

## Defence Procurement Law in Europe

### The Role of International Organisations

Baudouin Heuninckx\*

#### 1. *Collaborative Defence Procurement in Europe*

Defence procurement within the European Union (EU) could be broadly defined as the section of *public procurement performed for the benefit of the armed forces of the EU Member States*. Defence procurement therefore covers a wide scope of activities, ranging from the development and production of complex military equipment to the purchase of food and clothing for soldiers in the field. Within this broad definition, the procurement of 'hard' or 'war-like' defence materiel, such as tanks and missiles, can be subject to specific rules, and this part of defence procurement could be referred to as 'defence procurement *stricto sensu*'. This thesis will further highlight this distinction.

Defence procurement is much more than 'the public procurement activities of contracting authorities in the field of defence'.<sup>1</sup> The European Community (EC) Public Sector Directive uses this terminology only to delineate the applicability of the Directive, not to provide a definition of the notion of defence procurement, and an important part of defence procurement is performed by entities that are arguably not contracting authorities within the meaning of the Directive. This issue will be further discussed in this thesis, and we should at this stage simply note that the broader – even though vaguer – definition mentioned above should be used.

Defence procurement activities obviously play a key role in the security of the EU Member States and are therefore a very sensitive topic, touching the core sovereign competences of the

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\* Baudouin Heuninckx, LL.M., M.Sc., M.A., MCIPS, is Officer in the Executive Administration of the Organisation for Joint Armaments Cooperation (OCCAR) in Toulouse, France, fellow of the Academy of Political Sciences of New York, member of the Chartered Institute of Purchasing and Supply and of the International Bar Association. The views expressed in this article are his own and do not necessarily represent those of OCCAR-EA. He can be contacted at [100544.1653@compuserve.com](mailto:100544.1653@compuserve.com).

<sup>1</sup> Directive 2004/18/EC, infra, Article 10

State. This is to the extent of being the subject of a specific exemption in the Treaty establishing the European Community (EC Treaty).<sup>2</sup> The scope of that exemption will be further examined in this thesis, as we will see that it does not apply automatically, and only covers activities related to the procurement of ‘hard’ or ‘war-like’ defence materiel.

In addition, defence procurement plays an important economic role in the EU. Defence expenditures of EU Member States amounted in 2005 to 193 billion €, or 1.8% of the EU Gross Domestic Product (GDP). Of that total amount, about 18.3% (35.4 billion €) were used for the procurement of defence equipment and Research and Development (R&D),<sup>3</sup> as shown on Figure 1. In addition, many operations, maintenance and infrastructure expenses also find their source in procurement activities.

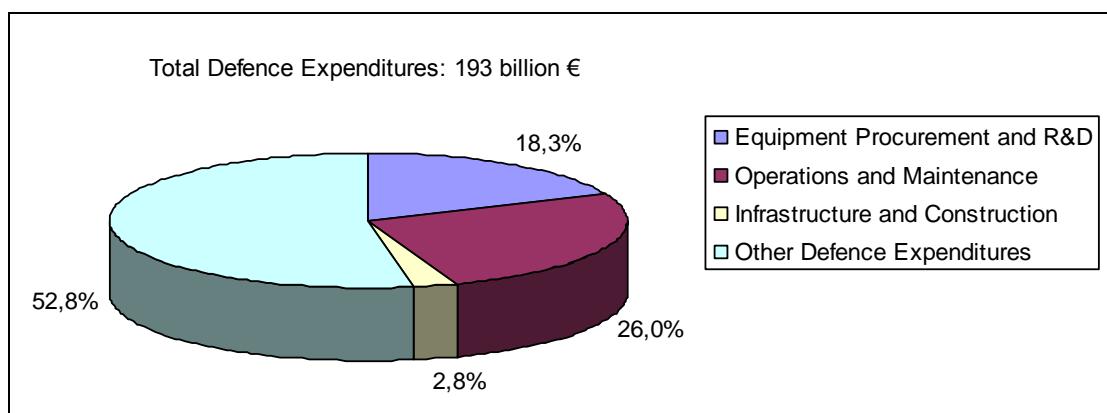


Figure 1: EU Defence Expenditures in 2005 (source: EDA)<sup>4</sup>

Despite this importance, defence procurement is still heavily segmented, much more so than any other sector of public procurement,<sup>5</sup> and is therefore considered as economically highly inefficient. A 1992 study carried out for the European Commission on the costs of non-

<sup>2</sup> Consolidated Version of the Treaty Establishing the European Community (EC Treaty), OJ 2002 C 325/33, Article 296(1)(b) (ex-Article 223(1)(b)), which will be discussed in details in the thesis

<sup>3</sup> European Defence Agency, ‘European Defence Expenditures in 2005’, 20 November 2006, pages 1 to 4 – all these figures except Denmark

<sup>4</sup> As the operations and maintenance figures for Belgium, Germany and Poland were not included in the EDA study, the original operations and maintenance expenditures have been increased by 20%, which corresponds to the percentage of total European defence expenditures for these three countries. The EDA study does not include such interpolations, which leads to a misleading picture of actual defence expenditures.

<sup>5</sup> Schmitt B., “From Cooperation to Integration: Defence and Aerospace Industries in Europe” (2000) Chaillot Paper No 40, pages 79-83; Georgopoulos A., “Defence Procurement and EU Law” (2005) 30 EL Rev 559, at 567

Europe in defence procurement suggested that savings ranging from 5 to 11 billion € per year could be achieved.<sup>6</sup>

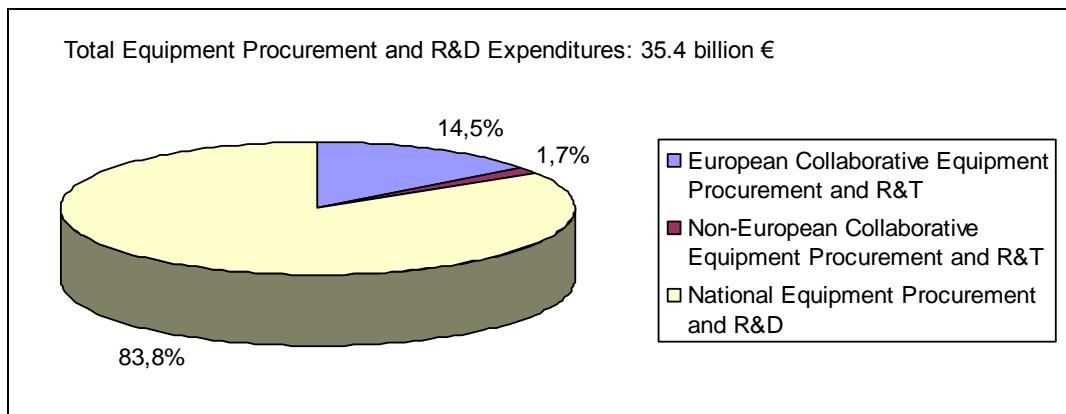


Figure 2: EU Defence Equipment and R&D Expenditures in 2005 (source: EDA)<sup>7</sup>

In an attempt to share the development costs of expensive pieces of defence equipment, such as fighter aircraft, and to secure economies of scale, States sometimes resort to *collaborative procurement*, where they agree to procure defence equipment and fund development costs in common. About 16.2% of the defence equipment procurement and R&D within the EU (5.7 billion €) was performed through collaborative efforts in 2005, and a significant portion of this collaborative procurement (about 90%) involved in majority EU Member States, as shown on Figure 2.<sup>8</sup> Yet, as only a limited number of Member States contributed data to this estimation,<sup>9</sup> it is likely that the contribution of collaborative procurement is closer to 20%, or about 7 billion €.

<sup>6</sup> Communication from the Commission: ‘The Challenges Facing the European Defence-Related Industry, a Contribution for Action at the European Level’, COM(96) 10 final, 24 January 1996, § 5.54 – Considering an average inflation rate of 2.5%, this would amount to about 6.9 to 15.2 billion € in 2005 economic conditions

<sup>7</sup> As stated above, as the collaborative equipment procurement and R&T expenditures figures for Germany were not included in the EDA study, the original collaborative equipment procurement and R&T expenditures have been increased by 12.7%, which corresponds to the percentage of total equipment procurement and R&D for Germany. The EDA study does not include such interpolations, which leads to a misleading picture. In addition, data from some other Member States is also missing.

<sup>8</sup> European Defence Agency, ‘European Defence Expenditures in 2005’, op.cit., pages 9-10 – This study referred only to 14.1% (5 billion €) of the defence equipment procurement and R&D within the EU, but these figures did not include the collaborative procurement for Germany and for other unidentified Member States (see therefore European Defence Agency, ‘National Breakdowns of European Defence Expenditures in 2005’, February 2007, page 17). According to the latter, Germany accounts for about 12.7% of the total defence equipment and R&D expenditures in the EU (page 13), and the collaborative procurement figures above have been increased on that basis (which is likely an underestimation of the German contribution to collaborative procurement, and in addition does not take into account the unidentified Member States who did not contribute).

<sup>9</sup> European Defence Agency, ‘National Breakdowns of European Defence Expenditures in 2005’, op.cit., page 17 – For the collaborative expenses, the document does not provide the exhaustive list of the Member States that

Collaborative procurement is less common for maintenance activities, although this trend is changing, and it is very limited for operations and infrastructure expenses, which remain mostly procured nationally.

This collaborative procurement is often entrusted to international organisations set-up for that purpose, even though it is sometimes performed through a ‘lead nation’.

Originally designed to increase the cost-effectiveness of defence procurement, collaborative programmes are often nevertheless based on the so-called *juste retour* principle (or principle of fair industrial return), or a variation thereof. Under this principle, the amount of work allocated to the industry of a participating State is calculated to match as closely as possible the latter’s financial contribution to the programme. This principle is nothing more than a multinational offset arrangement for collaborative programmes.

Even through that principle guarantees that the money paid by each participating State flows back to its national industry, it also contributes to the preservation of inefficiencies within the defence technological and industrial base, as each participating State will use it to ensure the survival of less than efficient undertakings. The *juste retour* principle is therefore considered by the Commission as one of the main obstacles for the creation of a genuine European defence equipment market.<sup>10</sup> It has been convincingly argued that, if procurement related to ‘hard’ defence material could not be excluded from the scope of the EC Treaty, the *juste retour* principle would most likely be in breach of the EC Treaty as a measure having equivalent effect to quantitative restrictions on imports, and would also breach the right of establishment and the freedom to provide services.<sup>11</sup> This thesis will discuss this analysis in more details.

However, over the years, some European States have started to take concrete measures to enhance the effectiveness of collaborative defence procurement.

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contributed data because some Member States did not allow the EDA to publish their individual figures (see e-mail of Dick Zandee, EDA Head of Policy and Planning Unit, to the author, 21 February 2007)

<sup>10</sup> Commission Green Paper on Defence procurement, COM(2004) 608 final, 23 September 2004, § I.3

<sup>11</sup> M. Trybus, *European Defence Procurement Law – International and National Procurement Systems as Models for a Liberalised Defence Procurement Market in Europe* (Kluwer Law International, 1999), page 40, on the basis of Case 21/88 *Du Pont de Nemours Italiana S.p.A. v Unità Sanitaria Locale No. 2 di Carrara*, [1990] E.C.R. I-889, [1991] 3 C.M.L.R. 25

A first attempt at creating a genuine European defence equipment market (which came to be known as EDEM) started within the Western European Armaments Group (WEAG),<sup>12</sup> created in 1993 as a part of the Western European Union (WEU).<sup>13</sup> This initiative led to an agreement on a non-binding defence procurement regime, but was not very successful,<sup>14</sup> and the WEAG closed and terminated its activities on 23 May 2005.<sup>15</sup>

In order to compensate the slow process of the activities of the WEAG, four major EU Member States founded in 1998 the Joint Organisation for Armaments Cooperation (OCCAR)<sup>16</sup> to manage more efficiently collaborative armaments development and procurement programmes and to strengthen the competitiveness of the European defence technological and industrial base.<sup>17</sup> OCCAR gained legal status at the end of the ratification process of the OCCAR Convention in January 2001.<sup>18</sup> The OCCAR budget dedicated to procurement programmes in 2006 was about 2.8 billion €, making it one of the major collaborative defence procurement organisations in Europe.<sup>19</sup>

At about the same time, the States hosting most of the European defence industry signed a Letter of Intent (LoI), which in 2000 became a Framework Agreement,<sup>20</sup> with the aim to facilitate the restructuring and operation of the European defence industry to create a more competitive and robust defence technological and industrial base. However, due to delays in

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<sup>12</sup> Not to be confused with the *West End Assembly of God* in Richmond, VA, USA, also answering to the acronym 'WEAG'

<sup>13</sup> Trybus, *European Defence Procurement Law*, op.cit., pages 31-44

<sup>14</sup> Trybus M., "Defence Procurement: The New Public Sector Directive and Beyond" (2004) 4 P.P.L.R. 198, at page 207

<sup>15</sup> WEAG web site <http://www.weu.int/weag>, accessed on 16 August 2005

<sup>16</sup> OCCAR is the acronym of *Organisation Conjointe de Coopération en matière d'Armements*: see Convention on the Establishment of the Organisation for Joint Armament Cooperation (Organisation Conjointe de Coopération en matière d'ARmement) – OCCAR, done at Farnborough on 9 September 1998, JORF N° 69 of 22 March 2001, page 4468 (*OCCAR Convention*)

<sup>17</sup> Cardinali N., "L'OCCAR, un Outil pour les Coopérations Futures en Europe" (2004) 75 CAIA Bulletin 26

<sup>18</sup> Those thinking that using complex acronyms increases certainty and who are not yet convinced of the risks inherent to this approach by the WEAG example should note that 'OCCAR' is also the acronym for the *Orange County Commercial Association of Realtors* in Orange, CA, USA

<sup>19</sup> Cardinali N., "The Place of OCCAR in the European Defence Procurement Debate", presentation to the European Defence Agency seminar of National Armaments Directors, 19 September 2006

<sup>20</sup> Framework Agreement between the French Republic, the Federal Republic of Germany, the Italian Republic, the Kingdom of Spain, the Kingdom of Sweden, and the United Kingdom of Great Britain and Northern Ireland concerning measures to facilitate the restructuring and operation of the European defence industry, done at Farnborough on 27 July 2000 (*European Defence Industry Restructuring Framework Agreement – EDIR/FA, formerly known as the Letter of Intent – LoI*)

its implementation, this Framework Agreement has not produced any concrete results yet.<sup>21</sup> In addition, it does not attempt to regulate directly procurement activities and it is submitted that the recent actions taken within the scope of the European Defence Agency (EDA, see below) in the areas of security of supply<sup>22</sup> and security of information<sup>23</sup> and will soon render it obsolete.

In addition, a number of specialised procurement and management organisations have been created within the ambit of the North Atlantic Treaty Organisation (NATO) and operate in Europe, for instance: the NATO Maintenance and Supply Organisation (NAMSO) in Luxemburg; the NATO Eurofighter and Tornado Management Organisation (NETMO) in Munich, managing two fighter aircraft programmes; the NATO Helicopter Management Organisation (NAHEMO) in Aix-en-Provence, managing the NH90 helicopter programme; or the NATO Air Command and Control System (ACCS) Management Organisation (NACMO) in Brussels, just to name a few.<sup>24</sup>

A number of EU Member States also cooperate with the United States of America (US) on specific projects outside the scope of NATO. This is for instance the case for the F-16 Multinational Fighter Programme (MNFP),<sup>25</sup> which is still in use for the support and upgrade of that aircraft, or for the development and production of the Joint Strike Fighter (JSF).<sup>26</sup> Procurement for these programmes is conducted by the US Department of Defence on behalf of the participating States.

More recently, the Council of the EU created a European Defence Agency (EDA) to support the Member States in their effort to improve the EU defence capabilities in the field of crisis management and to sustain the European Security and Defence Policy (ESDP). To that end,

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<sup>21</sup> Unisys study, “Intra-Community Transfers of Defence Products”, Brussels, February 2005; European Commission, “Consultation Paper on the Intra-Community Circulation of Products for the Defence of Member States”, ENTR/C, 21 March 2006, § 3.1.8

<sup>22</sup> European Defence Agency, Framework Arrangement for Security of Supply between Subscribing Member States (sMS) in Circumstance of Operational Urgency, 20 September 2006, <http://www.eda.europa.eu/reference/sbd/sbd-2006-09-0.htm>

<sup>23</sup> European Defence Agency, Security of Information Between Subscribing Member States (sMS), 20 September 2006, <http://www.eda.europa.eu/reference/sbd/sbd-2006-09-1.htm>

<sup>24</sup> North Atlantic Treaty Organisation, *NATO Handbook*, Brussels, 2006, Chapters 11 and 42

<sup>25</sup> Memorandum of Understanding Between the Government of the United States and the Governments of Belgium, Denmark, the Netherlands and Norway Relating to the Procurement and the Production of the F-16 Aircraft, 10 June 1975

<sup>26</sup> See [http://www.jsf.mil/program/prog\\_intl.htm](http://www.jsf.mil/program/prog_intl.htm), accessed on 31 December 2006

the EDA responsibilities cover capabilities development, armaments cooperation, defence industry strengthening, and research and technology.<sup>27</sup> Since its creation, it took a number of initiatives, especially the adoption of a Code of Conduct on defence procurement,<sup>28</sup> supplemented by a Code of Best Practice in the Supply Chain,<sup>29</sup> and of framework agreements on security of supply<sup>30</sup> and security of information.<sup>31</sup> It has been argued that creating a new agency alongside existing ones was an unnecessary duplication of resources,<sup>32</sup> and the EDA has even been branded as ‘a useless institution’,<sup>33</sup> but the EDA is still a very new organisation and, despite its current dynamism, we would submit that it is too early to render a final opinion its actual effectiveness in the long term.

As can be seen from the above, collaborative defence procurement is an important part of defence procurement in Europe, but little has been written on the subject from a legal point of view. Collaborative defence procurement is currently managed by an impressive array of international actors applying differing procurement rules that often deviate from the EC public procurement regime. To make matters worse, the very relationship between EU Law and these specific public procurement rules seems quite uncertain, as can be seen from some answers received over the years by the author to the question ‘how do the rules of your organisation comply with EU Law?’:

*‘EU Law does not apply to our organisation because our Board of Directors decided it did not.’ [2004, from a division leader of such organisation]*

*‘The EU is an international organisation distinct from ours, therefore EU Law does not apply to us.’ [2006, from the chief counsel of another organisation]*

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<sup>27</sup> Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency, OJ 2004 L 245/17, Articles 2 and 5

<sup>28</sup> The Code of Conduct on Defence Procurement of the EU Member States Participating in the European Defence Agency, Brussels, 21 November 2005, found at <http://www.eda.eu.int/reference/eda/E.D.A.%20-%20Code%20of%20Conduct%20-%20European%20Defence%20Equipment%20Market.htm>, accessed on 25 November 2005

<sup>29</sup> The Code of Best Practice in the Supply Chain Approved by ASD on 27 April and agreed by the EU Member States Participating In The European Defence Agency, Brussels, 15 May 2006, found at <http://www.eda.europa.eu/reference/eda/E.D.A.%20-%20Code%20of%20Best%20Practice%20in%20the%20Supply%20Chain%20-%20European%20Defence%20Equipment%20Market.htm>, accessed on 26 May 2006

<sup>30</sup> European Defence Agency, Framework Arrangement for Security of Supply, op.cit.

<sup>31</sup> European Defence Agency, Security of Information Between sMS, op.cit.

<sup>32</sup> Trybus M., “Defence Procurement: The New Public Sector Directive and Beyond”, op.cit., at page 210

<sup>33</sup> “EDA Under Pressure” (2007) 180 TTU International 1

*'We have our own rules and that's it. We have immunity.' [2005, from a procurement officer of another organisation]*

*'I asked that same question to five jurists of my organisation and received six different answers.' [2003, from the deputy head of a programme managed by another organisation]*

It would be beneficial, for both practitioners and academics, to clarify the law applicable to collaborative defence procurement. This thesis will therefore examine the extent to which EU Law applies to the defence procurement of international organisations, and offer a critique of the current regulatory regime of these organisations in light of these findings. Considering the recent developments in the field of defence procurement within the EU, now is an appropriate time for a research project that would explore these issues.

## **2. Objectives of the Thesis**

There is not much academic literature on the law applicable to collaborative defence procurement. The issue has been touched in some articles and books,<sup>34</sup> but no exhaustive research has been performed specifically on this topic. Moreover, we have seen that there is on the one hand considerable uncertainty on the law applicable to this field of procurement, but also a proliferation of collaborative defence procurement organisations, each of them with freestanding procurement rules. Therefore, the objectives of this thesis will be:

- To analyse the impact of EC Law on the public procurement regimes of key international organisations in the field of defence in Europe and the coherence of such rules with EC Law;
- To analyse these regimes and identify the options that might be followed for developing them in compliance with EC Law and enhancing the single market in defence procurement;
- To identify the possible benefits and drawbacks of these options.

As such, the results of this research project could and should be used by the international organisations under analysis as a basis to improve their procurement rules.

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<sup>34</sup> For instance in Arrowsmith S., 'The Law of Public and Utilities Procurement', Second Edition, Sweet and Maxwell, London, 2005, 6.101 et seq.; M. Trybus, *European Defence Procurement Law*, op.cit., pages 16 et seq. and 31 et seq.; Trybus M., 'Procurement for the Armed Forces: Balancing Security and the Internal Market', 27 EL Rev 692, 2002; Trybus M., 'Defence Procurement: The New Public Sector Directive and Beyond', op.cit.; Georgopoulos A., 'The New European Defence Agency: Major Development or Fig Leaf', 2 PPLR 103, 2005

In the light of the rapid pace of initiatives taken at the European level in the field of defence procurement regulation, the thesis will also highlight the areas of uncertainty within the law that could apply to international organisations in the field of defence (e.g. the conditions to invoke the relevant EC Treaty exemptions) and, when appropriate, make proposals on the ways to deal with such uncertainties.

Meeting the objectives of this thesis will require an analysis of a number of questions raised by collaborative defence procurement through international organisations. These questions are identified below.

### **3. *Questions Raised by Collaborative Defence Procurement***

#### **3.1. EU Law, Defence Procurement, and International Organisations**

The first question related to collaborative defence procurement is how it relates to EC Law, or more specifically how EC Law should and/or does affect it.

The EC public procurement regime, in addition to the applicable provisions of the EC Treaty, consists of two directives: the Public Sector Directive<sup>35</sup> and the Remedies Directive<sup>36</sup> (if we exclude the specific regime applicable to utilities). The applicability of these EC Law provisions to defence procurement is a subject of debate,<sup>37</sup> and has to be analysed in more details for the purpose of this thesis. Specifically, the following key issues should be discussed in turn:

- The applicability of EC Law in general to international organisations;<sup>38</sup>

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<sup>35</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004 L 134/114, amended by Commission Regulation (EC) No 1874/2004 of 28 October 2004, OJ 2004 L 326/17, Commission Directive 2005/51/EC of 7 September 2005, OJ 2005 L 257/127, Directive 2005/75/EC of the European Parliament and of the Council of 16 November 2005, OJ 2005 L 323/55, and Commission Regulation (EC) No 2083/2005 of 19 December 2005, OJ 2005 L 333/28

<sup>36</sup> Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, OJ 1989 L 395/33, amended by Council Directive 92/50/EEC of 18 June 1992, OJ 1992 L 209/1

<sup>37</sup> Summarised in Heuninckx B., “Defence Procurement in the E.U.: Time to listen to the Wake-up Calls” (2006) 7 BLI No 2, pages 208 et.seq.

<sup>38</sup> This should be based on an analysis of Case C-364/92 *SAT Fluggesellschaft mbH v European Organisation for the Safety of Air Navigation (Eurocontrol)*, [1994] E.C.R. I-43, [1994] 5 C.M.L.R. 208 and other relevant jurisprudence, especially that related to arbitration

- The applicability of EC Law to defence procurement in light of the EC Treaty exemptions, especially the one contained in Article 296(1)(b) (ex-Article 223(1)(b));<sup>39</sup>
- The applicability of the EC public procurement directives to international organisations in the field of defence.<sup>40</sup>

Such analysis has been performed for defence procurement activities of the EC Member States,<sup>41</sup> but not in details at this stage for international organisations. It will be therefore necessary to summarise the status of the current research on that topic and to focus it on the specific subject of the thesis.

Specifically, a number of key questions will have to be resolved, such as the jurisdiction of the Court of Justice of the EC (ECJ) to render rulings related to international organisations, the conditions for the application of the Article 296(1)(b) exemption in the light of the recent developments in this area, if international organisations may invoke that exemption, if international organisations can be considered as contracting authorities within the meaning of the Public Sector Directive, and the scope and applicability of the international organisation exemption and of the security exemption of the Public Sector Directive.

It should also be pointed out that this area of EC Law is evolving very quickly, with the Commission following-up on a number of initiatives, and that new developments are likely before the thesis is completed. These new developments will of course be included and discussed.

In addition, a number of actions have been taken by the EU Member States in the field of defence procurement under the second pillar of the EU Treaty. Specifically, as mentioned

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<sup>39</sup> Although the judgement in Case C-414/97 *Commission v Spain*, [1999] E.C.R. I-5585, [2001] 2 C.M.L.R. 53 has been analysed before, it has to be put in the context of recent developments such as the Communication from the Commission to the Council and the European Parliament on the results of the consultation launched by the Green Paper on Defence Procurement and on the future Commission initiatives, COM(2005) 626, 6 December 2005, and the Interpretative Communication on the Application of Article 296 of the Treaty in the Field of Defence Procurement (presented by the Commission), COM(2006) 779, 7 December 2006

<sup>40</sup> This point has been discussed briefly in Arrowsmith S., *The Law of Public and Utilities Procurement*, op.cit., Trybus M., *European Defence Procurement Law*, op.cit., and Georgopoulos A., *European Defence Procurement Integration: Proposals for Action within the European Union*, PhD thesis, University of Nottingham, 2004, and in other works, but has to be analysed in more details

<sup>41</sup> Especially in Trybus M., *European Defence Procurement Law*, op.cit.; and Georgopoulos A., *European Defence Procurement Integration*, op.cit.

above, the EDA approved a Code of Conduct on defence procurement<sup>42</sup>, supplemented by a Code of Best Practice in the Supply Chain<sup>43</sup>, the applicability of which to the procurement activities of international organisations should be investigated. Even though this Code of Conduct is non-binding and only a form of ‘soft law’, it adds one more layer to an already complex legal framework.

The answer to these specific questions will constitute the framework against which the procurement rules of international organisations in the field of defence in Europe can be analysed. One of the key conclusions should be to what extent their rules have to comply with EU Law.

### **3.2. The Procurement Rules of International Organisations**

Based on the above analysis of EU Law as it relates to collaborative defence procurement, additional questions related to the public procurement rules of international organisations can be addressed. Specifically, the analysis will concentrate on the procurement rules of OCCAR, NAMSO and the EDA. These organisations are considered to represent a good cross-section of defence procurement organisations for the following reasons:

- All of them are multi-purpose procurement organisations and therefore will integrate a number of programmes and conclude many procurement contracts. Most other NATO agencies are set-up to manage only one programme and therefore conclude only a few major contracts (usually one development contract followed by ‘tranches’ of production contracts with the same prime contractor);
- OCCAR is an organisation independent from the EU, but all its Member States are also EC Member States (even though non-EC Member States may participate in OCCAR programmes). This can allow for an interesting analysis of the obligation of the OCCAR Member States, as EC Member States, to take all appropriate measures to ensure fulfilment of the obligations arising out of the EC Treaty and to abstain from any measure that could jeopardise the attainment of the objectives of the EC Treaty.<sup>44</sup>

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<sup>42</sup> EDA Code of Conduct on Defence Procurement, op.cit.

<sup>43</sup> EDA Code of Best Practice in the Supply Chain, op.cit.

<sup>44</sup> EC Treaty, op.cit., Article 10 (ex-Article 5)

In addition, as some non-OCCAR (and non-EU) Member States such as Turkey participate in OCCAR programmes, this adds a new dimension to the analysis;

- NAMSO (and its executive agency NAMSA) is set-up under the umbrella of NATO, an organisation that predates the EC, and includes non-EU Member States (Canada, Norway, Turkey and the US). Its position towards EU Law is therefore likely very different from that of OCCAR, as non-EU Member States could block attempts to bring the NAMSO procurement rules in line with EU Law. In addition, NAMSO will not have as its objectives the development of the European defence equipment market, and it is expected that this will reflect in its procurement rules;
- The EDA was created within the second pillar of the EU Treaty. The relationship between the EDA procurement rules and the EC public procurement regime will therefore probably be much closer than for any other organisation;<sup>45</sup>
- NAMSO has been in existence for forty years,<sup>46</sup> and OCCAR, created in 1998,<sup>47</sup> has been originally seen by many as a possible improvement over the procurement practices of the ‘old’ NATO agencies. Furthermore, the creation of the EDA is generally seen as an improvement over existing structures that will contribute to an enhancement of the European defence equipment market. The analysis of procurement rules of these three organisations should allow us to identify the progress made over the years in the regulation of collaborative procurement, and to assess the correctness of the assumptions related to any improvement;
- Because the membership structure of these organisations is different, their privileges and immunities will not apply in a similar way in all EU Member States. The privileges and immunities of an international organisation, such as its immunity from jurisdiction, usually only apply within its Member States, even if this organisation conducts activities in other States;<sup>48</sup>

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<sup>45</sup> See EDA Steering Board Decision No. 2006/29 on Revision of EDA Financial Rules (approved by the Steering Board on 13 November 2006), 23 November 2006

<sup>46</sup> NAMSO Charter, Second Revision, 15 September 2000

<sup>47</sup> OCCAR Convention, op.cit.

<sup>48</sup> American Law Institute, ‘Restatement of the Law – The Foreign Relation Law of the United States’ (3<sup>rd</sup> Edition), American Law Institute Publishers, St-Paul, 1987, § 467, comment a

- From a purely practical point of view, all these organisations have a website where their procurement rules and founding documents are available as a starting point for the analysis.

The issues discussed during the analysis of EU Law and its applicability to international organisations performing defence procurement will be the basis on which the procurement rules of these international organisations will be reviewed. Each of these should be analysed with the aim to provide an answer to the following questions:

- To what extent should each of them be coherent or comply with EU Law and to what extent are they (external coherence)?
- To what extent are they an efficient set of rules (internal coherence), and do they in fact promote more efficiency in the European defence equipment market?
- What are the most fundamental differences between the procurement rules applied by each of these organisations?
- What measures could be taken to remedy any detrimental issue or incoherence identified within these rules and with EU Law?

Among some of the issues that will have to be dealt with, compliance with EU Law, the enforceability of remedies against international organisations enjoying immunities, the inefficiency of the publication of contract notices outside of the EU framework, the integration procedures of new programmes within the organisation, the nature of these rules as ‘soft law’, and the lack of existing jurisprudence on the procurement rules will most likely require detailed discussions.

#### **4. Methods and Limits of the Thesis**

The research performed in this thesis will nicely complement the work performed previously by other experts in the field,<sup>49</sup> thereby contributing to the emerging body of scholarly knowledge on European defence procurement law. The analysis will be limited to a legal analysis and will only cover tangentially the economic and political aspects of collaborative procurement.

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<sup>49</sup> Trybus M., *European Defence Procurement Law*, op.cit.; Georgopoulos A., *European Defence Procurement Integration*, op.cit.

This text-based analysis of the regulatory aspects of collaborative defence procurement will be based on the body of EC public procurement law, both primary and secondary (especially the public procurement directives), the procurement rules of the international organisations under analysis, applicable case law, official documents of the EC and other international organisations, studies performed by experts and specialised think-tanks, and relevant academic books and articles, all of this viewed in the light of the experience of the author as a public procurement practitioner.

The research will not include empirical work analysing the impact of those procurement rules and practices on the effectiveness of the European defence equipment market. This will not affect our analysis of the compliance of the procurement rules of international organisations with EU Law, and should not prevent reaching conclusions on the generic efficiency of the regulatory regimes of defence procurement organisations, but will require making certain assumptions and rely on existing economic research. The main assumptions made for this purpose will be the following:

- An internally coherent and clear set of procurement rules *within* an organisation will facilitate the opening of the market by easing the procurement process, increasing transparency, reducing the risks of administrative errors, and making public contracts accessible to more undertakings;
- Coherent procurement rules *across* international organisations will also help opening the market, by creating more uniformity in procedures and reducing the burden on undertakings to participate in procurements managed by different organisations or under different rules;
- Coherent rules between the civil and defence procurement processes will improve the defence procurement market by facilitating its access for companies usually operating in the civil market, thereby increasing competition and instilling innovation;
- Simple procurement rules, with limited number of exceptions and procedures, will lead to more transparency, less risks of administrative errors or abuses, and therefore to better value for money and reduced litigation;

- Unless justified in some specific cases, discrimination on the basis of nationality and/or unequal treatment of tenderers leads to inefficiencies in the procurement process, and lower value for money;
- Transparent procurement processes tend to increase compliance with the procurement rules by contracting authorities and to reduce risks of discrimination and unequal treatment of tenderers;
- Open tendering processes will potentially produce better value for money than restricted tendering processes, as they have the potential to open the market to competitors not previously identified;
- Competitive tendering will likely produce better value for money than purely negotiated procedures, as the competitive pressure of the former tends to reduce the prices and/or increase quality;
- For the purpose of litigation and remedies, independent judicial review of decisions made during the procurement process (even in last instance) is generally preferable and more impartial than a review performed by an organ belonging to the organisation performing the procurement;
- Better value for money for the taxpayer can be achieved by a consolidated and less fragmented defence equipment market, even if this would lead to mergers, closures and loss of jobs within the defence industrial base. This assumption is clearly contentious, as the preservation of their labour market is one of the main concerns of States in procuring defence equipment and services.<sup>50</sup>

The fact that this research does not include empirical analysis will lead us to make comparisons between the expected *qualitative* advantages and disadvantages of alternative proposals, such as their economic impact on the defence procurement market. It will not allow us to quantify these conclusions, but a qualitative analysis is preferred within the scope of this thesis in order to entice an open reflexion on the issues raised.

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<sup>50</sup> It will be interesting to compare this desire of the States to provide work for their national defence industry with the way social and environmental factors may be taken into account in the EC public procurement regime

Moreover, the fact that this analysis will not include empirical research should not prevent the conduction of qualitative interviews of public procurement practitioners or experts in order to clarify some points, especially related to the way the law is applied in practice.

In addition, collaborative procurement – and with whom States want to collaborate – is highly dependent on the political will of the EU Member States, and no thesis is necessary to recognise that point. The analysis of the shifting political will of the EU Member States, and especially their willingness to collaborate with the US, would warrant a thesis in itself. This political aspect has therefore been generally omitted from the present research.

We have seen above that the number of procurement and management organisations created under the umbrella of NATO is impressive. Analysing the rules and practices of each of these organisations would not fit within the limits of one thesis, could be redundant, and the choice was therefore made to limit the research to one such organisation (NAMSO), even though all conclusions applicable to NAMSO may not be valid for all NATO procurement organisations. This thesis could, however, stimulate NATO to conduct its own study of the matter.

Collaborative procurement performed through a ‘lead nation’ purchasing a specific piece of equipment on behalf of a number of partner States will not be analysed in any detail, either. This is primarily because the procurement rules applied to that procurement will be, or at least be based on, those of the lead nation itself. In addition, as the lead nation performing such procurement is often the US because of its relative weight in defence matters compared to European countries and its leading role in NATO, the link between such cooperation and EU Law is expected to be quite limited.

However, the thesis will consider the issues raised by collaborative procurement involving non-EU Member States when such States are not in a ‘lead nation’ position.

Likewise, the collaborative procurement rules developed within the scope of the WEAG, which now have only an historical interest, and the initiative of the LoI Framework Agreement, unfortunate stillborn child of European defence integration, will not be analysed in any details in this thesis.

## **5. Conclusions**

As the research for this thesis officially started only on 2 April 2007 and is schedule to end in 2013, it is a little early to identify its conclusions. However, it is expected that it will provide

some measure of clarification in an area of public procurement that has only rarely the subject of detailed academic consideration, and about which much confusion arises among practitioners. In particular, a number of incoherence between the procurement rules of international organisations in the field of defence and EU Law are expected to come to light, and this thesis will identify possible improvements of these rules that should be taken forward by those international organisations.