



DEFENCE BY TRANSPORT LAW? CONSTITUTIONAL CONSTRAINTS OF MILITARY TRANSPORTS PERMISSIONS AND EMERS IN THE PROPOSED MILITARY MOBILITY REGULATION (COM(2025) 847)

Pavel Linzer, PhD Candidate

Charles University, Faculty of Law

náměstí Curieových 901/7, Prague 1, 110 00, Czechia

linzerp@prf.cuni.cz

ABSTRACT

In November 2025, the European Commission tabled a proposal for a Regulation establishing a Union-wide framework to facilitate the cross-border transport of military equipment, goods and personnel (COM(2025) 847). Building on earlier military-mobility initiatives that relied predominantly on action plans and voluntary coordination, the draft would introduce directly applicable procedural harmonisation, including a uniform framework for authorisation procedures and an EU-level emergency mechanism (EMERS) designed for temporary, extraordinary and urgent situations.

The proposal relies on EU transport competences (Articles 91 and 100(2) TFEU), thereby triggering the ordinary legislative procedure; it is presented exceptionally without an impact assessment and is instead accompanied by a Staff Working Document.

The paper aspires to answer the following main question: under what constitutional conditions can EU transport competences sustain binding authorisation procedures and an emergency regime for military transport without encroaching upon Member States' national security prerogatives and sovereign discretion over transit decisions? It advances a "proceduralisation" account of the draft: rather than transferring substantive control over military movements to the Union, the proposal seeks to standardise how Member States operationalise transit decisions by imposing common procedural parameters and crisis-specific acceleration tools. At the same time, this design generates Treaty-sensitive pressure points, especially where accelerated procedures and emergency activation risk compressing national discretion in security-relevant contexts.

Methodologically, the paper uses doctrinal legal research, operationalised through textual, systematic and contextual interpretation. First, it assesses the choice of legal basis by analysing the

proposal's objectives and operative content, in line with the Court of Justice's established approach to legal-basis selection. Second, it evaluates two legally decisive clusters, the authorisation regime and EMERS, against the principles of conferral, subsidiarity and proportionality, with particular attention to the safeguards that preserve national security prerogatives. Third, it maps (without exhaustively analysing) the draft's infrastructure-readiness and solidarity components to clarify how they shape the proposal's overall constitutional profile and where legislative contestation is most likely to arise.

By focusing on competence boundaries, institutional design and emergency governance, the paper aims to offer a legally grounded account of the emerging "Military Schengen" agenda and clarifies how far defence-readiness can be pursued through non-CFSP hard law while remaining constitutionally disciplined.

Keywords: *Autonomy, CSDP, Competence, EMERS, Mobility*

1. INTRODUCTION

In November 2025, the European Commission proposed a Regulation establishing a Union-wide framework for the cross-border transport of military equipment, goods, and personnel (COM(2025)847)¹. The proposal represents a qualitative leap from voluntary coordination under the 2018 Action Plan on Military Mobility² and the Permanent Structured Cooperation (hereinafter: PESCO) framework to binding hard law³, adopted under the ordinary legislative procedure on the basis of Articles 91 and 100(2) Treaty on the Functioning of the European Union (hereinafter: TFEU). The choice of the transport title rather than a Common Foreign and Security Policy (hereinafter: CFSP) legal basis is not merely procedural. It determines the decision-making rule (qualified majority rather than unanimity), the role of the European Parliament (co-legislator rather than consulted), and the scope of judicial review (full rather than limited under Article 275 TFEU). All of this raises a wide spectrum of legal questions, which this paper addresses as follows.

The proposal sits at the intersection of two structural developments in EU law. The first is the steady "mainstreaming" of defence objectives into policy fields governed by the ordinary Treaty competences, a process that allows the Union to pursue security goals without engaging the unanimity and constraints of the CFSP. The second is the long-standing tension between the principle of conferral,

¹ Proposal for a Regulation of the European Parliament and of the Council establishing a Union-wide framework for cross-border transport of military equipment, goods and personnel, COM(2025) 847 final.

² JOIN(2018) 5 final (Action Plan on Military Mobility), JOIN(2025) 846 final (Action Plan on Military Mobility 2.0).

³ On the broader trajectory of defence mainstreaming through non-CFSP instruments, see Steinbach, A., "The Supranational Turn of EU Defence Policy", *Common Market Law Review*, Vol. 62, 2025, pp. 1635-1674.

which confines the Union to the competences attributed to it, and the functional pressure to read sectoral legal bases broadly enough to meet new strategic needs. COM(2025) 847 brings these two developments into direct contact as it uses a transport competence to pursue a defence-readiness objective, and in doing so raises the question of how far a sectoral legal basis can be stretched before it encroaches on competences the Treaties reserve to other procedures or to the Member States. This paper situates its doctrinal analysis within that broader frame.

Under what constitutional conditions can EU transport competences sustain binding authorisation procedures and an emergency regime for military transport without encroaching upon Member States' national security prerogatives? The question is not whether EU defence mainstreaming is desirable, given the geopolitical case for military mobility has been made quite clear since Russia's full-scale invasion of Ukraine exposed the operational consequences of fragmented transport rules⁴. The question is whether the specific legal architecture chosen by the Commission in this specific case can bear the constitutional weight placed upon it.

The paper advances a "proceduralisation" account of the proposal. The central claim is that COM(2025) 847 standardises how Member States operationalise transit decisions - such as timelines, notification formats, scope categories, revocation grounds - rather than transferring substantive control over which military movements to permit. Whether this proceduralisation logic can sustain the entire proposal, including its emergency chapter, is the constitutional challenge the paper investigates. It proposes a distinction between "procedural regulation" and "substantive predetermination" as a doctrinal criterion for assessing dual-use, defence-adjacent measures adopted on sectoral TFEU legal bases.

The analysis proceeds in six steps. Section 2 examines the choice of legal basis through the Court of Justice of the European Union's (hereinafter: CJEU) centre-of-gravity methodology, engaging directly with recently published Snell's opinion to the Grand Committee of the Finnish Parliament on COM(2025) 847 in which he objects that the permit system regulates entry rather than transport.⁵ Section 3 develops the proceduralisation account for the ordinary authorisation regime, identifying both its strengths and its constitutional limits. Section 4 tests whether EMERS⁶ can be sustained within the same framework. Section 5 maps the proposal's infrastructure-

⁴ Commission Staff Working Document accompanying the Proposal for a Regulation establishing a Union-wide framework for cross-border transport of military equipment, goods and personnel, SWD(2025) 847 final, Section 1.

⁵ Snell, J., *Legal Opinion to the Grand Committee of the Finnish Parliament*, U 1/2026 vp, 24 March 2026, Available at: [<https://www2.eduskunta.fi/FI/vaski/JulkaisuMetatieto/Documents/EDK-2026-AK-15265.pdf>], Accessed 2 April 2026.

⁶ European Military Mobility Enhanced Response System, Articles 18-31 of the Proposal.

readiness, capability-pooling, and temporary-control provisions as further constitutional pressure points. Section 6 synthesises the findings by distinguishing four types of constitutional challenge, followed by the conclusion of the paper.

This paper is methodologically based on doctrinal legal research, operationalised through textual, systematic, and contextual interpretation. The paper evaluates the authorisation regime and EMERS primarily against the principles of conferral and proportionality; subsidiarity receives lighter treatment because the Staff Working Document (hereinafter: SWD)⁷ evidence on failed voluntary coordination supports Union-level intervention as such, while the principal constitutional contestation centres on the specific design choices within that intervention. Two further limitations should be acknowledged. First, the paper analyses a legislative proposal, not an adopted act, and so the text may change during the legislative process. Second, the proceduralisation/predetermination distinction proposed here is consistent with the direction of the CJEU's jurisprudence but is not compelled by it; it is the paper's own doctrinal contribution, offered for debate.

2. THE CHOICE OF LEGAL BASIS: ARTICLES 91 AND 100(2) TFEU

The proposal is based on Articles 91 and 100(2) TFEU⁸. The Commission's justification is notably thin, with less than a page in the SWD, engaging neither with the centre-of-gravity methodology nor with Article 40 TEU or Article 4(2) TEU⁹. As Snell has demonstrated, the choice of legal basis is open to contestation. He concludes that Articles 91 and 100(2) TFEU are “not the correct legal basis” because the permit system regulates entry into the country, not transport as such.¹⁰

2.1. Aim and Content: a Split Result

The Court's legal-basis doctrine requires assessment of aim and content on the basis of objective factors amenable to judicial review.¹¹ Where one purpose is iden-

⁷ SWD(2025) 847 *op. cit.*, note 4.

⁸ COM(2025) 847, preamble. The SWD justifies the dual basis: “the Regulation includes measures applicable for road, rail and inland waterway transport, but also for air and sea transport” (SWD(2025) 847, Section 3.1).

⁹ SWD(2025) 847, Section 3.1. On the constitutional significance of legal-basis choice, see Case C-263/14, *Parliament v Council*, EU:C:2016:435, par. 43; Engel, A., “*The CJEU's Centre of Gravity Theory in Legal Basis Litigation: A Flawed Concept*”, in: Loxa, A.; Lonardo, L. (eds), *The Reasoning of the Court of Justice of the EU*, Oxford University Press, 2026, p. 234.

¹⁰ Snell, J., *op. cit.*, note 5.

¹¹ Case C-300/89, *Commission v Council (Titanium dioxide)*, EU:C:1991:244, par. 10; Case C-130/10, *Parliament v Council*, EU:C:2012:472, par. 42. On the Court's inconsistent application, See Engel, A., *op. cit.*, note 8, pp. 238-239.

tifiable as predominant and the other merely incidental, the measure must be founded on a single legal basis.¹² Applied to COM(2025) 847, this test yields a split result.

On the content side, the case is strong since the operative provisions regulate cross-border transport permissions (Articles 4-6), traffic arrangements and rail-path allocation (Articles 7-8), dangerous goods and abnormal cargo (Articles 10-11), customs formalities (Articles 15-16), infrastructure readiness (Article 32), and capability pooling (Article 35) which belong to the instruments from the established toolbox of the common transport policy¹³ and at the same time the proposal does not regulate deployment, command, or operational use of armed forces.

On the aim side, Article 1 frames the objective in transport-policy terms, but Recital (1) identifies military mobility as “an essential enabler for European security and deterrence,” and the proposal forms part of a Military Mobility Package linked to the Joint White Paper for European Defence Readiness 2030.¹⁴ The *telos* is defence readiness, but the question is whether a defence *telos* is fatal to a transport legal basis.

Case C-43/12 *Commission v Parliament and Council* provides a structural, though not dispositive, analogy. The Court held that cross-border exchange of road-safety information belonged to Article 91(1)(c) TFEU despite its law-enforcement dimension.¹⁵ The factual distance is considerable, but the case establishes that a measure does not lose its transport character merely because it serves adjacent non-transport objectives. Conversely, in C-377/12 *Philippines PCA* the Court treated transport clauses as ancillary to a predominant development-cooperation basis because they were limited to broad declarations of aims and did not determine in concrete terms the manner in which the cooperation would be implemented.¹⁶ Whether transport is the centre of gravity or merely ancillary, therefore, depends on the substantive weight of the transport provisions within the act.

This paper argues that the critical variable is the nature of the regulatory operation performed. Where the proposal standardises the procedures through which

¹² Case C-36/98, *Spain v Council*, EU:C:2001:64, par. 59; Craig, P., *The Lisbon Treaty*, Oxford University Press, 2010, p. 156 ff.

¹³ Cf. Regulation (EC) No 1072/2009; Directive 2012/34/EU, Art. 48; Directive 2008/68/EC. On the CTP's breadth, see Rusche, T. M., “Article 91 TFEU”, in Kellerbauer, M.; Klamert, M.; Tomkin, J. (eds), *The EU Treaties and the Charter of Fundamental Rights*, Oxford University Press, 2019, p. 944, par. 4, noting the “very far-reaching competence” not yet judicially constrained (p. 946, par. 14).

¹⁴ COM(2025) 847, Explanatory Memorandum, Section 1; JOIN(2018) 5; JOIN(2025) 846.

¹⁵ Case C-43/12, *Commission v Parliament and Council*, EU:C:2014:298, par. 42-44.

¹⁶ Case C-377/12, *Commission v Council (Philippines PCA)*, EU:C:2014:1903, par. 52-60.

Member States process military transport requests, it operates as a transport measure. Where it predetermines the substantive outcome, such as replacing national decisions with automatic acceptance, it crosses into a domain that the transport title alone cannot sustain, especially given the nature of CFSP. This distinction between procedural regulation and substantive predetermination is proposed as a doctrinal conclusion of the aim-and-content test for dual-use, defence-adjacent measures, which is consistent with the jurisprudence's direction, though not compelled by it.¹⁷

2.2. The “Entry” Objection and the CFSP Boundary

Snell's counter-argument goes directly to that limit, claiming the authorisation system does not, by its nature, directly concern transport but rather regulates the entry into the country.¹⁸ Article 4(2) TEU, he argues, precludes an expansive reading of the transport title, and by contrasting Article 11 TFEU (an integrating principle) with Article 4(2) TEU (a separating one), he concludes the authorisation provisions require either a CFSP basis or bilateral agreements.¹⁹ The paper finds this argument as correct in one important respect and too broad in another.

Snell is correct that Article 20(1) removes the national decision on territorial access. Under that provision, once EMERS is activated, a request for military transport is automatically treated as granted unless the receiving Member State acts, so that silence or inaction produces acceptance rather than refusal. What has been displaced is therefore a sovereign prerogative, not a transport procedure. Section 4 of this paper reaches a similar conclusion.

However, his characterisation of the ordinary regime (Articles 4-6) as “regulating entry” rather than transport is too broad, though not without force. The ordinary regime constrains national discretion significantly through the fact that standing

¹⁷ The doctrine has documented the broader pattern of defence mainstreaming through non-CFSP competences, see Steinbach, A., *op. cit.* 3, pp. 1635-1674; Meershoek, N., “*Why the EU Internal Market is Not the Correct Legal Basis for Regulating Military-strategic Procurement*”, *European Law Review*, Vol. 47, No. 3, 2022, pp. 353-375; Horn, A., *European Defence Under the Treaties*, Swedish Institute for European Policy Studies (SIEPS), European Policy Analysis, No. 2025:12epa, 2025, This article contributes a doctrinal criterion through the distinction between procedural regulation and substantive predetermination for assessing where such measures remain within the constitutional reach of sectoral legal bases.

¹⁸ Snell, J., *op. cit.*, note 5.

¹⁹ Snell, J., *op. cit.*, note 5, citing Case C-440/05, *Commission v Council*, EU:C:2007:625, par. 70-71. On the conferral principle, see Klamert, M., commentary on *Article 5 TEU*, in: Kellerbauer, M.; Klamert, M.; Tomkin, J. (eds.), *The EU Treaties and the Charter of Fundamental Rights*, Oxford University Press, 2019, par. 5-7.

permissions under Article 5 are pre-authorisations valid until revoked, and both Articles 5(5) and 6(4) limit revocation to force majeure or a “serious threat to public policy, public order or national security.” Nevertheless, the critical distinction remains because under Articles 5 and 6, each Member State retains an individual decision to grant or deny permission, but under Article 20(1), that decision is eliminated. It is this difference in the text that grounds the paper’s conclusion that the ordinary regime and EMERS must be assessed separately. More broadly, Article 91 TFEU has long covered transport rules that incidentally condition cross-border territorial access, such as cabotage rules and dangerous-goods regulations, which are also, in a sense, regulations of “entry,” yet uncontroversially accepted transport measures.²⁰

Article 40 TEU reinforces this differentiated analysis as it is “balanced” post-Lisbon and protects CFSP from TFEU encroachment and vice versa, without hierarchy.²¹ In *C-244/17 Kazakhstan PCA*, the Court confirmed that the centre-of-gravity test applies to CFSP/TFEU boundary disputes - in this case, stating that CFSP links not “sufficient” to require a CFSP basis may be treated as incidental.²² In our case, the proposal does not implement any pre-existing CFSP act, and the regulatory framework originates within the transport policy space. Whether it functionally reallocates authority away from CFSP requires separate assessment for the ordinary regime and for EMERS due to the different nature of each regime regarding the preservation of Member State discretion under CFSP.

2.3. Defence mainstreaming: the transport title as a new vector

The proposal extends Steinbach’s documented pattern of non-CFSP defence-mainstreaming to a previously unexplored vector using the transport title, which, unlike industrial or internal-market bases, structures physical access to territory rather than economic conditions.²³ Where earlier defence-mainstreaming mea-

²⁰ Rusche, *op. cit.*, note 13, pp. 944-945, par. 8-10.

²¹ On Article 40 TEU post-Lisbon, see Wessel, R. A., “*Legality in EU Common Foreign and Security Policy*”, in Kilpatrick, C.; Scott, J. (eds), *Contemporary Challenges to EU Legality*, Oxford University Press, 2021, pp. 82-85; Lonardo, L., “*Common Foreign and Security Policy and the EU’s External Action Objectives: An Analysis of Article 21 of the Treaty on the European Union*”, *European Constitutional Law Review*, Vol. 14, No. 3, 2018, pp. 584-608.

²² Case C-244/17, *Commission v Council* (Kazakhstan PCA), EU:C:2018:662, par. 42-44. See also Case C-658/11, *Parliament v Council*, EU:C:2014:2025 par. 44; Case C-263/14, *Parliament v Council*, EU:C:2016:435 par. 43.

²³ Steinbach *op. cit.* 3, pp. 1635-1638; Szép, V.; Wessel, R. A., et al., *The Current Legal Basis and Governance Structures of the EU’s Defence Activities*, ENGAGE Working Paper No. 4, December 2021; Horn *op. cit.*, note 17; On the parallel deployment of industrial-policy and internal-market competences for defence purposes, and the resulting “product federalism,” see Ríha, M., *Do you have EU Indus-*

asures effected a “marketisation” of EU defence through economic competences, COM(2025) 847 represents what this paper terms the “territorialisation” of defence mainstreaming through transport law - a distinction not, to the author’s knowledge, drawn in the literature.²⁴²⁵ This touches the sovereign prerogative at the core of Article 4(2) TEU. The adequacy of the proposal’s safeguards related to that is examined in Section 6.

2.4. Provisional conclusion

Applying the Court’s established methodology for the choice of legal basis to COM(2025) 847 does not yield a single answer since the non-EMERS architecture and EMERS stand on different constitutional footing.

For the non-EMERS architecture (Articles 4-16, 32-36, and supporting provisions), the transport legal basis is defensible, though not without tension. The operative content is recognisably transport-regulatory, the proposal does not implement a pre-existing CFSP act, and critically, the individual national decision to grant or deny each permission is preserved. Section 3 develops this through a proceduralisation account, while acknowledging that standing permissions create a ratchet on future sovereign discretion and compressed ad hoc timelines generate their own pressure.

For EMERS (Articles 19-21), the position is materially different. The deemed-acceptance clause (Article 20(1)) eliminates the individual national decision on territorial access. The mandatory priority-access regime (Article 21) compels service interruption. These provisions predetermine the substantive outcome by removing the decision itself. As Section 4 will argue, this pushes beyond what the transport title can plausibly sustain.

trial policy legal basis? And can I see it?, Prague Law Working Papers Series, No. 2026/I/4, 2026, who documents the use of Article 173 TFEU and Article 114 TFEU as indirect instruments for financing defence procurement and industrial development outside the CFSP framework.

²⁴ The concept of “territorialisation” is employed here in a competence-analytical sense, denoting the extension of defence mainstreaming from economic competences (internal market, industrial policy) to a legal basis that structures physical access to national territory. It should be distinguished from the spatial-geopolitical concept of “vertical territorialisation” advanced by Lingevicius, J.; Martins, B. O.; Bruni, G., *From the Ground to the Stars: The Vertical Politics of the EU Drone Wall and Airspace Defence*, *Journal of Common Market Studies*, [2026, doi:10.1111/jcms.70092], who use the term to describe the EU’s emergent multi-layered defence continuum extending from drone and counter-drone systems through air and missile defence to outer space.

²⁵ On competence creep through broad sectoral bases, see Garben, S., “*Competence Creep Revisited*”, *Journal of Common Market Studies*, Vol. 57, No. 2, 2019, pp. 205-222, at p. 206.

This does not mean the entire regulation lacks the correct legal basis. The centre-of-gravity determination rests on what each cluster substantively does, not on political motivation or article-counting. The *effet utile* of the constitutional settlement requires that both the CFSP framework and the transport title be given real effect and neither should be hollowed out by the other. Assessed substantively, the non-EMERS architecture determines *how* military transport is processed within civilian infrastructure. Even within this architecture, certain provisions generate additional constitutional pressure, notably the incorporation of Council Military Requirements (Article 32) and the temporary-control framework (Article 38), which requires Member States to establish binding orders for temporary control or use of infrastructure and assets. These provisions do not, however, alter the dominant transport-regulatory character of the non-EMERS architecture, and their specific pressure points are mapped in Section 5. Therefore, the paper reaches the conclusion that the non-EMERS architecture constitutes the act's centre of gravity.

EMERS is substantively different because of what it *does*, which is the elimination of the sovereign transit decision. EMERS as drafted, is constitutionally defective as it cannot be reconciled with the transport legal basis unless narrowed to preserve some form of individual national decision.

3. THE AUTHORISATION REGIME: PROCEDURALISATION AND ITS LIMITS

If the transport legal basis is defensible for the ordinary authorisation regime, this is because the proposal employs a specific regulatory technique rather than directly harmonising substantive outcomes. Eliantonio and Muir have termed this technique “incidental proceduralisation” as the insertion of procedural rules in secondary EU law adopted based on provisions enabling the EU to develop a substantive policy.²⁶ In such cases, the EU shapes how Member States exercise their powers without directly prescribing what outcome they must reach. Dubos traces its origins to “a grey area of European federalism” in which the Union, lacking explicit procedural competence, uses substantive legal bases to harmonise the procedural conditions of national decision-making.²⁷

²⁶ Eliantonio, M.; Muir, E., “*Concluding Thoughts: Legitimacy, Rationale and Extent of the Incidental Proceduralisation of EU Law*”, Review of European Administrative Law, Vol. 8, No. 1, 2015, pp. 177-204, at p. 178.

²⁷ Dubos, O., “*The Origins of the Proceduralisation of EU Law: A Grey Area of European Federalism*”, Review of European Administrative Law, Vol. 8, No. 1, 2015, pp. 7-26.

3.1. Standing Permissions (Article 5): Proceduralisation With a Ratchet

Article 5 establishes a regime of standing military transport permissions based on open-ended, pre-authorised permissions granted by the receiving Member State for defined categories of military transport operations. In this context, three features are constitutionally significant.

First, the initial decision to grant or deny the standing permission remains formally with the receiving Member State, though it is exercised within a Union-defined baseline. The receiving Member State “shall take a decision to grant or deny” the permission within two months (Article 5(2)), and the regulation does not prescribe what that decision must be, however, standing permissions must cover at least the categories listed in Annex I (Article 5(1)), and the Commission may amend Annex I by delegated act (Article 5(10)), meaning the Union partly shapes the substantive scope of what a granted permission must encompass. This forms the textual anchor of the proceduralisation thesis as the Union harmonises the procedure and defines the minimum baseline, while the Member State retains the substantive decision on whether to open its territory at all.

Second, once granted, a standing permission is “valid until explicitly suspended or revoked” (Article 5(5)). Revocation is limited to force majeure or a “serious threat to public policy, public order or national security,” and must be justified. This creates a ratchet. The initial sovereign choice is free, but its reversal is constrained. The permission, once given, generates a presumption of continued access that can be defeated only on narrow grounds. This is more than pure procedural harmonisation as it shapes the substantive landscape of future decisions by creating a default of openness.

Third, the receiving Member State may impose conditions and modify a standing permission (Article 5(3), (6)), which preserves a degree of ongoing control. But modification requires three working days’ notice, and the categories of transport covered must include at least those listed in Annex I as Union-defined minimum scope.

Assessed against the principles the abstract identifies: preservation of the initial grant/deny decision is the principal reason the ordinary regime remains defensible under the transport basis, notwithstanding the substantive effects of minimum mandatory scope (Annex I), open-ended validity, narrow revocation grounds, and delegated updating of the scope categories. However, the grant/deny decision alone does not settle the conferral question. What keeps the regime on the procedural side of the line is the combination of preserved initial discretion, the national security exit valve for revocation, and the absence of deemed acceptance which

constitutes a structural combination analogous to C-43/12 *Commission v Parliament and Council*, where the Court accepted the transport characterisation in part because binding procedural obligations (information exchange) coexisted with preserved national substantive discretion (the decision whether to prosecute).²⁸

The subsidiarity question is addressed by the SWD's evidence that voluntary coordination failed: 76.92% of Member States still rely on ad hoc arrangements, and only approximately 50% have integrated the EDA Technical Arrangements into national procedures.²⁹ This evidence supports the case for Union-level intervention but does not, by itself, justify the specific design choice of open-ended validity with narrow revocation grounds, which is the most contestable aspect of the ordinary regime's proportionality. The proportionality question, therefore, turns on whether that particular configuration falls within the legislature's margin of appreciation in choosing among proportionate means. Alternative designs could reduce this pressure. Fixed-term validity with periodic renewal, broader security-based revocation grounds, or a requirement of periodic parliamentary review at the national level would all constitute less intrusive means of achieving the same regulatory objective. The paper's assessment is that the current design nevertheless falls within the legislature's margin of appreciation, because national security remains an explicit ground for withdrawal, preventing the most acute encroachment on sovereignty. It does so, however, at the outer edge of that margin, and the ratchet effect of a regime that is easy to enter and hard to exit must be acknowledged as a constitutional cost even where the overall proportionality assessment is favourable. The legislative process may well opt for a less constitutionally exposed configuration.

3.2. Ad Hoc Permissions (Article 6): Compressed Timelines

Article 6 regulates ad hoc permissions for individual or short-notice transport operations not covered by standing permissions. The receiving Member State must decide within three working days (Article 6(3)). The revocation grounds are identical to Article 5, and the Member State may impose conditions, including specific routes, and may require police escort or other safety arrangements.

The constitutional pressure here consists in the timeline. Three working days to evaluate a potentially complex multinational military transit compresses the evaluative space within which the sovereign decision is exercised. If the timeline makes a meaningful "no" practically difficult, particularly for operations involving dangerous goods, abnormal cargo, or large-scale movements, the procedure begins to constrain the substance.

²⁸ Case C-43/12 *op. cit.*, note 15, paras. 38–44.

²⁹ SWD(2025) 847, *op. cit.*, note 4, Section 3.1.1.

The paper's assessment is that the three-day deadline is constitutionally defensible, though at the margin. The absence of deemed acceptance does not eliminate the constitutional concern. If reality shows that the decision window is so short that refusal becomes operationally unrealistic in complex cases, the procedure constrains the substance regardless of the formal default rule. This is the strongest argument against the ordinary regime's proportionality, and the paper does not dismiss it, acknowledging that the assessment could theoretically be contested. Three considerations nevertheless mitigate, though they do not eliminate, the concern.

First, the Member State can still deny within three days and critically, silence does not trigger deemed acceptance under the ordinary regime, unlike under EMERS (Article 20(1)). The consequence of failing to decide in time is administrative delay and not automatic authorisation, which creates a qualitatively different constitutional situation.³⁰ Second, the Member State may attach conditions, including route restrictions, which allow risk mitigation even where outright refusal would be difficult to justify. Third, the proposal aligns with the 2024 Military Mobility Pledge, in which Member States themselves committed to a three-day standard (Recital 10), suggesting that the timeline reflects operational practice rather than Union imposition.³¹

3.3. The Constitutional Boundary

The ordinary authorisation regime thus represents proceduralisation in a constitutionally permissible degree as the Union standardises procedures without prescribing outcomes, in a structural pattern analogous to the transport measures the Court accepted in *C-43/12 Commission v Parliament and Council*.³² Even Snell, whose objection to the transport legal basis is the most developed in the current debate, acknowledges that under the ordinary regime "the granting or refusal of authorisations is, under normal circumstances, at the discretion of the Member States."³³

The ordinary regime is not constitutionally costless, since standing permissions create a ratchet and compressed timelines narrow the evaluative space, but the es-

³⁰ This is the critical difference since under Article 6, non-response within the deadline does not equal acceptance but under Article 20(1), all requests are "deemed accepted."

³¹ Recital (10) of the Proposal refers to the 2024 Military Mobility Pledge, in which participating Member States committed to processing ad hoc military transport permissions within three working days. On the Pledge and its policy context, see JOIN(2025) 846 final (Action Plan on Military Mobility 2.0).

³² Case C-43/12 *op. cit.*, note 15.

³³ Snell, J., *op. cit.*, note 5.

sential feature that separates it from EMERS remains intact because each Member State retains an individual decision that can result in denial and that can be exercised on national security grounds. Where that decision is eliminated, as Section 4 will demonstrate, the proceduralisation account breaks down and the transport legal basis is pushed beyond what it can plausibly sustain.

4. EMERS: WHERE PROCEDURALISATION BREAKS DOWN

The proceduralisation account holds for the ordinary regime because, however constrained, the individual national decision survives. EMERS (Articles 18-27) disrupts this logic. The deemed-acceptance clause (Article 20(1)) and the priority-access regime (Article 21) cross the constitutional threshold identified by this paper's procedural/substantive distinction and the existing safeguards are insufficient to reconcile EMERS with the transport legal basis.

4.1. The Deemed-Acceptance Clause: Elimination of the National Decision

Article 19 provides that EMERS may be activated by Council implementing act upon Commission proposal where there is “an existing or an expected need for significantly higher volumes, frequency or speed of military transport” that existing rules cannot meet. Activation must occur within 48 hours, for a maximum of 12 months (Article 19(3)). The conditions are broadly defined and non-exhaustive.

The constitutionally decisive provision is Article 20(1): “By way of derogation from Article 5 and 6, during the period of activation of EMERS, requests for military transport permissions shall be deemed accepted by the receiving Member States.” This replaces the individual national grant/deny decision, identified in Section 3 as the constitutional anchor of the ordinary regime, with automatic acceptance. In such a situation, the requesting Member State needs only to notify the receiving Member State six hours before arrival at the border crossing point (Article 20(2)). This can be dissected into three main constitutional objections.

Firstly, on the conferral, the proceduralisation thesis holds for the ordinary regime because the Union regulates how, while the Member State decides whether. Under Article 20(1), there is no “whether”, and the decision is predetermined by the regulation itself. The receiving Member State may determine traffic arrangements (Article 20(3)), but it cannot refuse transit. What has been displaced is not a procedural parameter but the sovereign decision on territorial access. This is precisely the line Snell draws: “Member States would thus lose their ability to control the armed forces entering their territory. This directly affects the core functions of the

state and national security as referred to in Article 4(2) TEU,³⁴ and on this point, the paper agrees with Snell.

Secondly, on the Article 4(2) TEU reservation, that provision requires the Union to respect “their essential state functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.” The deemed-acceptance clause removes the individual Member State’s ability to exercise that responsibility in respect of each specific military transit during the activation period. The safeguard clause in Article 20(1) using the formula “without prejudice to the specific character of the security and defence policies of certain Member States” is too vague to constitute an effective exit valve and its operational meaning is unclear. Does it permit a neutrality-based opt-out? A case-by-case refusal on specific security grounds? Or is it merely a declaratory recital-style saving? The proposal does not specify that, and the absence of specificity represents in itself a constitutional deficiency. If Article 4(2) TEU requires the Union to respect essential State functions including national security, then an instrument that eliminates the individual sovereign decision on military transit must contain a safeguard whose scope and operation are sufficiently clear to permit the Member State to know whether it may refuse, and the Court to review whether the balance required by Article 4(2) TEU has been maintained. A clause whose operative content cannot be determined fails to perform that function.³⁵

A narrower counter-reading is conceivable. The “without prejudice” clause may have been intended solely to accommodate the specific position of neutral or non-aligned Member States, such as Austria, Ireland, or Malta, rather than to preserve a general right of refusal for all Member States. Even on this narrower reading, however, the clause remains constitutionally insufficient. A neutrality-specific saving would leave non-neutral Member States without any mechanism to refuse individual transits during EMERS on national security grounds unrelated to neutrality, which is a result that Article 4(2) TEU, applying to all Member States without distinction, cannot easily accommodate.

³⁴ Snell, J., *op. cit.*, note 5.

³⁵ Klamert, M., *Commentary on Article 4 TEU*, in Kellerbauer, M.; Klamert, M.; Tomkin, J. (eds), *The EU Treaties and the Charter of Fundamental Rights*, Oxford University Press, 2019, par. 22-23, observing that the requirement to respect essential State functions does not amount to an inherent general exception excluding security-related measures from the scope of EU law, and that Article 4(2) TEU does not create an obligation to give priority to national interests over Union interests. On the related but distinct derogation under Article 346 TFEU, see Kellerbauer, M., *Commentary on Article 346 TFEU*, *ibid.*, p. 2051, par. 5-6.

Thirdly, on democratic legitimacy, EMERS is activated by a Council implementing act, adopted by a qualified majority (Article 19(2)-(3)). A Member State can therefore be outvoted on activation and subsequently be required, under Article 20(1), to accept military transits it did not consent to permit. If EMERS is correctly characterised as displacing sovereign security and defence decisions rather than regulating transport procedure, routing it through the transport title and qualified majority voting (hereinafter: QMV) deprives the CFSP/CSDP institutional safeguards, in particular the unanimity requirement of Article 42(4) TEU, of practical effect. As Wessel observes, Article 40 TEU is designed to protect precisely these procedural distinctions.³⁶³⁷

4.2. Priority Access: Obligations on Member States and Private Actors

Article 21 requires Member States and infrastructure owners, operators, and managers to “grant military transports priority access” across all modes. Ongoing or planned civilian services “shall be interrupted, postponed or cancelled” to allow priority access (Article 21(6)). No compensation is due to affected transport users (Article 21(7)).

This provision raises concerns under the Charter of Fundamental Rights (hereinafter: the Charter), specifically Article 17 (right to property) and Article 16 (freedom to conduct a business), which this paper flags without exhaustive analysis, as the abstract limits its scope to competence and institutional questions. Infrastructure owners, operators, and managers are compelled to interrupt, postpone, or cancel civilian services (Article 21(6)), while the no-compensation rule of Article 21(7) applies to “other affected transport users.” Both features are constitutionally intrusive. The first imposes direct obligations on private actors, the second denies remedy to those whose services are displaced.³⁸ Any such limitation must, under Article 52(1) of the Charter, be provided for by law, respect the essence of the right, and comply with proportionality which are requirements that merit further analysis beyond this paper’s scope.³⁹

³⁶ Wessel *op. cit.*, note 21 pp. 82-85.

³⁷ Besides that the European Economic and Social Committee has called for “structured democratic oversight at EU and Member State level over the activation and use of military mobility derogations and priority mechanisms, including regular reporting to parliaments”: EESC Opinion on COM(2025) 847, 2025, par. 1.14.

³⁸ The EESC has similarly called for compensation on a tort law basis for logistics and transport operators, including employees, who suffer direct damage from military transport prioritisation: EESC Opinion on COM(2025) 847, 2025, par. 1.7.

³⁹ See also Rumenov, I.; Tasev, D., *Cultural Heritage, Property Rights, and Cross-Border Disputes: The Influence of J. Paul Getty Trust and Others v. Italy on National Legislation and Private International Law*,

4.3. Comparison With Other Emergency Instruments

EMERS is not without precedent in EU emergency governance. The Internal Market Emergency and Resilience Act (IMERA - Regulation 2024/2747) similarly provides for graduated emergency modes with Council activation, temporary derogations, and enhanced coordination obligations.⁴⁰ Article 122 TFEU has been deployed as the basis for emergency measures in economic crises and the COVID-19 pandemic.⁴¹ Cinnirella identifies an emerging “supranational model” of EU emergency powers, in which sectoral legislation incorporates dormant emergency frameworks that can be activated by institutional decision.⁴²

EMERS fits within this trajectory but exceeds it in one critical respect. As far as the author of this paper is aware, there is no EU emergency instrument that compels acceptance of the physical transit of foreign sovereign actors across Member-State territory. IMERA’s emergency mode imposes information obligations, priority-rated orders, and coordination requirements, but it does not displace the sovereign decision on territorial access, which constitutes a qualitative, not merely quantitative, difference.

4.4. Conclusion on EMERS

EMERS represents a pre-emptive codification of emergency military-transport powers. In principle, such codification offers a constitutional advantage over ad hoc improvisation by subjecting emergency authority to predefined conditions, temporal limits, and institutional safeguards. But the specific design of Article 20(1) is constitutionally incapable of achieving this purpose. Additionally, White has argued in the broader context of EU emergency governance that pre-emptive regularisation of the exception raises problems of its own, including the risk of normalising executive discretion and fostering the appetite to invoke emergency powers beyond what is strictly necessary.⁴³

EU and Comparative Law Issues and Challenges Series (ECLIC), Issue 9, 2025, pp. 3-20. comparing the reconciliation of individual property rights with an overriding public or sovereign interest as a recurring theme in European fundamental-rights adjudication under Article 1 of Protocol No. 1 ECHR, the Convention analogue to Article 17 of the Charter.

⁴⁰ Somssich, R., “*How Resilient Will the Internal Market Emergency and Resilience Act Be?*”, *Common Market Law Review*, Vol. 62, 2025, pp. 797-832.

⁴¹ Chamon, M., “*The Non-Emergency Economic Policy Competence in Article 122(1) TFEU*”, *Common Market Law Review*, Vol. 61, 2024, pp. 1501-1526; Calleja, R.; Rusche, T. M.; Shipley, T., “*EU Emergency - Call 122?*”, *Columbia Journal of European Law*, Vol. 29, 2024, pp. 520 ff.

⁴² Cinnirella, C., “*Emergency Powers’ of the European Union: An Inquiry on the Supranational Model*”, *European Papers*, Vol. 10, No. 3, 2025, pp. 525-553.

⁴³ White, J., “*Constitutionalizing the EU in an Age of Emergencies*”, *Journal of Common Market Studies*, Vol. 61, 2023, pp. 781-796.

The strongest defence of Article 20(1) would read the “without prejudice” clause as preserving an individual right of refusal on security grounds, via interpretative integration with Article 4(2) TEU. But that reading produces an internal contradiction. The provision cannot simultaneously mean that all requests are deemed accepted and that each Member State may refuse on specific security grounds. If the clause permits refusal, deemed acceptance is emptied of content but if it does not, the safeguard is purely declaratory. This incoherence is itself evidence that the provision, as drafted, has not resolved the constitutional tension it generates.

By eliminating the individual national decision on territorial access and providing only a vague safeguard, EMERS compresses national security discretion to a degree that the transport title cannot plausibly sustain. This is no longer a mere constitutional strain but a mismatch between the regulatory technique (transport-law derogation) and the substantive operation performed (displacement of sovereign territorial-access decisions).

The paper accordingly concludes that EMERS in its current form requires at least the modification of the deemed-acceptance mechanism to preserve some form of individual national decision. This could be done, for example, by replacing deemed acceptance at least with an accelerated permission procedure subject to a 24- or 48-hour deadline, with refusal permitted on national security grounds. Alternatively, Snell has suggested that the emergency provisions might require a separate constitutional architecture, either within CFSP or through bilateral agreements, following the logic of C-440/05 *Commission v Council*, where different components of a policy area required different legal bases.⁴⁴

5. INFRASTRUCTURE, SOLIDARITY, AND THE BROADER CONSTITUTIONAL PROFILE

Beyond the authorisation regime and EMERS, the proposal contains infrastructure-readiness, capability-pooling, and asset-control provisions that shape its overall constitutional profile. Three features are constitutionally significant and merit identification as likely axes of possible contestation.

⁴⁴ Snell, J., *op. cit.*, note 5; in: C-440/05 *Commission v Council*, the Court there held that certain provisions could not validly be adopted on the transport basis; it did not, however, positively endorse a specific split-instrument architecture. The question of whether Article 122 TFEU or a dedicated CFSP instrument could provide a more appropriate basis for the emergency chapter merits further research beyond this paper's scope.

5.1. The Incorporation of Council Military Requirements Into Transport Law

Article 32 requires Member States to upgrade dual-use infrastructure along military mobility corridors to “the transport infrastructure requirements defined in Annex II to the Council Military Requirements.” The Council Military Requirements were approved by the Council within an intergovernmental defence-planning context, rather than enacted as part of the transport regulation itself. Article 32 gives them legal effect through a transport regulation adopted under the ordinary legislative procedure, creating a normative bridge between intergovernmental military planning and supranational transport law.

The constitutional significance is that, while Article 32 itself sets substantive priorities (network continuity, gauge migration, bridge reinforcement, throughput capacity), it does so by importing and operationalising an external benchmark of Annex II to the Council Military Requirements. The SWD estimates that implementing the resulting infrastructure upgrades along military mobility corridors requires investment exceeding EUR 100 billion.⁴⁵ Whether this constitutes an exercise of transport competence or an operationalisation of defence-readiness policy is a question the proposal does not address, and the centre-of-gravity analysis in Section 2 treats as part of the non-EMERS architecture that remains transport-regulatory in character. That assessment holds because the infrastructure obligations concern transport capacity, for example, bridge reinforcement, gauge migration, throughput enhancement, rather than military command. But the dependence on externally defined Council Military Requirements introduces a defence-policy input into the transport-law framework that deserves continued scrutiny.

5.2. The temporary control framework and the Solidarity Pool

Two further provisions share a common constitutional logic. Both extend the proposal’s reach beyond procedural harmonisation into the material availability of transport assets for military use - one through coercive domestic powers, the other through funding-linked coordination.

Article 38 requires each Member State to establish a framework for issuing “binding orders to obtain the temporary control or right of use over an infrastructure, asset or equipment located on its territory which is necessary for the execution of military transport operations.” This is framed as a last resort, applicable only where “no alternative solution can be achieved through mutual agreement or under an

⁴⁵ SWD(2025) 847, Section 1.2. Approximately 500 “hotspot” projects have been identified for priority implementation along the four military mobility corridors.

existing contract within the required timeframe” (Article 38(1)). Compensation must be provided (Article 38(2)(b)), and measures must be “strictly necessary and proportionate” (Article 38(3)).

Article 38 is among the most constitutionally intrusive non-EMERS provisions. It mandates a quasi-requisitioning power⁴⁶ exercised by the Member State, not by the Union, but required to exist by the regulation. The fundamental-rights implications (Article 17 Charter - right to property; Article 16 - freedom to conduct a business) are apparent and merit analysis that exceeds this paper’s scope. The last-resort and proportionality requirements mitigate, but do not eliminate, the concern.

The Solidarity Pool (Article 35) creates a separate constitutional dynamic. Registration of capabilities is voluntary for Member States, but mandatory for capabilities “acquired or contracted with the financing support of any Union funding” (Article 35(4)). During EMERS, Article 25 adds a stronger consequence: if capabilities acquired, contracted, or purchased with Union funding could support priority requests, Member States may not invoke the exceptional-situation carve-out in Articles 35(10)-(11) to withhold those capabilities. Together, these create a graduated conditionality because Union funding triggers mandatory registration, and during EMERS, it precludes withdrawal of registered capabilities that could support priority requests as a form of financial conditionality applied to defence logistics, consistent with the broader pattern documented by Steinbach.⁴⁷

5.3 Likely Axes of Contestation

Three axes of contestation are identifiable. Firstly, the incorporation of Council Military Requirements into binding transport law could face objections from Member States that resist importing intergovernmentally approved military planning standards into a regulation adopted under the ordinary legislative procedure, a concern grounded in the conferral principle and the CFSP/TFEU demarcation. Secondly, the temporary control framework (Article 38) could be contested under Articles 16 and 17 of the Charter, from both infrastructure operators and Member States concerned about the precedent of Union-mandated requisition-type powers exercised at the national level. Thirdly, the Solidarity Pool’s financial conditionality, consisting in a mandatory registration of Union-funded capabilities in combination with the EMERS-triggered constraint on withdrawal (Article 25) may be contested by Mem-

⁴⁶ Power to compel temporary control over privately held assets against the owner’s will, subject to compensation.

⁴⁷ On financial conditionality in EU defence policy, see Steinbach *op. cit.*, note 3, pp. 1655-1660.

ber States that wish to retain full discretion over assets acquired with Union support. These axes are flagged for further research rather than resolved here.

6. SYNTHESIS OF CONSTITUTIONAL PRESSURE POINTS

COM(2025) 847 generates constitutional pressure at several identifiable points. Not all of these engage the same legal standard or produce the same legal consequence. This section distinguishes four types of constitutional challenge that the proposal may face in the legislative process or, if adopted, before the Court.

6.1. Legal Basis

The analysis in Sections 2 to 4 concludes that the transport legal basis is defensible for the non-EMERS architecture but not for EMERS as currently drafted. The centre-of-gravity assessment locates the act's predominant content in the transport-regulatory provisions while identifying the deemed-acceptance mechanism (Article 20(1)) as a structural mismatch between the chosen legal basis and the substantive operation performed. This differentiated conclusion presupposes that EMERS is severable from the remainder of the act without altering its remaining substance.⁴⁸

However, the severability question is not self-evident, given that EMERS-linked provisions permeate other chapters of the proposal, notably the Solidarity Pool conditionality (Article 25) and the priority-access regime (Article 21). Snell, for his part, argues that the authorisation provisions constitute “one of the core elements” and cannot be severed.⁴⁹ The paper does not share that assessment insofar as the permanent architecture, comprising the authorisation regime, infrastructure-readiness provisions and solidarity mechanisms, retains independent regulatory meaning without EMERS. A full resolution of the severability question nevertheless exceeds the scope of this paper and would need to be tested against the Court's established severability case law.

6.2. Conferral and Proportionality

The second type of challenge accepts the transport legal basis but argues that specific provisions exceed the limits of that competence. Two distinct objections

⁴⁸ On partial annulment and severability, see e.g. Case C-244/03, *France v Parliament and Council*, EU:C:2005:299, par. 12-13; Case C-263/14, *Parliament v Council*, EU:C:2016:435, par. 47. The Court permits partial annulment only where the provisions to be annulled are severable from the remainder of the act without altering its substance.

⁴⁹ Snell, J., *op. cit.*, note 5.

arise. The first is a conferral objection under Article 5(2) TEU, as the Union may act only within the limits of the competences conferred. If a provision performs an operation that the transport title cannot sustain, which this paper argues is deemed acceptance, the problem is not that the measure goes further than necessary, but that the Union lacks competence for what the provision actually does.

The second is a proportionality objection under Article 5(4) TEU. Even where competence exists, the specific design must not exceed what is necessary.⁵⁰ For the ordinary regime, the most contestable proportionality point is the design of standing permissions with open-ended validity with narrow revocation grounds, assessed against the legislature's margin of appreciation. For the non-EMERS infrastructure provisions, Article 32's incorporation of Council Military Requirements and Article 38's temporary-control framework are vulnerable to proportionality challenge, the former because it operationalises externally defined defence-planning standards, the latter because it mandates a quasi-requisitioning power.

6.3 National Security Prerogatives

The third type of challenge invokes the Treaty-level protection of national security under Article 4(2) TEU, which requires the Union to respect essential State functions, including safeguarding territorial integrity and national security. As Klamert observes, this requirement does not amount to an inherent general exception excluding security-related measures from the scope of EU law, nor does it create an obligation to give priority to national interests over Union interests.⁵¹ It does, however, require that the Union demonstrate respect for these functions, which entails a balancing exercise in which the intensity of the Union measure is weighed against the degree of interference with the national security prerogative.

The deemed-acceptance clause is the provision most directly engaged by Article 4(2) TEU. By eliminating the individual national decision on military transit, Article 20(1) compresses Member States' ability to exercise their national security prerogative in respect of each specific operation, which becomes acute when combined with QMV activation, as Section 4 demonstrated. The distinction between Section 6.1 and this section should be noted. Section 6.1 concerns whether the Union has used the correct legislative procedure, and this section concerns wheth-

⁵⁰ Klamert, M., *Commentary on Article 5 TEU*, in: Kellerbauer, M.; Klamert, M.; Tomkin, J. (eds), *op. cit.*, note 19, paras. 33–35.

⁵¹ Klamert, M., *Commentary on Article 4 TEU*, in: Kellerbauer, M.; Klamert, M.; Tomkin, J. (eds), *op. cit.*, note 36, paras. 22–23.

er Article 4(2) TEU operates as a substantive limit on what even a correctly based act can require of Member States.

A related but distinct question is whether Member States could invoke Article 346(1)(b) TFEU to resist specific obligations under the proposal. This paper does not pursue that question in depth, because Article 346(1)(b) is framed around measures connected with “the production of or trade in arms, munitions and war material” which is a scope that does not naturally encompass compelled acceptance of military transit across territory, which concerns the physical movement of armed forces rather than defence products.⁵²

6.4 Charter Rights

The fourth type of challenge concerns fundamental rights under the Charter, specifically the right to property (Article 17) and the freedom to conduct a business (Article 16). The priority-access regime (Article 21) compels private infrastructure operators to interrupt civilian services, while the no-compensation rule (Article 21(7)) denies redress to other affected transport users, which is a combination that raises the sharper rights concern. The temporary-control framework (Article 38) raises related but partly mitigated concerns, because it includes express compensation and proportionality safeguards. Any such limitation must satisfy Article 52(1) of the Charter. This paper flags but does not exhaustively analyse these rights questions, which merit dedicated treatment in further research.

7. CONCLUSION

COM(2025) 847 is constitutionally defensible in some respects and constitutionally defective in others. The transport legal basis is capable of sustaining the proposal’s permanent architecture, such as the authorisation regime, infrastructure-readiness provisions, and solidarity mechanisms, because these provisions standardise the procedures through which Member States process military transport rather than predetermining the outcome. The individual national decision to grant or deny permission survives, even if it is exercised within a Union-defined baseline of minimum scope, open-ended validity, and narrow revocation grounds. This assessment extends to the authorisation regime and infrastructure-readiness provisions, though not without qualification. As Section 5 demonstrated, certain non-EMERS provisions, notably the temporary-control framework (Article 38)

⁵² On the strict interpretation of Article 346 TFEU, see Kellerbauer, M., *Commentary on Article 346 TFEU*, in Kellerbauer, M.; Klamert, M.; Tomkin, J. (eds), *op. cit.* 36, p. 2051, pars. 5-6; Randazzo, V., *Article 346 and the qualified application of EU law to defence*, EUISS Brief, 2014.

and the EMERS-linked conditionality of the Solidarity Pool (Articles 35 and 25), reach beyond procedural harmonisation into the material availability of transport assets. These provisions generate their own constitutional pressure, but they do not cross the threshold of substantive predetermination identified by this paper, because the underlying sovereign decisions, whether to establish a requisitioning framework and whether to register capabilities, remain with the Member State.

However, EMERS, as currently drafted, cannot be sustained on the same basis. The deemed-acceptance clause (Article 20(1)) eliminates the individual national decision, which is the very feature that makes the ordinary regime constitutionally viable. The priority-access regime (Article 21) adds direct obligations on private infrastructure operators and denies compensation to affected transport users. The safeguard clause in Article 20(1) is operationally ambiguous, so it cannot simultaneously mean that all requests are deemed accepted and that each Member State may refuse on specific security grounds. This internal contradiction reveals that the provision has not resolved the constitutional tension it generates.

The paper's central analytical contribution, which lies in the distinction between procedural regulation and substantive predetermination, is offered as a doctrinal criterion for assessing where sectoral TFEU competences can sustain defence-adjacent measures. Articles 91 and 100(2) TFEU can sustain measures that proceduralise military transport decisions, but they cannot sustain measures that displace the sovereign decision on whether foreign armed forces may cross national territory. That is the line EMERS clearly crosses.

Beyond COM(2025) 847, the proposal marks a new frontier in EU defence mainstreaming. Where earlier instruments effected a "marketisation" of EU defence through industrial and internal-market competences, this proposal represents the "territorialisation" of defence mainstreaming through transport law and structuring physical access to territory, not merely economic conditions. How far this vector extends will depend on whether the constitutional discipline of conferral, proportionality, and national security prerogatives proves adequate to the task. That is a question not for this paper alone, but for the legislative process, the Member States, and ultimately the Court.

REFERENCES

BOOKS AND ARTICLES

1. Calleja, R.; Rusche, T. M.; Shipley, T., *EU Emergency - Call 122?*, Columbia Journal of European Law, Vol. 29, 2024
2. Chamon, M., *The Non-Emergency Economic Policy Competence in Article 122(1) TFEU*, Common Market Law Review, Vol. 61, 2024, pp. 1501-1526

3. Cinnirella, C., *'Emergency Powers' of the European Union: An Inquiry on the Supranational Model*, European Papers, Vol. 10, No. 3, 2025, pp. 525-553
4. Craig, P., *The Lisbon Treaty*, Oxford University Press, 2010
5. Dubos, O., *The Origins of the Proceduralisation of EU Law: A Grey Area of European Federalism*, Review of European Administrative Law, Vol. 8, No. 1, 2015, pp. 7-26
6. Eliantonio, M.; Muir, E., *Concluding Thoughts: Legitimacy, Rationale and Extent of the Incidental Proceduralisation of EU Law*, Review of European Administrative Law, Vol. 8, No. 1, 2015, pp. 177-204
7. Engel, A., *The CJEU's Centre of Gravity Theory in Legal Basis Litigation: A Flawed Concept*, in: Loxa, A.; Lonardo, L. (eds), *The Reasoning of the Court of Justice of the EU*, Oxford University Press, 2026
8. Garben, S., *Competence Creep Revisited*, Journal of Common Market Studies, Vol. 57, No. 2, 2019, pp. 205-222
9. Horn, A., *European Defence Under the Treaties*, Swedish Institute for European Policy Studies (SIEPS), European Policy Analysis, No. 2025:12epa, 2025
10. Kellerbauer, M., *Commentary on Article 346 TFEU*, in: Kellerbauer, M.; Klamert, M.; Tomkin, J. (eds), *The EU Treaties and the Charter of Fundamental Rights*, Oxford University Press, 2019
11. Klamert, M., *Commentary on Article 4 TEU*, in: Kellerbauer, M.; Klamert, M.; Tomkin, J. (eds.), *The EU Treaties and the Charter of Fundamental Rights*, Oxford University Press, 2019
12. Klamert, M., *Commentary on Article 5 TEU*, in: Kellerbauer, M.; Klamert, M.; Tomkin, J. (eds.), *The EU Treaties and the Charter of Fundamental Rights*, Oxford University Press, 2019
13. Lingevicius, J.; Martins, B. O.; Bruni, G., *From the Ground to the Stars: The Vertical Politics of the EU Drone Wall and Airspace Defence*, Journal of Common Market Studies, 2026, [doi:10.1111/jcms.70092]
14. Lonardo, L., *CFSP and the EU's External Action Objectives: An Analysis of Article 21 of the Treaty on the European Union*, European Constitutional Law Review, Vol. 14, No. 3, 2018, pp. 584-608
15. Meershoek, N., *Why the EU Internal Market is Not the Correct Legal Basis for Regulating Military-strategic Procurement*, European Law Review, Vol. 47, No. 3, 2022, pp. 353-375
16. Randazzo, V., *Article 346 and the qualified application of EU law to defence*, EUISS Brief, No. 22, 2014
17. Říha, M., *Do you have EU Industrial policy legal basis? And can I see it?*, Prague Law Working Papers Series, No. 2026/II/4, 2026
18. Rumenov, I.; Tasev, D., *Cultural Heritage, Property Rights, and Cross-Border Disputes: The Influence of J. Paul Getty Trust and Others v. Italy on National Legislation and Private International Law*, EU and Comparative Law Issues and Challenges Series (ECLIC), Issue 9, 2025, pp. 3-20
19. Rusche, T. M., *Commentary on Article 91 TFEU*, in: Kellerbauer, M.; Klamert, M.; Tomkin, J. (eds.), *The EU Treaties and the Charter of Fundamental Rights*, Oxford University Press, 2019

20. Somssich, R., *How Resilient Will the Internal Market Emergency and Resilience Act Be?*, Common Market Law Review, Vol. 62, 2025, pp. 797-832
21. Steinbach, A., *The Supranational Turn of EU Defence Policy*, Common Market Law Review, Vol. 62, 2025, pp. 1635-1674
22. Szép, V.; Wessel, R. A. et al., *The Current Legal Basis and Governance Structures of the EU's Defence Activities*, ENGAGE Working Paper No. 4, December 2021
23. Wessel, R. A., *Legality in EU Common Foreign and Security Policy: The Choice of the Appropriate Legal Basis*, in: Kilpatrick, C.; Scott, J. (eds.), *Contemporary Challenges to EU Legality*, Oxford University Press, 2021, pp. 71-99
24. White, J., *Constitutionalizing the EU in an Age of Emergencies*, Journal of Common Market Studies, Vol. 61, 2023, pp. 781-796

COURT OF JUSTICE OF THE EUROPEAN UNION

1. Case C-300/89 *Commission v Council* (Titanium dioxide) [1991] ECR I-2867
2. Case C-36/98 *Spain v Council* [2001] ECR I-779
3. Case C-244/03 *France v Parliament and Council* [2005] ECR I-4021
4. Case C-440/05 *Commission v Council* [2007] ECR I-9097
5. Case C-130/10 *Parliament v Council* [2012] (EU:C:2012:472)
6. Case C-658/11 *Parliament v Council* [2014] (EU:C:2014:2025)
7. Case C-43/12 *Commission v Parliament and Council* [2014] (EU:C:2014:298)
8. Case C-377/12 *Commission v Council* (Philippines PCA) [2014] (EU:C:2014:1903)
9. Case C-263/14 *Parliament v Council* [2016] (EU:C:2016:435)
10. Case C-244/17 *Commission v Council* (Kazakhstan PCA) [2018] (EU:C:2018:662)

EU LAW

1. Proposal for a Regulation of the European Parliament and of the Council establishing a Union-wide framework for cross-border transport of military equipment, goods and personnel, COM(2025) 847 final
2. Commission Staff Working Document, SWD(2025) 847 final
3. Joint Communication to the European Parliament, the European Council and the Council, JOIN(2018) 5 final (Action Plan on Military Mobility)
4. Joint Communication to the European Parliament, the European Council and the Council, JOIN(2025) 846 final (Action Plan on Military Mobility 2.0)
5. Regulation (EU) 2024/2747 of the European Parliament and of the Council of 9 October 2024 establishing a framework of measures related to an internal market emergency and to the resilience of the internal market (Internal Market Emergency and Resilience Act)
6. Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market
7. Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area

8. Directive 2008/68/EC of the European Parliament and of the Council of 24 September 2008 on the inland transport of dangerous goods

OTHER SOURCES

1. EESC Opinion on COM(2025) 847, 2025

WEBSITE REFERENCES

1. Snell, J., *Legal Opinion to the Grand Committee of the Finnish Parliament*, U 1/2026 vp, 24 March 2026, Available at:
[<https://www2.eduskunta.fi/FI/vaski/JulkaisuMetatieto/Documents/EDK-2026-AK-15265.pdf>], Accessed 2 April 2026