

Protecting strategic defence and security assets

Kangaroo Group meeting in the European Parliament,

Brussels, May 3rd, 2011

Mr Chairman,

Members of the Parliament, Mrs Gomes,

Ladies and Gentlemen, Dear Colleagues,

I am honoured and a bit frightened by this offer by the Kangaroo Group to speak about a topic fraught with political difficulties.

Let me start with two preliminary observations :

- Most participants in this debate expect me to say something about the legal technicalities of this issue. This will range from article 63 of the treaty, the one freeing the movement of capital between member states and between member states and non EU states, to article 346, which allows one member state to suspend momentarily the effects of the treaty when not doing so would affect the essential interests of the member state in the limited field of arms and ammunition. I shall come back to this but let me put it in a nutshell : there is no limitation to what the EU institutions might do to protect the legitimate interests of the EU.

If we limit ourselves to the issue of the movement of capital, the EU is negotiating open skies agreements which contain limitation to the control of EU based airlines by non EU shareholders. And the control of capital is only one of many tools to control assets.

- The second observation is about the title of this meeting's agenda, which is a bit vague :
 - What is **protecting** ? against whom ? Who is going to do it ?

- **Strategic** ? Where is the strategy we are referring to ?
 - **Defence and security.** What is the span of this ? Where does it stop ?
 - **And the word Assets** ? Does it mean companies ? Laboratories ? Human brains ? Technology ? Intellectual property rights ? Infrastructure ? Are we talking about national or European assets ? Please note that the word European is not in the title.
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- Most people will summarize the issue at “avoiding a takeover by an unwanted investor”. Immediately, references to a number of press headlines will pop in mind and these headlines were about investment from one member state’s champion into another member state’s company. In other terms, a limitation to intra community circulation of capital. That is against the spirit and the letter of the treaties. There have been worries about non EU investment in bank, gas or hotels. These headlines have been remotely connected to defence and security, ranging from banking to electricity, from nuclear energy to yoghurt. There have indeed been two headlines about yoghurts and one is ongoing ! On the other hand , there have been non EU takeover of defence or security suppliers, important ones, in every member state. These have generally not made the headlines.
 - I shall therefore respectfully suggest that we rephrase the title and limit ourselves to **the protection by the EU of defence, security and space assets critical to the implementation of an independent EU defence and security strategy.** This would already be a very ambitious agenda indeed.

That said, I shall at last try to address the topic and I would like to submit three ideas :

- The first one is to look at what is done in this respect in countries like the USA, Russia, China and, to a lesser degree, France.

It starts with a strategy. What are the public policies you want to lead ? What part of these policies do you want to be free from interference, veto, obstruction or influence by foreign powers ?

At this point, you look at the possible suppliers of the means for this policy. Companies, laboratories who will deliver to you the hardware and software that

you need. You will also have to decide the degree of monopoly you want to retain on these. In other terms, if these assets are going to be for your sole use, you will have to control exports, information, and make sure the effective control of these assets is in safe hands. You will also have to assume all of the expense. If that is economically unaffordable, you will have to set priorities.

This is not a one shot policy. If you decide you need Ariane to give you an independent access to space, you will have to manage this independence year after year and use your public procurement power to keep the capability alive. A laboratory cannot be put into storage for a year and restarted later.

You will also, but this is only one between many difficulties to overcome have to make sure the shareholders or management in charge of those assets do not decide to close the activity or relocate it outside of your jurisdiction.

This is not a policy relying only on prime contractors : A small company producing high tech casting, or seals or surface treatment or software necessary for several applications can be more critical than a large one doing the final assembly of a system.

In other terms, this is not an industrial policy but a public procurement policy : constantly monitoring the supply base, deciding what is critical and acting accordingly to guarantee a minimum workload to each critical player. Industry in this case is not an end in itself justified by jobs creation or the economy, but just the tool of a public policy. Please also note that it is not protectionism, even if some members of the US Congress try from time to time to misuse it in favor of local jobs.

The USA do this. They use three main tools to that effect : The Federal Acquisition Regulations, ITAR and CFIUS.

The FAR are used to control the economy of the supply base, as I described before. A special section, called DEFAR, deals with defence procurement.

CFIUS is used to keep the capabilities into US hands. Please note that this is not about the movement of capital but about the effective control. You can in some instances buy the majority of the stock but a proxy board will be set up to separate capital control and effective control. Please also note that capital come in many shapes, like stock with voting rights, without voting rights, certificates of investment etc. When studying the effects of art 63 of the UE treaty, please remember this distinction between control of capital and effective control.

ITAR is used to make sure technologies considered strategic by the US government are not communicated to unwelcome third parties. These technologies are in their majority not military but they are considered a critical element of an US strategic superiority and independence

In short, these countries design a strategy, have legal tools and use them to lead procurement policies accordingly .

- The second idea is to observe that such methodical and complex organization of a non dependence in defence, security and space is very limited in Europe. To my knowledge, only France, particularly for its nuclear force, the European Space Agency and, to a lesser degree, Britain and Sweden have led or lead such policies. France on the other hand has a pragmatic approach and accepts dependence on a variety of capabilities, from AWACs to transport to airborne tankers. Conducting these policies is very technical, very complex and relies on civil servants with special skills. The know how is scarce in Europe, both at political and civil service level. The EU will have to learn.
- The third idea is this : the assets necessary for a non dependent European policy are based in the Member states.

They are part of four different types of public strategies

1. Supply policies by one Member State for national programmes. That Member State decides the degree of dependence he is ready to accept and the resources he wants to devote to non dependence . If necessary, that Member state will make use of art 346 and this use is, in that case, legitimate.
2. Alternatively, they are organized through cooperation programmes between several member states, of an intergovernmental nature. I must confess that I am quite ignorant as regards non-dependence policies in these programmes and particularly the level of coordination between the participating states to foster and maintain this non dependence. The European defence Agency has been working on this for some time. How do you ask a member state to maintain capability which is strategic to you and not to him ?
3. A third category covers programmes led by the European Space Agency. Non dependence is part of the Agency's policy.
4. And last, programmes decided, financed and led by the EU.

Galileo, GMES, SESAR, VIS, Eurodac, SSA.

There, we are talking of an EU strategy, financed and organized by the EU.

Galileo is a positioning system which will free Europe from its current dependence on the US GPS, a programme controlled by the US military. Non dependence is at the root of the political decision to make Galileo.

As regards GMES, Commissioner Hedegaard remarked recently in the Parliament that she counts on GMES to provide intelligence on the climate change policies by third countries without relying only on information supplied by those states.

SESAR is the control of airspace for both civilian and military flights by European policy makers. The USA are developing Nextgen to the same effect. Like Galileo and the GPS, the two systems must be interoperable but Europe has affirmed its policy of controlling its own airspace with its own means.

VIS, the visa information system, Eurodac, the Asylums management system and SSA, the monitoring of space for debris, satellites or incoming missiles are three other examples of European infrastructures with a strong non-dependence dimension.

However, if the starting point in building these public infrastructures has been European political non dependence, this strategy has generally not been implemented in the programmes' management. One may fear that each of these systems will end up being dependent on foreign government decisions and, worse yet, I am not certain that this is the result of conscious and informed choices and that anyone has a clear picture of the situation.

In conclusion, I would suggest to the Members of Parliament to concentrate on these EU programmes and on organizing a procurement policy with a coherent and pragmatic degree of non dependence. The set up of a legal instrument will be the easiest part of the exercise.

There is no obstacle in the treaties to the EU institutions doing so, if there is a political will.
