THE FUTURE OF DEFENCE INDUSTRY IN THE EU: HOW THE UK COULD BE ASSOCIATED WITH CAPACITY BUILDING

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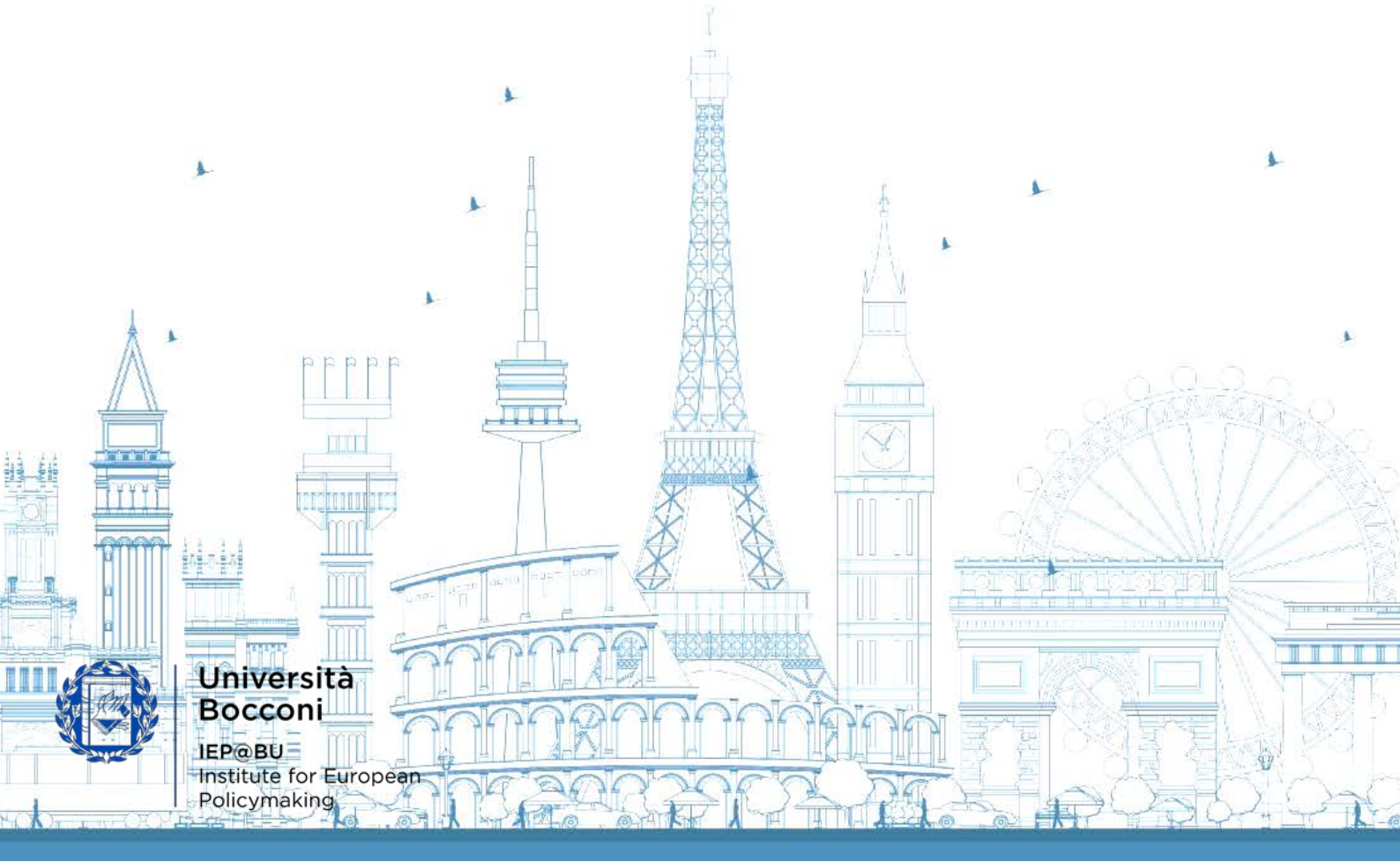

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The future of defence industry cooperation is a major preoccupation in the EU[1] as the industry and its products are seen as needing consolidated structures and specifications[2].

While buying from the USA can be seen as a way of placating President Trump, many in Europe see industrial policy advantages in boosting autonomous European research, development and production. There is also the small matter of persuading European public opinion that increased defence budgets are a good idea, which would be facilitated by pointing to growth, employment, innovation and spillovers.

All this raises the perennial question about how the UK fits in[3]. The harmonisation of standards and application of procurement rules laced with a degree of protectionism are likely to be based on single market provisions and concepts with which the UK will feel uncomfortable. It will require legal inventiveness and political will to make this work.

Professor Dashwood's paper sets out how a foreign policy, security and defence partnership between the EU and the UK could be agreed.

This paper develops one important aspect of the future partnership, namely how to overcome the impediments to achieving closer integration of the defence industry of the UK, as a third country outside the EEA, with that of the EU, using the EU/Switzerland relationship as a possible model. This is particularly relevant to Professor Dashwood's references to medium term objectives, regarding both institutional arrangements (see second and third proposals on pp 12 and 13) and the possibility of a "partial association" giving the UK access to the internal market for defence products (see pp 20 to 21).

A major inhibiting factor for the UK is "entanglement" in EU law, requiring compliance with rules in the preparation and enactment of which it has not participated and acceptance of the jurisdiction of the ECJ as the final arbiter of their interpretation and validity. For the EU, a similar inhibiting factor arises.

The involvement of a foreign, "third" country in the EU's legislative, regulatory and judicial processes has to be reconciled with the autonomy of the EU's legal order[4].

Thus associating a third country with EU decision-making is challenging for both parties.

The country concerned will have its own constitutional constraints, procedures and institutions. The EU itself can seem inflexible, even insecure, with its rule-based pooled sovereignty and its complex institutional arrangements for conferral of a mandate on the Commission which then negotiates with one eye on the party on the other side of the table and the other on the member states looming

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[1] See, for example, European Parliament briefing paper, https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/762320/EPRS_BRI(2024)762320_EN.pdf
A useful bibliography is to be found at https://www.epsjournal.org.uk/index.php/EPSJ/article/view/371

[2] See European Defence Agency, https://eda.europa.eu/what-we-do/all-activities/activities-search/materiel-standardisation

[3] **See, for example, Terhorst, How the UK Can Compete in a Consolidating European Defence Industry** https://rusi.org/explore-our-research/publications/commentary/how-uk-can-compete-consolidating-european-defence-industry

[4] The locus classicus is Case 26/62, van Gend en Loos (judgment of 5 February 1963), ECLI:EU:C:1963:1

behind it.

Under the pressure of events, experience shows that, despite these challenges, workable international agreements can be reached which stand the test of time. The security crisis following the attacks on the USA on 11 September 2001, the financial crisis which began in 2007, the Covid-19 pandemic and the Russian invasion of Ukraine all led to innovative international relations and rule-making.

In more peaceful circumstances, the development of the “Schengen area” posed new problems for its members and an important landlocked country with which it shares numerous land borders, railways, rivers, lakes and even airports: Switzerland.

“Schengen” is a complex set of rules and procedures under which its members manage their external borders collectively and allow free movement across their internal borders, with agreed rules on procedures, exceptions, derogations and suspensions. It is backed up by a comprehensive system of shared information and configuration of airports and other border posts.

Switzerland, located in the heart of Europe, could hardly stand aside as its neighbours all joined in. A country as attached to its sovereignty as the UK, if not more so, Switzerland was not going to find it easy to accept being a “rule-taker” as it joined the Schengen system.

Fortunately for all concerned, the Schengen area had already overcome challenges to its legal and institutional framework and managed “variable geometry”. Its membership included non-EU countries and not all EU countries had joined it.

Perhaps most relevantly for present purposes, the UK was resolutely determined to stay outside Schengen while equally enthusiastic about participation in the sharing of information essential for law enforcement and security which the Schengen system engenders. This led to complex legislative and administrative arrangements, sometimes tested in the courts, and the development of a science (tinged with art) of what became known in Brussels as Schengenology.

This example of “cakeism” took root in circumstances where the EU and British sides had a strong security interest in cooperation, faced with common external and internal threats.

The UK was widely seen as having crucial capabilities, experience and information. This is therefore a promising precedent, although the UK’s changed status from an awkward but generally helpful member state to a sometimes curmudgeonly third country is obviously a significant new factor.

So with abundant caution and much recourse to mutatis mutandis, the Swiss case is worthy of study.

Switzerland does not apply EU law as such in its territory, but adopts its provisions as Swiss law when they are relevant for the implementation of its agreements with the EU. It participates in “decision-shaping”, sitting in the EU’s legislative committees with the right to intervene but not to vote. In practice, its input is highly valued and influential. It has many borders, a well organised civil service and a good reputation for honouring the rule of law.

Mixed EU-Switzerland committees (known amusingly as Comix[5]) provide regular oversight and an arbitral tribunal is available to resolve disputes. If a question of EU law needs to be resolved in order to deliver its decision, the arbitral tribunal submits that question to the European Court of Justice, whose ruling is binding on the tribunal.

FSDP cooperation between the UK and the EU will inevitably involve some rules which, on the EU side, will be based on single market concepts. The EU institutions will be involved in harmonising standards and procurement rules for military equipment, interaction with NATO, financial matters and local content choices. The UK's association with the EU in these endeavours will need legal and political infrastructure. The EU-Switzerland relationship has developed such infrastructure for different purposes, but in a way which respects sovereignty without sacrificing efficiency.

There will have to be give and take on both sides. The EU must overcome its defensive, precedent-obsessed categories and dare to invent something new.

The UK will have to recover its understanding that, in today's hostile world, untrammelled national sovereignty is not a plausible option for a medium-sized country deeply involved in international affairs.

The EU too will have to shed its post-cold war complacency: if neutral, rich, landlocked Switzerland can be accommodated, so can the UK with its different outlook, history and geography.

Rule-making will have to be shared through committees and consultations. Public support will have to be engendered and maintained by regular reports, summits and communications. Parliamentary oversight will have to be effective on both sides.

Judicial oversight should be limited to genuinely justiciable issues and should take place in arbitration proceedings with judges from both sides, subject to appeal on points of law to the Supreme Court as regards UK law and the ECJ as regards EU law.

The sense of urgency brought about by Presidents Putin and Trump has led to renewed European consideration of its structural weaknesses.

While most EU member states are in NATO, some remain neutral as a matter of policy (Ireland) or constitutional design (Austria, Malta). Others have openly pro-Russian leaders. Turkey, both a member of NATO and formally a candidate for EU accession, pursues often very different foreign and security policy interests. And of course there is the United Kingdom….

All of this has led to the desire to build coalitions of the willing, preferably outside EU structures so as to welcome the UK and ignore veto-wielding appeasers.

In particular case of France, this may also help a President[6] without a majority in the National Assembly to make executive decisions without recourse to Parliament. Nevertheless, Parliaments

[5] From the French *comité(s) mixte(s)*.
[6] The French President is also "chef des armées" (Constitution, Art. 15).

usually control the purse strings. The EU's institutional structures and legal system are often the best way of delivering results on economic and corporate issues. Thus, procurement, harmonisation of standards and corporate consolidation will need to call upon the systems of the EU to be effective. Several recent studies[7] have examined the obstacles and made suggestions as to how they could be overcome. The prospect of a UK-EU defence and security agreement is now real enough for the seemingly inevitable linkages, such as fisheries , to have reared their heads. This should be seen as a good sign that an end-game is under way.

Less attention seems to have been paid to the single market issues set out clearly enough in the Commission's and the High Representative's Joint White Paper on European Defence Readiness 2030[8].

The EU's core business of creating and sustaining a single market has neglected the defence sector for far too long[9]. The Union could agree to limit the application of Article 346[10] TFEU by announcing that all Member States consider the protection of the essential interests of their security connected with the production of or trade in arms, munitions and war material to be a collective matter and that they do not intend to invoke Article 346 to stand in the way of measures to create a single market for such products (and related services). This would clear the way for the application of general EU single market law to the defence sector.

In conclusion, "Europe" is a strange mixture of its states operating in various combinations, including but not limited to the European Union. Third countries have to engage with that messy reality. They - and "Brussels" – may wish it were different, and it may change over time, but in an emergency they should find ways to make it work as it is.

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[7] Luigi Scazzieri, *How the UK and the EU can deepen defence co-operation,* Centre for European Reform, March 2025; Max Becker, Johanna Flach, Nicolai von Ondarza, *Third-State Participation in the EU's Common Security and Defence Policy - Opportunities and Conditions for the United Kingdom*, German Institute for International and Security Affairs, Working Paper 02, February 2025; Tim Lawrenson, Ester Sabatino, *The Impact of the European Defence Fund on Cooperation with Third-country Entities*, International Institute for Strategic Studies, October 2024.

[8] JOIN(2025) 120 final, 19 March 2025. See particularly p. 14: Building a true EU-wide Market for Defence equipment, simplifying and harmonising rules.

[9] The EU's first Defence Commissioner, Andries Kubilis, has said bluntly: *"We have no single defence market. Our defence industry is very fragmented."*
See speech at Forum Europa, 11 April 2025, https://ec.europa.eu/commission/presscorner/detail/en/speech_25_1045orner/detail/en/speech_25_1045

[10] Article 346:
1. The provisions of the Treaties 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;
(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 internal 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.