar’ and the Treaty on European Union (TEU, Maastricht 1992, as amended) comprising the second pillar on Common Foreign and Security Policy (CFSP) and the third pillar on the Co-operation in Justice and Home Affairs.⁷

A preliminary question when contemplating the regulation of PMCs/PSCs(-services) at the EU level is to what extent regulatory measures have an impact on the Internal Market. Where the Internal Market is concerned, the TEC with the European Commission as the most important law-making (or: law initiating) body provides the regulatory framework. As regards the strengthening of the security of the EU, the maintenance of peace and international security in accordance with the UN Charter, the developing and strengthening of democracy and the rule of law and respect for human rights and fundamental freedoms, the intergovernmental “second pillar” (CFSP) with the Council as main decision-making organ and a large role for the Presidency and the European Council provides the regulatory framework.

The Court of Justice of the European Communities (‘the Court’) has ruled that the provision of private security services *within* the Internal Market is subject to ‘first pillar’ rules on the freedom of persons and services, with the Commission having the competence to bring cases before the Court to correct national legislation regarding private security services through which the Member State is violating Community legislation (see further below). In the CFSP, various instruments have been adopted regarding the *export* of defense-related equipment, some explicitly covering technical assistance related to weapons of mass destruction and dual-use items, some explicitly covering private arms transfers and some constraining export or transfer of goods and technologies (see further below).

The Court of Justice has been called upon on several occasions to demarcate the areas of competence between the Commission and the Council. When the legal basis of a measure or secondary act (based on a measure) is challenged, the Court must determine, on the basis of *objective* criteria the main purpose(s) and main content, or main “component(s)”, of the measure contested.⁸ The Court in the *Ecowas* case has

⁶ At the December 2008 European Council, Ireland announced to hold a second referendum on the Lisbon Treaty, in 2009. Arguably one of the problems of the Lisbon Treaty campaign was the mix up of the institutional and the constitutional; the institutional face-lift (which the Union needs) has been confused with the idea that Europe was in need of a Constitution (also due to the original idea of a Constitutional Treaty), see ‘Editorial: Marking the Anniversary of the Universal Declaration; the Irish No and the Lisbon Treaty’, 19 *EJIL* 4 (2008): 647-653, at 650.

⁷ The latest consolidated versions of the TEU and of the TEC have been published in the Official Journal of the European Union, OJ C 321 E/1, 29.12.2006.

⁸ In short, the Court has to determine the “centre of gravity” of the measure or implementing secondary act. Then, on the basis of this analysis the Court will have to place the measure under the scope of competences of one or more legal bases. This requires an interpretation of the Treaty provisions that are presented by the parties as the most appropriate legal basis.

ruled that if a measure or act contains two equally important components one falling within the first and the other within the second pillar, a choice for a single legal basis must be made as these pillars are as a legal basis *per se* incompatible and cannot provide a dual legal basis.⁹ This “per se” incompatibility can probably be explained from the fact that the Court perceives the first pillar and the CFSP as connected, yet distinct legal orders. The sum of the many and fundamental differences between the two pillars apparently makes it impossible to use the first and the second pillar simultaneously as legal basis. These differences include the “supranational” nature of the first pillar with its potential for direct applicability in the national legal systems of the member states versus the more intergovernmental nature of the CFSP; the set of legal instruments available (Regulation, Directive, individual Decision under the first pillar and Common Strategy, Common Position, Joint Action under the second pillar); the type of decision-making (often co-decision under the TEC versus unanimous voting in the Council and almost no role for the European Parliament under the CFSP) and the jurisdiction of the Court itself (full jurisdiction under the first pillar, almost no jurisdiction under the second pillar).

Any regulation at the EU level of the *export* of security (and military) services by EU based PMCs/PSCs to (post-)armed conflict situations in third States would according to its substance seem to be a matter for the Council under the CFSP, at least if regulation is concerned with the carrying and use of firearms or contact with prisoners by PMCs/PSCs in (post-)armed conflict areas abroad. Then again, the supply of services is generally a concern of the Internal Market and the TEC also provides a basis for EC development co-operation with third countries, as well as economic, financial and technical co-operation of the EC with third countries for the general purposes of developing and consolidating democracy and the rule of law and respect for human rights and fundamental freedoms (Titles XX and XXI TEC). As appears from the *Ecowas* case the Commission is carefully guarding its scope of competence.¹⁰ After all, in that case even the decision of the Council implementing a Joint Action, whereby a financial contribution of the EU was granted to ECOWAS to assist this organization in combating the accumulation and spread of small arms and light weapons in Africa, was successfully challenged by the Commission as being in the exclusive realm of Community powers because it had aspects of European development policy (and did not exclusively serve the CFSP perspective of preserving peace and strengthening international security). The outcome of the *Ecowas* case has been determined by the Court’s interpretation of the current Article 47 TEU, according to which nothing in the

⁹ See Case C-91/05 *Commission v Council*, judgment of 20 May 2008, par 76-77, 108-109. On the competence of the Court in these matters, see also Case T-299/04, *Selmari v Council and Commission*, par. 54-56.

¹⁰ Or perhaps better, is stretching its field of competence; cf. also Case C-170/96, *Commission v. Council (airport transit visa)*, judgment of 12 May 1998 (concerning first and third pillar). See further Case C-403/05, *EP v Commission*, judgment of 23 October 2007, where the European Parliament successfully challenged the competence of the Commission to take implementing measures for border patrols in the Philippines on the basis of a Regulation on development aid (financial, technical and economical cooperation with developing countries in Latin-America and Asia) whereas the measures had as their aim the fight against terrorism and transnational criminal networks.

TEU shall affect the TEC. According to the Court, it is not even necessary that the measure having legal effects adopted by the Union in any way prevents or limits the exercise of Community powers, but it is sufficient that the measure *could have been* adopted by the Community.¹¹ Once it can be established that there is a proper legal basis for Community action the Community is competent in principle, not the Union. Due to the wording of Article 47 EU as interpreted by the Court this means that if a measure or secondary act by its aims and content falls under both the first and the second pillar, still the first pillar must be chosen as the single legal basis – maybe unless the measure or secondary act can be split up along the lines of its different, not inextricably linked, aims.¹²

In the same regard, it can be noted that the European Defense Agency (EDA), a legal person established under the CFSP which, under the Council's authority, is active in the field of defense-capabilities development, research, acquisition and armaments, shall act without prejudice to the competences of the EC, in full respect of Art. 47 TEU.¹³

Only if it can be established that the main aims and content of the regulatory measure is a matter of CFSP, the Council is competent to act under the TEU and not the Commission under the TEC. This also applies to combinations under the first and third pillar.¹⁴ Combination between the second and the third pillar – both intergovernmental pillars – have not been rejected by the Court.¹⁵ It should be observed that if the Treaty on the Functioning of the European Union comes into being (the TEC will be renamed Treaty on the Functioning of the European Union – TFEU – when the Lisbon Treaty enters into force¹⁶), a new Article 40 TEU will replace the current Article 47 TEU. That new Article 40 is more balanced in that implementation of CFSP should respect Union powers laid down in the TFEU, but also the implementation of TFEU powers should respect CFSP powers. But even then it would seem clear that regulatory measures at the EU level on the providing of private security services in third states should not at the same time create legal or factual barriers for the functioning of the Internal Market (even if the Commission has not yet adopted specific measures in that field). It is a

¹¹ See Case C-91/05 *Commission v Council*, judgment of 20 May 2008, par 60-61.

¹² The Court did not refer explicitly to this possibility in the *Ecovas* case, but in other cases has ruled that partial annulment was impossible due to the un-dissociable or inextricably linked aims and content of the contested measure, see Case C-300/89 *Commission v Council*, judgment of 11 June 1991 (*Titanium Dioxide*), par. 13; Case C-440/05 *Commission v Council*, judgment of 23 October 2007 (*Ship-Source Pollution*), par. 72-74. This would seem to imply that splitting up, if possible, could solve the problem of impossible combinations of legal basis.

¹³ See Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defense Agency, Art. 1(2).

¹⁴ See Case C-176/03 *Commission v Council*, judgment of 13 September 2005 (relating to the protection of the environment through criminal law).

¹⁵ Cf. Case T-338/02 *Segi v Council*, Order of 7 June 2004, where the Court of First Instance ruled that a first pillar basis should have been used instead of a third pillar basis but did not pronounce on the combination of second pillar and third pillar competences used in the measure disputed.

¹⁶ See the consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 115/01, 9 May 2008.

fundamental principle - see Art. 297 and 298 TEC¹⁷ - that the functioning of the Internal Market, competition in particular, must not be affected by measures which a Member State may be called upon to take in exceptional circumstances, such as serious internal disturbances, the threat or outbreak of war, or actions for the maintenance of peace and international security (pursuant to Article 11(1) TEU, preserving peace and strengthening international security is one of the core CFSP objectives).

Another important element which crosses the pillar structure is the budgetary power of the Commission in the second pillar. All CFSP expenditure other than military or defense operations – so including (the) civilian (part of) EU missions – shall be charged to the budget of the EC (Art. 28(3) TEU). The CFSP budget is thus implemented by the Commission under its own responsibility and having regard to the principles of sound financial management (Art. 28(4) TEU and Art. 274 TEC). Only military missions fall outside the budgetary powers of the Commission (and other organs); there is no EU budget and the Member States themselves pay directly for (their share in the) EU military operations ('costs lie where they fall'), although there is an ESDP mechanism for the funding out of the Community budget of the common costs of operations with military or defense implications (the so-called ATHENA mechanism).¹⁸

4. Regulation of security services at the EU level

4.1 Private security services

From a 2004 survey of the Confederation of European Security Services (CoESS), it is clear that (almost) all of the then 25 Member States of the EU have specific national laws and regulations in place regarding private security services.¹⁹ The security services concerned are typical domestic private security services, such as guarding and protecting of movable or immovable property, protecting persons, guarding money and valuables transports, private alarm networks, and industrial security. At the EU level there are as yet no specific regulations in respect of the private

¹⁷ Article 297 TEC reads: "Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security. Article 298 TEC reads: "If measures taken in the circumstances referred to in Articles 296 and 297 have the effect of distorting the conditions of competition in the common market, the Commission shall, together with the State concerned, examine how these measures can be adjusted to the rules laid down in the Treaty. By way of derogation from the procedure laid down in Articles 226 and 227, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in Articles 296 and 297. The Court of Justice shall give its ruling in camera."

¹⁸ For an overview, see EU Council Secretariat Fact Sheet 'Financing of ESDP operations', June 2007 (www.consilium.europa.eu).

¹⁹ See 'Panoramic Overview of Private Security Industry in the 25 Member States of the European Union' (2004). Only the Czech Republic and Cyprus reportedly did not have specific legislation. In Austria and Germany, the regulation is part of more general laws (Austria: commercial law, Germany: industrial code). On CoESS, see further *infra*, par. 8.

security sector. Although there have been some attempts to move towards common European regulations on private policing, few concrete results can be pointed at today.²⁰ At the regulatory level, there is only a (third pillar) Council Recommendation relating to the exchange of information from private security companies insofar as it is material for public security.²¹

However, in the absence of harmonization still the provisions of the TEC which are meant to ensure freedom of movement of persons, services and capital fully apply to the private security sector(-services). In a series of judgments, the Court of Justice has established the competence of the Commission according to which private security counts as an ‘economic sector’ and as such is subject to the same rules as other supply of services within the Internal Market.²² The Member States in the cases concerned have tried to invoke all possible justifications provided in the TEC itself²³, in particular the exception relating to the exercise of official authority, but the Court has consistently rejected those arguments. The following rules and principles can be derived from (one or more of) these judgments of the Court:

- Nationality requirements in national laws regarding private security undertakings and private security workers are contrary to the freedom of movement of persons including access to employment for foreign EC nationals to a national economic sector, the freedom of establishment and the freedom to provide services within the internal market.
- Nationality requirements affecting the freedom of establishment cannot be justified on the basis of the exception of the exercise of official authority: the purpose of the private security undertakings and the security staff is to carry out surveillance and protection tasks on the basis of relations governed by private law. Exercise of that activity does not mean that they are vested with powers of constraint. Instead they are merely making a contribution to the maintenance of public security, which any individual may be called upon to do, and does not constitute the ‘exercise of official authority’. In addition, as regards the freedom of movement for workers (i.e., not self-employed persons but employees), for which the TEC only recognizes an exception with respect to ‘employment in the public service’, it is clear that such exception cannot apply as it does not encompass employment by a private natural or

²⁰ Cf. E. Krahnemann, *Regulating Military and Security Services in the European Union*, in: M. Caparini & A. Brayden (eds.), *Private Actors and Security Governance*, DCAF 2006, p. 196.

²¹ See Council Recommendation of 13 June 2002, OJ C 153/1, 27.6.2002. Guided by the consideration that the private security sector may receive information which is also important for the (public) purposes of preventing crime and safeguarding of public security, the Council under the heading of police and judicial cooperation has made a Recommendation that the Member States encourage and facilitate cooperation and collaboration between national authorities responsible for the private security sector with a view to exchanging experiences in the handling of information obtained through private security firms which is material to public security.

²² See *Commission v Spain*, Case C-114/97, judgment of 29 October 1998; *Commission v Belgium*, Case C-355/98, judgment of 9 March 2000; *Commission v Italy*, Case C-283/99, judgment of 31 May 2001; *Commission v Portugal*, case C-171/02, judgment of 29 April 2004; *Commission v Netherlands*, Case C-189/03, judgment of 5 May 2003; *Commission v Spain*, Case C-514/03, judgment of 26 January 2006; *Commission v Italy*, Case C-465/05, judgment of 13 December 2007.

²³ The TEC acknowledges the possibility of exemptions on the freedoms of the Internal Market - see in particular Art 30, 45, 46, 55, 296 TEC.

legal person, whatever the duties of the employee. Therefore, even sworn private security guards (such as in Italy) do not form part of the public service and, even stronger, the requirement that private security guards before they can do their work as a security guard must swear an oath of allegiance to the State is prohibited.

Other domestic law requirements that may hamper freedom of movement are prohibited as well:

- The requirement that the provider of the private security services must be constituted as a legal person (in the Member State of establishment) is prohibited, since that rules out the possibility that natural persons provide transfrontier services in the Member State. The same applies to the requirement to employ a minimum or maximum number of staff, which is restrictive in character as well.

- Also, the fixing of prices for private security services with approval of a domestic authority within a certain margin is prohibited (as it, according to the Court, infringes on the freedom to set fees and hinders effective competition as it is likely to prevent operators from other Member States from incorporating in their fees certain costs that domestic operators do not have to bear). Similarly, minimum share capital requirements for the private security undertaking (in order to protect creditors) or requirements to lodge a security deposit with a domestic body (to cover potential liabilities) without taking account of security deposited in the Member State of origin, also constitute a prohibited restriction of the freedom to provide services and the freedom of establishment, considering that less intrusive measures are possible such as setting up a guarantee or taking out an insurance contract.

- The exception in the TEC allowing the barring of access to a certain occupation for reasons of public policy, public security or public health (Articles 39(3) and 46(1) TEC) does not apply generally to the private security sector, either. Those exceptions are meant to allow Member States to refuse access to their territory of persons whose access or residence would by itself constitute a danger for public policy, public security or public health.

- Furthermore, the residence condition, *viz.* the requirement that the security undertaking must have its place of business in the Member State in which it operates, is contrary to the freedom to provide services and cannot be justified by reference to public policy and public security. This is even so if the national measures only apply to economic operators from other Member States that offer their services in the Member State for a period of more than one year, as these measures are still, in principle, capable of restricting the freedom to provide services.

- The related personal residence condition, *viz.* that the directors and managers of security undertakings must have their residence on the territory of the Member State in which they are established, cannot be justified in order to ensure public security, either. That justification requires that there is a genuine and sufficiently serious threat affecting one of the fundamental interests of society. In addition, potential problems with monitoring of undertakings and compliance with the national laws are not related

to the place of residence of directors or managers. They can be carried out on any undertaking established in a Member State whatever the place of residence of its directors. Moreover, the payment of any penalty may be secured by means of a guarantee to be provided in advance.

Finally, Member States must take into account the obligations which private security undertakings and workers have to fulfill according to the domestic laws of their Member State of establishment:

- Member States may not require as a general rule a prior authorization, permit or approval (or charge fees for such permit) for undertakings, their managers or workers before these undertakings and workers are allowed to provide their services in the Member State and without taking into account these domestic law obligations.

- In line with the foregoing, the requirement to have for every security staff member of a security firm or internal security service an identification card to be issued by the authorities of the Member State where the services are provided and without taking into account checks to which cross-frontier providers of services are already subject in their Member State of origin, is likewise a prohibited restriction of the freedom to provide services as well as a disproportionate measure considering that every provider of a service who goes to another Member State must anyway be in possession of an identity card or passport.

- Members of staff may also not be required to have a diploma issued by a domestic educational organization of the Member State where the services are provided only and qualifications obtained in another Member State must be taken into account.

In sum, according to the Court, within the Internal Market nationality requirements (of undertakings or workers) are prohibited and no domestic licenses, permits or qualifications for undertakings or individual workers (self-employed or employees) can be required without taking into account the qualifications obtained in the Member State of origin. This latter consideration also illustrates the current absence of harmonized regulatory measures at the EU level with regard to private security services.²⁴

Private security services are excluded from the general Services Directive which applies to services supplied by providers established in a Member State.²⁵ On the basis of this Directive the Commission shall assess by 28 December 2010 the possibility of presenting proposals for additional harmonization instruments for the Internal Market

²⁴ Cf. *Commission v Spain*, Case C-514/03, judgment of 26 January 2006, par. 22 (a case on national VAT exemption for private security services): “Private security services are not, to date, harmonized at Community level. However, although it is true that, in such circumstances, Member States remain, in principle, competent to define the conditions for the pursuit of the activities in that sector, they must, when exercising their powers in this area, respect the basic freedoms guaranteed by the Treaty (...)”.

²⁵ See Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376/36, 27.12.2006, Art. 2(k).

on private security services and transport of cash and valuables.²⁶ It is clear that such harmonizing proposals are driven by economic considerations, especially competition, not compliance with IHL or human rights law. As mentioned before, it is a fundamental principle of the TEC that the functioning of the Internal Market, competition in particular, must not be affected by measures which a Member State may be called upon to take in exceptional circumstances, including in the event of carrying out action for the maintenance of peace and international security.²⁷

4.2 *Security-related export controls*

At the EU level, two regulatory frameworks of security-related export controls can be found. First, the dual-use items and technology export control, and second, the export control of military equipment.

The regulation of dual-use items, including software and technology, covers ‘services’ in the meaning of technical assistance (i.e. technical support related to, *inter alia*, manufacture, assembly, testing and maintenance, in the form of instruction, training, know-how or consulting services)²⁸ but nevertheless is not of direct importance to PMCs/PSCs. The rules relate to dual-use items which can be used both for civilian purposes and for chemical, biological or nuclear weapons and other nuclear explosive devices. They are part of the EU strategy against the proliferation of weapons of mass destruction. The controls which must be prescribed by the Member States in their national legislation apply to technical assistance where provided outside the EC by persons established in the EC if it is intended, or the provider is aware that it is intended, for use in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or other nuclear explosive devices, or the development, production, maintenance or storage of missiles capable of delivering such weapons.²⁹ Clearly, technical assistance with respect to weapons of mass destruction components or -technology is not part of the services offered by PMCs/PSCs, also if operating in (post-)armed conflict situations abroad.³⁰ It is true that Member States must also consider the application of the same controls to technical assistance related to other military end-uses

²⁶ See Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376/36, 27.12.2006, Art. 38.

²⁷ See Articles 297 and 298 TEC (note 17).

²⁸ See Council Regulation (EC) 1334/2000 setting up a Community regime for the control of exports of dual-use items and technology, OJ L 159/1, 30.6.2000; and see in particular Council Joint Action 2000/401/CFSP concerning the control of technical assistance related to certain military end-uses, OJ L 159/216, 30.6.2000.

²⁹ Council Joint Action 2000/401/CFSP concerning the control of technical assistance related to certain military end-uses, OJ L 159/216, 30.6.2000, Art. 2.

³⁰ Therefore, the qualification of Krahmhann that “the technical assistance as defined covers nearly the entire spectrum of private and security services, albeit only with regard to WMDs” (E. Krahmhann, *Regulating Military and Security Services in the European Union*, in: M. Caparini & A. Brayden (eds.), *Private Actors and Security Governance*, DCAF 2006, p. 195) seems to put too much emphasis on the wide definition of assistance instead of the restriction to WMD.

(that is, other than WMD components or technology) if provided in countries or destinations that are subject to legally binding EU, OSCE or UN arms embargoes.³¹ However it goes without saying that such country-specific arms embargoes are not a means of (indirect) regulation of PMC/PSC services at the EU level.

Central to the export regulation of military equipment at the EU level is the European Union Code of Conduct on Arms Exports, drawn up by the Council of the EU as part of the EU Program for preventing and combating illicit trafficking in conventional arms.³² It is meant to contribute to the combat against the illicit trafficking of arms, to a better respect of human rights and to a greater degree of international security and stability.³³ The Code of Conduct sets a number of criteria against which each EU Member State will assess, on a case-by-case basis, export license applications for military equipment. The criteria (when to refuse export licenses) relate to international obligations of the EU Member States with respect to UN, OSCE and EU arms embargoes, WMD arms control agreements and export policies, the respect for human rights in the country of final destination and the internal situation in that country, including whether there is a clear risk that the proposed export would be employed in the use of force against another State or against the people of the State – internal repression – or to support terrorism. The Code in addition provides for the circulation through diplomatic channels of details of licenses refused in accordance with it, the drawing up of a common list of military equipment covered by it (“Common Military List of the European Union”³⁴) and the circulation of an annual report on defense exports and implementation of the Code. In practice, especially the annual reports of the Member States and the Council’s annual report reviewing the implementation of the Code have become important aspects of this regulatory regime.³⁵ The Code is followed in practice by all EU Member States. It should however be noted that the interpretation of the criteria and the final decision to transfer or deny the transfer of any item of military equipment will remain at the national discretion of each Member State³⁶ – the Code (including the Military List) has the status of a political commitment in the framework of CFSP. As is clear both from the Code, the User’s Guide to it³⁷ and the Common Military List of covered equipment, military or security *services* are not

³¹ Council Joint Action 2000/401/CFSP concerning the control of technical assistance related to certain military end-uses, OJ L 159/216, 30.6.2000, Art. 3.

³² See European Union Code of Conduct on Arms Exports, 5 June 1998; and See EU Program for Preventing and Combating Illicit Trafficking in Conventional Arms, EU/9057/97.

³³ See Code of Conduct, par. 3; Council Declaration of 13 June 2000, issued on the occasion of the adoption of the common list of military equipment covered by the European Union code of conduct on arms export, OJ C 191/1, 8.7.2000.

³⁴ Common Military List of the European Union, lastly adopted by the Council on 10 March 2008, OJ C 98/1, 18.4.2008.

³⁵ See for the ninth annual report from the Council (relating to the year 2006) OJ C 253/1, 26.10.2007.

³⁶ See M. Bromley, “10 years down the track – the EU Code of Conduct on Arms Exports”, in: *European Security Review* 39 (July 2008), p. 4.

³⁷ Council of the EU User’s Guide to the Code of Conduct on Arms Exports, as agreed by the Working Party on Conventional Arms Exports at its meeting of 22 February 2008, 7486/08, 29 February 2008. This Guide is intended for use primarily by export licensing officials of the EU member states.

included. In addition, its scope is limited to the (territories of the) EU Member States.³⁸ In contrast, the control of arms *brokering* at the EU level seeks to extend beyond EU territory. Arms brokering is defined as the negotiating and arranging of transactions in, or the buying, selling or arranging of the transfer of, items on the EU Common List of military equipment from a third country to any other third country in order to avoid circumvention of UN, EU or OSCE embargoes on arms export or of the criteria set out in the Code of Conduct.³⁹ In that context, the Member States undertake not only to control brokering activities taking place within their territory but are also ‘encouraged’ to consider controlling brokering activities outside of their territory carried out by brokers of their nationality resident or established in their territory. This system of controlling arms brokering in the State of residence or establishment includes the requirement to obtain a license or written authorization for brokering activities (assessed against the provisions of the Code of Conduct) and may also include the requirement of a written authorization to act as arms broker and the establishment of a register of arms brokers, as well as an exchange of information on brokering activities among Member States and third states, and adequate national enforcement measures. It would seem that this regulatory structure (which applies to equipment and not to services, either) provides a useful starting-point when contemplating regulation at the EU level of private contractors offering military services in (post-)armed conflict areas. Reportedly, Finland, Hungary and Slovakia have set a precedent for the extraneous application of national regulations concerning arms brokering to the foreign operations of their national companies or citizens but most EU Member States are reluctant to follow this course, mainly because they do not have the resources to monitor compliance with national standards abroad.⁴⁰

As regards military equipment and third States, the Council has also adopted a Joint Action to help combat the destabilizing accumulation and spread of small arms and light weapons (and their ammunition) in third countries, in particular where this may help to prevent armed conflict or in post-conflict situations.⁴¹ This Joint Action relates to financial and technical assistance of the EU and does not regulate – or contain obligations to regulate – goods or services.

³⁸ There is a small complementary program to organize seminars to assist certain third countries (in the Western Balkans, North Africa and Eastern Europe) in creating legislation in order to implement norms similar to the Code of Conduct, see Council Joint Action 2008/230/CFSP, OJ L 75/81, 18.3.2008.

³⁹ See Council Common Position 2003/468/CFSP on the control of arms brokering, OJ L 156/79, 25.6.2003, and see the form “denial notification on arms broker registration under the Council common position 2003/468/CFSP on the control of arms brokering” in the User’s Guide to the EU Code of Conduct on Arms Exports, 7486/08, 29 February 2008.

⁴⁰ See E. Krahnemann, *Regulating Military and Security Services in the European Union*, in: M. Caparini & A. Brayden (eds.), *Private Actors and Security Governance*, DCAF 2006, p. 203.

⁴¹ See Council Joint Action 2002/589/CFSP, OJ L 191/1, 19.7.2002. It was this Joint Action the Commission sought to nullify in the *Ecovas* case (to no avail; only the implementing decision of the Council was nullified) which indicates that if the third countries concerned can be involved in EC development policy, Council action may give rise to questions of competence.

In sum, the security-related export control regulations at the EU level are equipment-related and do not (seek to) apply to the services commonly provided by PMCs/PSCs.

5. Public procurement regulations and the defense industry

5.1 *Defense procurement inside the Internal Market*

According to existing EU law, defense contracts fall under the rules of the Internal Market. Directive 2004/18/EC on the procurement of goods, works and services expressly applies to public contracts “awarded by contracting authorities in the field of defense, subject to Article 296 [TEC]”.⁴² In general this clause confirms that, as with any public procurement, the award of contracts in the defense industry concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the principles of the TEC, in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. For public contracts above a certain value (with respect to supply and services contracts in the field of defense, this threshold is EUR 162 000 for certain listed products or otherwise it is EUR 249 000),⁴³ the Directive sets provisions of Community coordination of national procedures based on these principles for the award of such contracts so as to ensure the effectiveness of these principles and to guarantee the opening-up of public procurement to competition. The services covered by the Directive (listed in its Annex II) include air transport of passengers and freight, telecommunication and computer services as well as investigation and security services (this latter term is not further defined, but clearly the regular domestic security services are meant) and armoured car transport services.

Article 296 TEC provides for a possible exemption of the Internal Market rules for the Member States in respect of (the award of) contracts connected with the production of and trade in arms, ammunition and war material (including nuclear arms). In respect of those products, which are intended for specifically military purposes, the Member States can take measures they consider necessary for the protection of their ‘essential security interests’.⁴⁴ The products, which have been identified by the (then-

⁴² See Directive 2004/18/EC of the European parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, Art. 10.

⁴³ See Art 7 of the Directive and Annex V to it. The general threshold for public *works* contracts is much higher, namely EUR 6 242 000 and the Directive also applies to the awarding of work and supply contracts which are subsidized for more than 50% by the contracting authorities.

⁴⁴ Article 296 TEC reads: “1. The provisions of this Treaty shall not preclude the application of the following rules:

(a) No Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;

EEC) Council as early as in 1958, include (very) broad categories of typically military equipment, ranging from portable firearms and machine guns to rocket launchers, tanks, warships and aircraft, as well as munitions.⁴⁵ According to the Court, any derogation from the TEC based on public safety considerations, including article 296 TEC, deals with exceptional and clearly defined cases which, because of their limited character, do not lend themselves to wide interpretation.⁴⁶ Furthermore, the Court has ruled that Article 296(1)(b) TEC is not intended to apply to activities relating to products other than the military products identified on the EC Council list and that only procurement of equipment which is designed, developed and produced for specifically military purposes can be exempted from Community rules on the basis of Art. 296 (1) (b) TEC.⁴⁷ In an Interpretative Communication of 2006, the Commission has confirmed the restrictive view on the application of Article 296: the TEC contains strict conditions for the use of this derogation to prevent possible misuse and to ensure that the derogation remains an exception limited to cases where Member States have no other choice than to protect their security interests nationally. This means that even if the products are included in the Article 296 list, exemption from the EU procurement rules is still only warranted on a case-by-case basis if necessary for the protection of essential security interests.⁴⁸ With respect to non-military State security purposes, Directive 2004/18/EC in Article 14 provides an exception of non-applicability for secret contracts and contracts requiring special security measures.⁴⁹ It seems that this Directive-based exception is closely

(b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.

2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.”

⁴⁵ The list comprises portable and automatic firearms such as pistols, rifles and machine guns (but excluding hunting rifles and small caliber pistols), artillery and smoke, gas and flame throwing weapons such as cannon, rocket launchers and their munitions, bombs, torpedoes, rockets guided missiles, military fire control equipment such as firing computers and guidance systems, tanks and specialist fighting vehicles including armored cars, toxic or radioactive agents, powders, explosives and liquid or solid propellants, warships and their specialist equipment such as for laying, detecting and sweeping mines, aircraft and their equipment for military use, military electronic equipment, cameras specifically designed for military use, parachutes and electrical projectors for military use, specialized parts or items of material included in this list insofar as they are of a military nature, and machines, equipment and items exclusively designed for the study, manufacture, and control of arms, munitions and apparatus of an exclusively military nature included in this list. See EEC Council, ‘Decision of 31 March 1958 Drawing up a List of Products to which Article 223(1)b [= now Art. 296(1)(b)] Applies’ (available in French); see also answer to the written question E-1324/01 (2001/C 364/091) of 4 May 2001, for the English translation of the list.

⁴⁶ See *Commission v Spain*, Case C-414/97, judgment of 16 September 1999, par. 21-22. This case related to the exclusion of VAT of imports and acquisitions of armaments in Spain. The other possible derogations involving considerations of public policy are Article 30, 39, 46 and 297 TEC.

⁴⁷ See *Fiocchi Munzioni v Commission*, Case T-26/01, judgment of 30 September 2003, par. 59 and 61.

⁴⁸ See Commission of the European Communities, ‘Interpretative Communication on the application of Article 296 of the Treaty in the field of defense procurement’, COM (2006) 779, 7.12.2006.

⁴⁹ Article 14 reads: “This Directive shall not apply to public contracts when they are declared to be secret, when their performance must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned, or when the

linked with the – equally restrictive⁵⁰ – exemption of Art. 296 (1) (a) TEC which provides that no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security. Confidentiality needs which are related to the procurement process for military equipment is covered by Art. 296 (1) (b) TEC.⁵¹

In sum, only in highly exceptional cases, public supply and service contracts can be exempt from the freedom of movement of goods and the freedom to provide services to foster Internal Market competition. A Member State that hires PMCs/PSCs to provide services within the Internal Market would have to abide by the government procurement rules even if the services would be provided to third country nationals (e.g., private firms hired to provide training in an EU Member State to third country military personnel or law enforcement authorities).

However, it should be noted that in practice Member States have been reluctant to use the public procurement Directive in the field of security and defense and have widely invoked Article 296 TEC (defense) or Article 14 of the Directive (to justify exemptions in the field of security), to justify exceptions to the rule. This is motivated by the Member States because of the risks involved in particular of security of information and security of supply in this sector.⁵² The Commission in 2007 has issued a proposal for a Directive for the coordination of procedures for the award of public contracts in the fields of defense and security.⁵³ The proposed Directive shall apply to public contracts for (a) the supply of arms, munitions and/or war material, referred to in the list drawn up by the Council in 1958 and, where necessary, public works and services contracts strictly related to these supplies; (b) the supply of parts, components and/or subassemblies for the goods referred to under a), or for the repair, refurbishment or maintenance of such goods; (c) the supply of all products intended for training or testing of the goods referred to under a); (d) works, supplies and/or services involving, entailing and/or containing sensitive information, and which are necessary for the security of the EU and its Member States, in the fields of protection against terrorism or organized crime, border protection and crisis management operations. Still, even the proposed Directive (which cannot change the treaty) shall apply explicitly without

protection of the essential interests of that Member State so requires.” See also Recital (22) of the Directive.

⁵⁰ See Commission of the European Communities, ‘Interpretative Communication on the application of Article 296 of the Treaty in the field of defense procurement’, COM (2006) 779, 7.12.2006, par. 4.

⁵¹ See Commission of the European Communities, ‘Interpretative Communication on the application of Article 296 of the Treaty in the field of defense procurement’, COM (2006) 779, 7.12.2006, par. 1.

⁵² See Press Statement by Ch. McCreevy, European Commissioner for Internal market and Services, Defense Procurement, Brussels 5 December 2007 (available at www.europa.eu/rapid/pressReleases).

⁵³ Proposal for a Directive of the European parliament and the Council on the coordination of procedures for the award of certain public works contracts, public supply contracts and public service contracts in the fields of defense and security, COM (2007) 766, 5.12.2007.

prejudice to Article 296 TEC⁵⁴, so it remains to be seen whether it will change the current practice once it has become law, even though it can be expected that by then it will become more difficult for Member States to rely on the exemption.

For completeness' sake it should be mentioned that also the European Defense Agency has produced regulations, albeit non-legally binding, in the field of defense procurement. Since 2005 there is a voluntary, non-binding Code of Conduct on Defense Procurement in place for (participating) EU Member States, which relates to defense procurement that takes place outside Internal Market rules on the basis of Article 296 TEC.⁵⁵ Without prejudice to their rights and obligations under the TEC and TEU, the participating Member States through the Code aim at encouraging application of competition in this segment of defense procurement, on a reciprocal basis between those subscribing to it. In addition, recently the EDA has adopted a voluntary, non-legally binding Code of Conduct on Offsets in the defense sector to which the Member States can subscribe.⁵⁶ It is meant to encourage competition in the European defense equipment market, while recognizing that the defense market (both in Europe and at the global level) is not perfectly functioning and that procurement in the defense market remains different from procurement in purely commercial markets.

5.2 *EU defense procurement and third countries*

The public procurement in the field of defense from the EU (Member States) with respect to third countries is governed by WTO rules, in particular the WTO Government Procurement Agreement (GPA).⁵⁷ Suppliers in each GPA member (which include among others the EU, the United States, Canada, Hong Kong China, Japan, South Korea and Switzerland) can bid for government contracts in other GPA member countries. The WTO rules seek to liberalize trade although in certain circumstances its rules support maintaining trade barriers, for example to prevent the spread of disease or protect the environment. Important principles are openness, transparency, non-discrimination and national treatment (i.e., no less favorable treatment of foreign suppliers as compared to domestic suppliers) taking account of the economic needs of developing countries. The GPA in Article XXIII allows for an exception for military equipment and procurement indispensable for national security or national defense purposes (therefore more extensive in its wording than Art. 296 (1) (b) TEC). Also, measures to protect public safety are allowed as long as they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against countries where the same conditions prevail or a disguised restriction on international trade.

⁵⁴ See Art 1 of the proposed Directive. The Directive is also without prejudice to the exceptions to the freedom of movement of goods, services and capital – Art 30, 45, 46, and 55 TEC.

⁵⁵ See EDA Code of Conduct on defense Procurement, 21.11.2005(available at www.eda.europa.eu); see also the related EDA Code of Best Practice in the Supply Chain, 15.06.2006.

⁵⁶ EDA Code of Conduct on Offsets, 24 October 2008 (available at www.eda.europa.eu). The Code will apply to all compensation practices required as a condition of purchase or resulting from a purchase of defense goods or defense services as of 1 July 2009. See also the EDA European Armaments Co-operation Strategy, 15 October 2008.

⁵⁷ See Uruguay Round 'Agreement on Government Procurement', available at www.wto.org.

The relationship between the rules on third country procurement and the rules of the Internal Market is such that for the purposes of the award of contracts by contracting authorities, EU Member States shall apply in their relations conditions as favorable as those which they grant to economic operators of third countries in implementation of the GPA.⁵⁸

6. The EU position on International Humanitarian Law

The EU does not effectively possess one of the typical state-like abilities: to use armed force in or against other States. This may explain why the EU in its political co-operation has expressed itself more in terms of respect for international law in general and human rights law than IHL, even though references to IHL have increased where the EU has issued political Declarations on (international) conflict situations.⁵⁹ Apart from a brief statement in 1999,⁶⁰ so far the only EU document dealing exclusively with IHL is the 2005 document EU Guidelines on Promoting Compliance with IHL.⁶¹ The purpose of the Guidelines is to set out operational tools for the EU and its institutions and bodies to promote compliance with IHL by third States and, as appropriate, non-State actors operating in third States. The same commitment extends to the EU Member States in their own conduct including their own forces but that commitment emerges from the Geneva Conventions and the Additional Protocols to which all EU Member States are Parties; the Guidelines do not address that.

The Guidelines in essence highlight two ways to stimulate compliance with IHL. First, the Guidelines are meant to trigger further recognition and awareness of IHL issues within the EU bodies and their internal and external consultations and reports.⁶² Second, in its relations with third countries the EU can use a variety of means of action to promote compliance with IHL. These means of action range from political dialogue and public statements to promoting IHL in EU operations and the providing or funding of training in IHL (including the possible refusal of an arms export license based on the

⁵⁸ See Directive 2004/18/EC of the European parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, Art. 5.

⁵⁹ See T. Ferraro, 'Le droit international humanitaire dans la politique étrangère et de sécurité commune de l'Union européenne', 84 *International Review of the Red Cross* 846 (June 2002), p. 435-444.

⁶⁰ See 'Declaration by the Presidency on behalf of the European Union on the Occasion of the 50th Anniversary of the four Geneva Conventions', CFSP Statement of 12.8.1999.

⁶¹ European Union's Guidelines on Promoting Compliance with international humanitarian law (IHL), OJ 2005/C 327/04, 23.12.2005. It is not stated in the document which organ adopted or issued the Guidelines but it would seem this was the Council in its composition of General Affairs Council.

⁶² Reference is made to the following means of action: (a) monitoring situations of applicability of IHL and recommending action to promote compliance with IHL where necessary drawing on legal advice as well as consultations and exchange of information with other actors such as the ICRC, the UN, other organizations and the humanitarian fact-finding commission (Art. 90 AP I), (b) making assessments of the IHL situation in reports of EU Heads of Mission, EU representatives including Heads of EU Civilian Operations, Commanders of EU Military Operations and EU Special Representatives about a given State or conflict and (c) including IHL issues in Background Papers for EU meetings as well as informing, in armed conflict situations, the Council Working Group on International Law (COJUR) which could be tasked to make suggestions of future EU action to relevant EU Bodies.

intended recipient's compliance with IHL).⁶³ It is clear that the Guidelines are political rather than legal in nature and that they do not specifically address PMCs/PSCs or their services. Still, the Guidelines show that there is political support in principle within the EU and its Member States for training and education in IHL of relevant groups such as law enforcement officials and military personnel in third countries, and for preventing and suppressing violations of IHL by EU Missions.

In addition, IHL has also featured as an important point of reference in several Common Positions regarding armed conflicts (such as Rwanda, Afghanistan) and Joint Actions regarding weapons (such as combating the destabilizing accumulation of conventional arms; the support for the ban on anti-personnel landmines), including in motivations for the imposition of EU arms embargoes (e.g., former Yugoslavia).⁶⁴

In sum, EU support for stimulating compliance with IHL, also in non-international armed conflicts, seems to be clearly present and would seem to provide an appropriate political embedding for addressing the issue of private contractors and their compliance with IHL (and human rights law) in third States.

7. EU and Crisis Management Operations

The predecessors of the EU (and the WEU⁶⁵) had already been active in the field of peace and security long before the foreign and security policy was brought clearly under the treaties (CFSP; Maastricht, 1992), once again reflecting the strong linkage between economic strength (spread of wealth) and the preservation of peace and security in the European order. Part of the CFSP is the European Security and Defense Policy (ESDP). The ESDP was launched by the European Council in June 1999 in order to provide the EU with the operational capabilities, made available to the EU by its Member States on a voluntary basis, and the institutional basis necessary for conducting autonomous crisis management operations in third countries.⁶⁶ It has a civilian dimension with four priority fields: police, strengthening the rule of law, strengthening civilian administration and civil protection. The CFSP and ESDP also have a military dimension, which includes the European Defense Agency (whose activities relate

⁶³ According to the Guidelines the EU has the following actions at its disposal (a) political dialogue, (b) general public statements, (c) demarches and/or public statements about specific conflicts, (d) restrictive measures/sanctions to promote compliance with IHL (also to non-state actors and individuals), (e) cooperation with other international bodies, (f) the importance of IHL in the drafting of mandates of EU crisis-management operations and collecting information which may be of use for the ICC or the investigation of war crimes, (g) highlight individual responsibility for war crimes inter alia by supporting the ICC (h) the EU should consider providing or funding training in IHL in third countries, also in peacetime, (i) the European Code of Conduct on Arms Export provides that the importing country's compliance with IHL is a factor for consideration before granting a license to export arms to that country.

⁶⁴ See T. Ferraro, op. cit. (note 59), p. 450-461. For an overview of EU arms embargoes see entry "international arms embargoes" at www.sipri.org.

⁶⁵ The WEU, although still existing, has effectively been integrated in the EU as per the treaties of Amsterdam (1999) and Nice (2001). Europe's collective defense now rests in full with NATO.

⁶⁶ See A. Sari, 'Status of Forces and Status of Mission Agreements under the ESDP: The EU's Evolving Practice', in 19 *EJIL* 1 (2008): 67-100, at 68.

mainly to defense equipment and the European defense technological and industrial base). EU crisis management operations include humanitarian and rescue tasks, peace-keeping tasks, tasks of combat forces in crisis management, including peacemaking, as well as joint disarmament operations, the support for third countries in combating terrorism and security sector reform. These tasks require that EU armed forces are able to work together and to interact with civilian tools (so-called interoperability).

In its Headline Goal 2010, the Member States of the EU have set themselves the goal to be able by 2010 to respond with rapid and decisive action applying a fully coherent approach to the whole spectrum of crisis management operations covered by the TEU.⁶⁷ PMCs/PSCs are not mentioned in the Headline Goal; the only reference to ‘civil’ forces is to the police components in EU crisis management operations, but that is merely to distinguish them from ‘military’ forces (police functions are part of civilian crisis management).⁶⁸ So far, (only) one ESDP mission has been mixed civilian-military⁶⁹ and two ESDP missions have as their object the provision of civilian advice and assistance to security sector reform in a third country.⁷⁰

Any regulations as regards the hiring of private (military or) security contractors seem to be absent at the EU level. The foregoing does show, however, that the use of private (military and) security contractors in crisis management operations, if any, would be a matter of the EU (CFSP; ESDP) not the EC.

Within the ESDP, the Political and Security Committee (PSC), the EU Military Committee (EUMC) and the EU Military Staff (EUMS) are the permanent political and military structures responsible for an autonomous, operational EU defense policy. The Treaty of Nice (2001) gave the PSC charge of EU crisis management operations, although the Council retained responsibility. Despite the ambitious goals, the capability of the EU (in practice: of its Member States) to mount combat expeditionary operations outside the European area is limited. The EU can have recourse to NATO assets and capabilities not only for crisis management and conflict prevention operations but also for autonomous EU military operations (such as in the EU Battlegroups Concept).⁷¹ The relationship with NATO is such that the overall policy of the CFSP as well as decisions having defense implications shall respect the obligations of the States that are also members of NATO and must be compatible with the common defense and security

⁶⁷ Headline Goal 2010, approved by the General Affairs and External Relations Council on 17 May 2004, endorsed by the European Council of 17-18 June 2004.

⁶⁸ See the Civilian Headline Goal 2010, noted [sic] by the General Affairs and External Relations Council on 19 November 2007 (doc. 14823/07).

⁶⁹ Namely, AMIS EU Supporting Action, Sudan; see Council Joint Action 2005/557/CFSP 18 July 2005, OJ L 188/46. It was to support the African Union mission in the Darfur region of Sudan (Art. 1).

⁷⁰ EU missions in Congo and in Guinea-Bissau. See Council Joint Action 2005/355/CFSP, 2 May 2005, OJ L 112/20 (EUSEC DRC), and see Council Joint Action 2008/112/CFSP of 12 February 2008 on the European Union mission in support of security sector reform in the Republic of Guinea-Bissau (EU SSR GUINEA-BISSAU).

⁷¹ See, e.g., NATO-EU Declaration on ESDP, 16 December 2002 (available at www.nato.int); EU fact sheet, ‘The EU Battlegroups and the EU civilian and military cell’, February 2005; EU Council fact sheet, ‘what can the EU do in cases of emergency/crisis?’, 15 June 2006; EU Council Secretariat fact sheet, ‘EU Battlegroups’, November 2006 (EU BG 02) and February 2007; Policy document ‘European Defense: NATO/EU Consultation, Planning and Operations’ (all available at www.consilium.europa.eu).

strategy established within the NATO framework, whereas closer co-operation between Member-States bilaterally or within the (WEU or) NATO is not prohibited but should not run counter or impede the cooperation within the CFSP.⁷² What this ‘hierarchy’ of obligations means in concrete terms is difficult to establish, also considering the close co-operation between the EU and NATO (described as a ‘strategic partnership’)⁷³, but it would at least seem that CFSP decisions and policies should not run counter to or impede the obligations of the Member States within NATO – in particular the mutual assistance obligation of Art. 5 of the North Atlantic Treaty (such an obligation is absent in the TEU).

It seems that no European State has yet employed a PMC in a direct combat role.⁷⁴ Most policy makers in the EU do not consider direct combat to be a legitimate role for the private sector whereas some European governments are even outspoken against such use of private firms.⁷⁵ In US military doctrine (which is also important for decision-making within NATO) it is likewise acknowledged that there are ‘certain constraints placed on the functions that contractors may perform in battlefield environments’.⁷⁶ There are also no indications that the US government would employ a PMC in a combat role alongside US forces.⁷⁷ Likewise, also within the EU organs the prevailing idea will be that military capabilities, such as force protection, are not a task for private contractors (in EU missions).⁷⁸ The EU itself has been very restrictive in hiring private security contractors so far. Apart from the security guards on the premises of the Commission and the Council in Brussels, the few known examples relate to private guards within the embassy in Baghdad (shared with the UK) and incidental private security officers hired for civilian missions.

⁷² See Art. 17(1), 17(3) and 17(4) TEU.

⁷³ NATO Bucharest Summit Declaration, 3 November 2008, par. 14; NATO Declaration on Alliance Security, 4 April 2009 (www.nato.int).

⁷⁴ J. Wither, *Expeditionary Forces for Post Modern Europe: Will European Military Weakness Provide an Opportunity for the New Condottieri?*, Conflict Studies research Centre 05/04, January 2005, p. 6.

⁷⁵ France, Germany, the UK, Poland and Sweden were involved in the ‘Swiss Initiative’, which has established as one of its Good Practices that Contracting States should determine generally which activities may not be contracted out to commercial enterprises, taking into account factors such as “whether the particular service could cause PMSC personnel to become involved in direct participation in hostilities”, see Montreux Document, 17 September 2008, at 10. The UK Ministry of Defense in response to the UK Green Paper of 2002 ruled out a frontline role for the private sector in a UK supported international operation; see J. Wither, *Expeditionary Forces for Post Modern Europe: Will European Military Weakness Provide an Opportunity for the New Condottieri?*, Conflict Studies research Centre 05/04, January 2005, p. 12-13. In France, a Law relative to the Repression of Mercenary Activities of 2003 criminalizes the taking or attempting to take direct part in hostilities by persons who have no national or State agency relation to an armed conflict and who do so “in order to gain a personal advantage”, see A-M Buzatu, ‘European practices of regulation of PMSCs and Recommendations for regulation of PMSCs through international legal instruments’, DCAF, Geneva, 30 September 2007, at p. 29 (available at www.unwg.rapn.ru).

⁷⁶ See US Joint Chiefs of Staff, Joint Publication 4-0, *Joint Logistics* (rev. ed.) 18 July 2008, p. II-16.

⁷⁷ Cf. the ‘Swiss Initiative’ which is supported by the US, has established as one of its Good Practices that Contracting States should determine generally which activities may not be contracted out to commercial enterprises, taking into account factors such as “whether the particular service could cause PMSC personnel to become involved in direct participation in hostilities”, see Montreux Document, 17 September 2008, at 10; see also J. Wither, op. cit. (note 72), p. 12.

⁷⁸ This was confirmed in informal talks held with members of the Dutch delegation with the EU in Brussels, 13.11.2008.

8. ‘Self regulation’ at the European level

The representatives of European social partners Confederation of European Security Services (CoESS) and the trade union federation Uni-Europa have issued a voluntary Code of Conduct for the private security sector, for the companies and employees in the sector to be used in their activities.⁷⁹ Their idea is that the rules governing the sector should be harmonized across the EU to guarantee the level of professionalism and quality that the sector needs. The recommended principles to be observed by the sector include transparency of internal procedures, compliance with applicable national laws, permits and authorizations, responsible selection and recruitment of staff and vocational training, good working conditions and health and safety standards, good working relations with national authorities such as police forces, and fair competition. These initiatives inspired by social dialogue do not seek to apply any (voluntary) normative frameworks to the export of private (military and) security services outside the EU.⁸⁰

9. Case law

Apart from the case law of the European Court of Justice already referred to in this report, there seems to be no relevant case law at the European level with respect to private security (or military) firms or contractors.

10. Conclusions & Observations

At present, private military and security services are not regulated at the European level. Even within the Internal Market, (domestic) private security services so far have not been harmonized. The (few) regulatory measures at the European level which touch upon the movement of goods and related services in the field of security and defense do not regulate – or require EU Member States to regulate – the export of military and security services in their own right, which is what the bulk of today’s PMC activity is about.⁸¹ Apart from restraints with respect to the arms trade with third countries which may derive from the voluntary EU Code of Conduct on Arms Exports or from UN, EU or OSCE embargoes on arms export to certain destinations, it can be concluded that the activities of EU-based or EU-hired PSCs/PMCs carried out in third

⁷⁹ See CoESS and Uni-Europa “Code of Conduct and ethics for the private security sector”, 18 July 2003; see also Joint Declaration of CoESS and UNI-Europa on the European harmonization of legislation governing the private security sector, 13 December 2001; Joint declaration by CoESS and Uni-Europa “Towards a European Model of Private Security”, 15 October 2004.

⁸⁰ As a side note: even if a ‘self-regulation’ organization for private military and security firms operating in (post-) armed conflicts areas existed at the EU level, this is no guarantee for responsible behavior. Witness e.g., the killing of 11 Iraqi civilians on September 16, 2007 by employees of Blackwater USA, which was a member of the International Peace Operations Association (IPOA). IPOA issued a Code of Conduct (latest version March 2005) on ethical and human rights standards to be observed by its members operating in conflict and post-conflict environments.

⁸¹ See also A.J.K. Bailes & C. Holmqvist, ‘The increasing role of private military and security companies’, study at the request of the European Parliaments Subcommittee on Security and defense, October 2007, p. 20.

States are not regulated at the European level. At the same time, the EU Guidelines on Compliance with IHL indicate that the EU is willing in principle to use all kinds of actions ‘externally’ to support compliance with IHL by third States – though ‘internally’ confining itself to stating that all EU Member States are parties to the Geneva Conventions and the Additional Protocols (indicating that any harmonizing measures in that context are unnecessary). However, concrete regulatory measures to support compliance with IHL by PMCs/PSCs are as yet absent – also, it seems, when private contractors would be hired for EU crisis management operations.

Although this report is not meant to discuss the need for or the design of any specific regulation at the European level, some preliminary observations can be made:

- It would seem that a European regulation should be attached to the services offered and provided by the contractors, not to the firms or contractors as such. After all, there is general agreement that categorizing these (legal) persons as ‘military support firms’ or ‘military provider firms’ or even as ‘private military’ firms or ‘private security’ firms is generally speaking based on simplification since the division in types of firms is only ideal-typical. Many companies and contractors offer both security and military services and sometimes even these services may look very similar, e.g., armed private policing in a hostile area shortly after a ceasefire or in an area of (military) occupation may come very close to combat services.
- It would seem that a European regulation should take account of potential overlap between CFSP and Internal Market matters. First of all, as can be observed from the case-law of the European Court, the private security sector is an economic sector and regulation should not create obstacles to free movement of goods, to the establishment and the provision of services as guaranteed by the TEC, and should not disturb competition within the Internal Market. At the same time, the export of private (military and) security services to third States would seem to be a matter of the EU – in any case if their use is part of a crisis management or conflict prevention operation (ESDP). Considering that a private security firm located in the EU can act globally in principle, this means that regulation either should distinguish between the export of (military and) security services to third countries and the same - or similar - services provided within the Internal Market, thus creating separate regimes, or should be directed at creating a harmonized standard applicable to private (military and) security services both within and outside the Internal Market. Even then, the EU (i.e., the Council under Art. 47 TEU) has to respect the competence of the EC, also if the Commission has not adopted measures but (only) could have done so.
- It would seem that a European regulation should avoid any interference with the production of or trade in military equipment or with public defense procurement, considering the practice of Member States’ use of the exemption of Art. 296 TEC. Given that the carrying of (fire-)arms by PMC/PSC personnel is a distinctive feature of the type of services that pre-eminently has the potential of challenging compliance with IHL and human rights law, the limiting of the armaments carried by private contractors - e.g., allowing only handguns for self defense - would be a necessary component of any regulation. That kind of limitation would not seem to interfere with the production or trade in military equipment, defense industry (procurement) or the essential security interests of the Member States.

- It would seem that it is a benefit of European-level regulation of the export of certain private military and security services from the EU Member States to third States that the rules would apply irrespective of where in the EU and by whom the PMC/PSC is hired. Such regulation could be designed to apply to PMCs/PSCs acting outside of the EU as well if resident of or established in an EU Member State (cf., the EU arms brokering framework). Such regulation could also prevent ‘shopping’ within the EU to find the most liberal regime. Still, the regulation of services at the European level in general seems to concentrate on the providers of services and much less on the hiring entities. Regulating the (providers of) services is fundamentally different from imposing binding obligations on the entities hiring the services to comply with certain standards (e.g., to prohibit anyone from hiring non-licensed contractors, to require anyone before hiring to verify the record of the PMC/PSC as regards training and educational quality standards and/or to check on any incidents or reported cases of non-compliance with IHL and human rights law).⁸² How to prevent the hiring of irresponsible contractors by irresponsible parties would seem to be the biggest challenge.

⁸² An attempt to provide guidelines also for the interactions between hiring companies and the private security sector is part of (the since 2000 ongoing process of developing and creating adherence to) the ‘Voluntary Principles on Security and Human Rights’ (www.voluntaryprinciples.org). This is not an EU initiative.