The Netherlands non-paper on the upcoming Defence Omnibus Simplification proposal

Introduction
Russia's military aggression against Ukraine has marked the dramatic return of territorial conflict and high-intensity warfare on European soil. This structural change in the geopolitical situation has led Member States to rethink their defence plans and capacities. The armed forces of Member States must be able to develop, train and use capabilities for deterrence and deployment. The EU and Member States' security is reliant on the ability of the Member States to execute their exclusive territorial defence tasks, which they exercise collectively in the context of NATO[1]. While national defence and territorial defence are exclusively the responsibility of the Member States, the Treaty[2] does recognise the special position of national security and territorial integrity as essential state functions of the Member States that the Union respects.

The EU Court has considered on this provision that, although not entirely excluded from its application, EU law cannot be interpreted so as to prevent the armed forces from fulfilling their tasks and adversely affect the essential functions of the State, namely the preservation of its territorial integrity and the safeguarding of national security.[3] At the moment, some EU legislation does indeed impede the performance of the tasks of the armed forces. Failure to obtain a (nature) permit for the increased or renewed use, for example, for an existing military airport is a direct impediment to the readiness of the armed forces. Exercises and flying are a necessary part of operational readiness and deterrence, for which there are no alternatives. There are many (ongoing) procedures that significantly delay and thus impede the necessary activities required to achieve operational readiness of the armed forces of the Member States.

The Netherlands would like to thank the Commission for announcing a Defence Omnibus Simplification, to be presented in June. In addition to addressing **legal obstacles to the defence *industry*** in the Omnibus, we strongly advocate for the Commission's legal analysis and proposals for solutions to also address the **legal obstacles for *operational readiness*** of our armed forces and defence organisations. We would like to propose the following way forward.

1. Recognition of the situation we are currently in: a moment of severe and increasing geopolitical tension which threatens the security of the Member States/and or the Union, short of armed conflict. Acknowledge the need for armed forces to prepare in advance for crises or possible armed conflict in the future. This recognition will help guide the interpretation of EU legislation by national authorities and courts.
2. Provide guidance in specific areas where useful and necessary, in order to further aid Member States in the correct interpretation of certain EU acts.
3. Introduce, where necessary, amendments to existing EU legislation which severely hamper the operational readiness of the armed forces of the Member States.

1. Recognition of the current phase of the crisis (leading up to a possible crisis or armed conflict)
Many EU legal acts provide for an exemption in times of crisis or war. However, this does not provide enough legal certainty with regard to the interpretation of legislation in the phase leading up to armed conflict and proper deterrence in order to prevent conflict. As the Dutch minister of Defence says: *we are not at war, but there is no peace either*. In this phase, *a moment of severe geopolitical tension which threatens the security of the Member States and/or the Union, short of armed conflict*, the armed forces must be able to prepare accordingly. Becoming operationally ready realistically takes years. Therefore, existing legislation should be, as much as possible, interpreted in a way that allows the armed forces to act on a threat possibly years before the actual crisis strikes. We see this is currently not the case, and e.g. courts do not make exemptions for security and defence. A statement from the European Commission confirming we are currently in a situation between war and peace, confirmed in EUCO or Council conclusions, can help guide the legal interpretation of legislation.

2. Provide guidance in specific areas
The Commission could provide guidance on the interpretation of EU legislation in specific areas which Member States identify as forming practical hindrances to the armed forces' readiness. Taking into account the phase we are in as mentioned under title 1, this could help Member States to interpret EU legislation correctly and more appropriately, fitting to the current time. Uncertainty or hesitation when interpreting EU legislation delays readiness actions while we in fact should accelerate.

3. Introduce amendments to existing EU legislation
Some legal acts provide for an exemption or derogation, but as these were written in times of peace, these come with strict conditions which are often time consuming and effectively halt activities. The current geopolitical situation does not leave sufficient time for the armed forces (often with limited personal capacity) to comply, as they must focus all their efforts on becoming operationally ready. In other cases, exemptions or derogations were formulated in a stringent way which practically does not have the desired effect, because the legislators could not possibly cover all unforeseen effects of the legislation. Another category entails legal acts which, unintendedly, regardless of providing an exemption or derogation, form a practical hindrance to operational readiness of armed forces. Therefore, some legal acts need defence specific adaptations, for example:

- The Habitats Directive (1992): Our MoD feels a strong responsibility to protect nature and the handling of defence locations has contributed more to nature conservation and restoration than its disruption. We commit to a positive

[1] In the case of Member States which are also NATO allies.

[2] Article 4(2) TEU

[3] *Ministrstvo za obrambo* arrest d.d. 28 januari 2021 r.o. 43

net balance. However, it is very difficult for the MoD to fulfil all administrative and compensation requirements of the Habitats Directive. The current applicable law does not provide for a tailored approach for MoD's, which is urgently needed. As a consequence, we risk having to suspend many of our activities for becoming operationally ready. This is not only in breach of our responsibilities and the essential tasks for territorial integrity, but by extension damages the security of the EU and its Member States. An optional way forward would be to explicitly recognise national defence as Overriding Public Interest, accommodating defense along the lines of the Nature Restoration Regulation. Notwithstanding the fact that where reasonably possible, the MoD will comply with the Directive. In addition, we plead for an exemption on the compensation obligation arising from the Nature Restoration Act, as well as the Habitats Directive, for MoD activities, so other public interests, such as housing and agriculture, will not be harmed.

- The Council Directive on the conservation of wild birds (1979) confronts the MoD with the same challenges as the Habitats Directive. In many cases, the need to compensate or derogate on a case by case basis makes activities very challenging for the MoD.
- The Defence Procurement Directive (2009) needs a few adaptations to be more in service of the MoD's and armed forces of the EU.
  First, the crisis concept in the Directive is unfit for the current situation. As mentioned above, we must prepare (and therefore procure) products now in the *run up to* a possible crisis or armed conflict. That is why we should broaden the scope of the definition of crisis, for example by lowering the threshold to a crisis that is *impending.*
  Second, we need the possibility to bypass the synchronicity requirement for common procurement. This is one of the factors that in practice often hampers common procurement. Member States' weapons systems' life-cycles are often not exactly aligned in time. In cases where a Member State needs replacement of a weapons system and buys new products, a Member State who needs similar equipment but in e.g. two years' time, should be able to make use of that Member State's framework agreement. This would significantly improve interoperability between armed forces by ramping up aggregated demand and speed up procurement processes.
  Third, a similar argument can be made for more flexibility in proving that unforeseen circumstances have had an impact on reaching the maximum value/quantity of a contract than the current legal framework offers. This would benefit both parties to the contract and the readiness of the armed forces.
  Fourth, the Directive is intended to tailor to the specific needs of procurement by armed forces, but does not include civil equipment which is frequently used during operations of the armed forces. The scope of the Directive should be broadened to equipment which the armed forces use regularly, instead of only military equipment.
  Fifth, the Directive does not provide for an exemption which enables exclusion of economic operators due to national security concerns because they (will) make use of subcontractors or products from third countries. Adding this exemption would increase security standards for products of armed forces and will lead to a higher level of readiness.
- The Waste Framework Directive (2008) has a partial exemption for the armed forces which states that decommissioned explosives are excluded from the directive. The revised Waste Shipment Regulation (2024) refers for the definition of waste to this Waste Framework Directive, but does not share this exclusion of decommissioned explosives. We propose to enter a more simple and effective exemption in both the Waste Framework Directive and the Waste Shipment Regulation by referring to Class 1 Explosives, referring to the UN Globally Harmonised System of Classification and Labelling of Chemicals[4], hereby harmonising definitions and preventing varying interpretations by Member States. Confusion or misinterpretation can form a practical hindrance to operational readiness when (decommissioned) Class 1 Explosives are designated as waste.
- The Regulation on the coordination of social security systems (2004) aims to determine which country's social security legislation applies to a person who moves within the EU. Under the current rules on applicable legislation, inactive family members of civil servants — including defence personnel — may face a change in applicable legislation when their country of residence changes. As a result, these family members may become socially insured in a different country than the civil servant, which could lead to unnecessary changes in coverage. Therefore, it is recommended to explore the feasibility of introducing a specific provision for the inactive family members of defence personnel. This issue makes it more difficult to recruit personnel for military postings which are essential for the readiness of our armed forces and effective military cooperation between Member States.
- The Regulation on medical devices (2017). Under the current rules it is not possible to make an urgent 'defence specific' request for an exemption or derogation from the conformity assessment procedure for a military essential medical device from outside the EU, on behalf of the MoD. Therefore, we propose to expand article 59 MDR with the condition such as 'national security and defence purposes'. This would allow exemptions for defence-specific cases.

[4] The UN recommended system of nine classes for identifying dangerous goods. Class 1 identifies explosives. *United Nations Globally Harmonized System of Classification and Labelling of Chemicals (GHS)*. ST/SG/AC.10/30/Rev.6 Geneva. United Nations. 2015.