

# **THE LAW OF COLLABORATIVE DEFENCE PROCUREMENT THROUGH INTERNATIONAL ORGANISATIONS IN THE EUROPEAN UNION**

Baudouin Heuninckx, MCIPS

LL.M., M.Sc., M.A.

Major (GS), Belgian Air Force

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## **Abstract**

This thesis critically analyses the procurement rules of international organisations or agencies performing collaborative defence procurement in the European Union (EU). In collaborative defence procurement, States agree to procure equipment or services for their armed forces in common, thereby sharing development costs and looking for economies of scale. The management of collaborative defence procurement programmes is often entrusted to an international organisation or agency acting on behalf of the participating States.

After setting out the political, economic and legal context of collaborative defence procurement in the EU, we analyse the applicability of domestic and EU law to international organisations, in particular public procurement law in the field of defence. The conclusion of this first part is that, whilst domestic and EU law apply in general terms to international organisations or agencies, this is subject to the substantive provisions of the relevant laws and to international law, such as the privileges and immunities of the organisations. Specifically, international organisations or agencies in the EU most likely would not have to comply with domestic procurement law or with the EU public procurement directives, but they would still have to comply with the procurement principles flowing from the EU Treaties, except if non-EU Member States control their decision-making.

We then move on to an analysis of the procurement rules of three international organisations or agencies performing collaborative defence procurement in the EU: the Joint Organisation for Armaments Cooperation (OCCAR), the NATO Maintenance and Supply Organisation (NAMSO) and the European Defence Agency (EDA). For these organisations we analyse to what extent their procurement rules should comply with EU law, to what extent they are an efficient set of rules, and what measures could be taken to remedy any detrimental issue or incoherence identified.

We conclude with recommendations aiming to improve the applicable law.



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# Chapter 1 – Introduction and Research Questions

## 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.

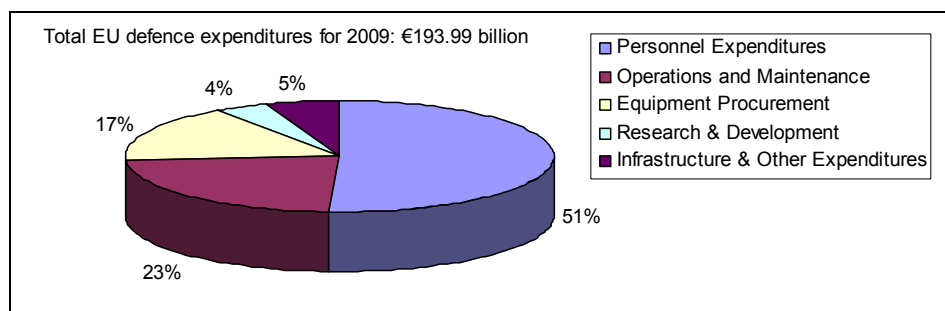
Defence procurement activities obviously play a key role in the security of the EU Member States and are therefore very sensitive, touching the core sovereign competences of the State. This is to the extent of being the subject of a specific exemption in the Treaty on the Functioning of the EU (TFEU).<sup>1</sup>

Defence procurement also plays an important economic role in the EU. Defence expenditures of EU Member States amounted in 2009 to about €194 billion. Of that total amount, as shown on Figure 1, about 21% (€41 billion) were used for the procurement of defence equipment and Research and Development (R&D), and

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<sup>1</sup> Mezzadri S., *L'ouverture des Marchés de la Défense: Enjeux et Modalités*, Occasional Paper No 12 (Institute for Security Studies, 2000), p.6; Schmitt B. (rapporteur), *Defence Procurement in the European Union – The Current Debate* (Institute for Security Studies, 2005), p.11; Trybus M., *European Defence Procurement Law – International and National Procurement Systems as Models for a Liberalised Defence Procurement Market in Europe* (Kluwer, 1999), p.25; B. Heuninckx, “Lurking at the Boundaries: Applicability of EU Law to Defence and Security Procurement” (2010) 19(3) P.P.L.R. 91; Georgopoulos A., “Defence Procurement and EU Law” (2005) 30 E.L.Rev. 559; Trybus M., “European defence procurement: towards a comprehensive approach” (1998) 4(1) E.P.L. 111; Consolidated Version of the Treaty on the Functioning of the European Union (TFEU), [2008] OJ C115/47, Art.346 (formerly Art.296(1)(b) EC), which will be discussed in detail in the thesis

about 23% (€44 billion) for operations and maintenance,<sup>2</sup> a large part of which also find their source in procurement activities.<sup>3</sup>



*Figure 1: EU Defence Expenditures in 2009*

Despite this economic importance, defence procurement is still heavily segmented, much more so than any other sector of public procurement,<sup>4</sup> and is therefore considered as economically highly inefficient. Studies show that up to 32% of the European defence procurement budget could be saved by a combination of reduced market fragmentation, harmonisation of requirements in time and scope, and especially increased efficiency of collaborative procurement programmes.<sup>5</sup>

In an attempt to share the development costs of expensive defence equipment, such as fighter aircraft, and to secure economies of scale, States sometimes resort to *collaborative procurement*, whereby they agree to procure such defence equipment and fund development costs in common. In addition to aiming at reducing costs, collaborative procurement allows States to procure military equipment that they would not be able to develop on their own because of lack of budget and of technical or industrial capability.

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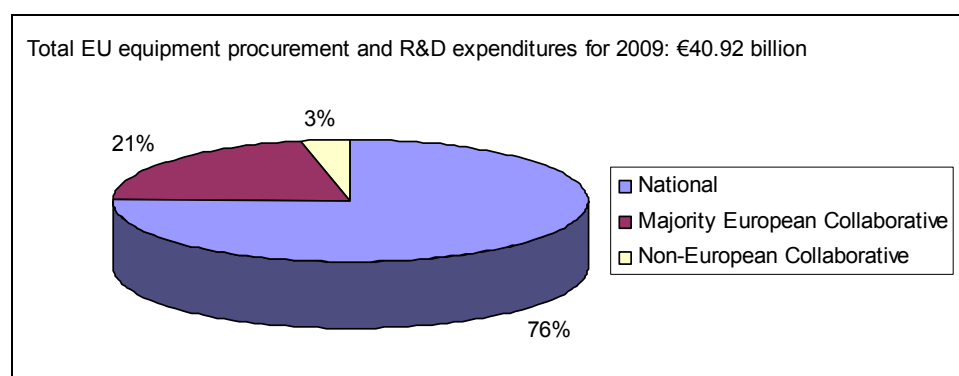
<sup>2</sup> European Defence Agency, "Defence Data 2009", December 2010, <http://www.eda.europa.eu/defencefacts/>, accessed on 3 February 2010, p.6 – all these figures except Denmark

<sup>3</sup> Darnis J-P., et al., *Lessons Learned from European Defence Equipment Programmes*, Occasional Paper N° 69 (Institute for Security Studies, 2007), p.3; The European Commission estimates the total defence procurement costs for 2004 at about €82 billion, which are likely the sum of the operations and maintenance costs and equipment procurement costs: Commission Staff Working Document accompanying the Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement – Impact assessment, SEC(2006)1554, §1.1.5

<sup>4</sup> Schmitt B., *From Cooperation to Integration: Defence and Aerospace Industries in Europe*, Chaillot Paper No 40 (Institute for Security Studies, 2000), pp.79-83; Georgopoulos, "Defence Procurement and EU Law", above, p.567

<sup>5</sup> Dufour N. et al., *Intra-Community Transfers of Defence Products* (Unisys, 2005), §6.7; Communication from the Commission: 'The Challenges Facing the European Defence-Related Industry, a Contribution for Action at the European Level', COM(96)10, §5.54; see Trybus M., "Challenges Facing the European Defence-Related Industry – Commission Communication COM(96)08" (1996) 5(4) P.P.L.R. CS98

An estimate of about 24% of the defence equipment procurement and R&D within the EU (€10 billion) was performed through collaborative efforts in 2009, and a significant portion of these collaborative procurement activities (about 88%) was performed by States that were in majority EU Members, as shown on Figure 2.<sup>6</sup> The percentage of collaborative defence equipment and R&D expenditures in the EU has remained fairly constant (21-27%) over the last years, as shown on Figure 3.<sup>7</sup>



*Figure 2: EU Defence Equipment and R&D Expenditures in 2009*

Collaborative programmes have not always been very successful at increasing the cost-effectiveness of defence procurement. This is primarily due to a complex procurement process and to an inefficient allocation of money and industrial resources, mostly because of the so-called *juste retour* principle or variations thereof. Under that principle (or principle of fair industrial return), 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.<sup>8</sup>

We will discuss in more detail the benefits and drawbacks of Collaborative defence procurement in Section 7,<sup>9</sup> but we should already highlight that, over the years, some European States have attempted to take concrete measures to enhance the effectiveness of collaborative defence procurement.

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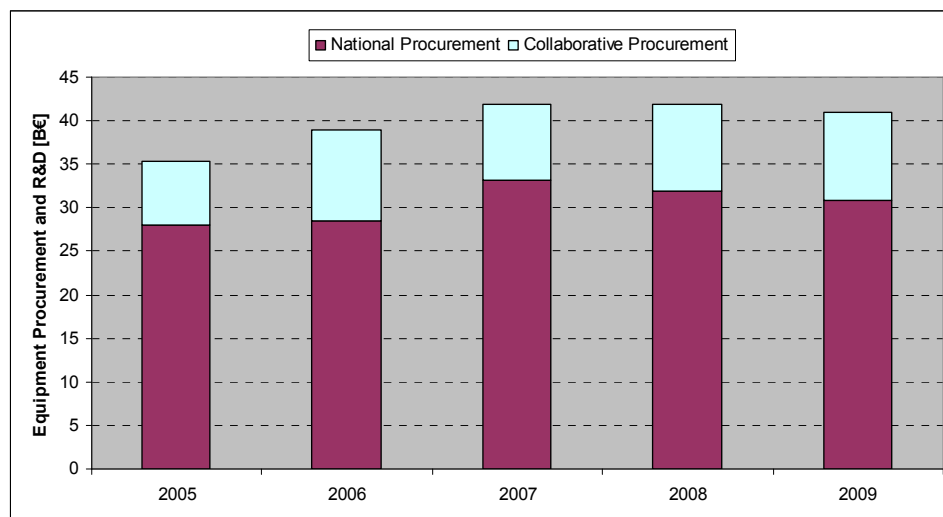
<sup>6</sup> European Defence Agency, "Defence Data 2008", above, p.15

<sup>7</sup> On the basis of the defence data published by the EDA <http://www.eda.europa.eu/defencefacts/>, accessed on 2 September 2010

<sup>8</sup> Bourn J., *Maximizing the Benefits of Defence Equipment Co-Operation*, HC 300 Session 2000-2001 (UK NAO, 2007), pp.20-26; Michel J. and Rivière J. (rapporteurs), *Rapport d'Information sur les nouveaux défis de la construction de l'Europe de la défense* (French National Assembly, 2005), pp.40-41; Trybus, *European Defence Procurement Law*, above, pp.39-42

<sup>9</sup> For more on collaborative defence procurement, see also Heuninckx B., "A Primer to Collaborative Defence Procurement in Europe: Troubles, Achievements and Prospects" (2008) 17(3) P.P.L.R. 123

First, some initiatives were taken at the intergovernmental level. Four major EU Member States (France, Germany, Italy and the United Kingdom, later joined by Belgium and Spain) founded in 1998 the Joint Organisation for Armaments Cooperation (OCCAR)<sup>10</sup> to manage more efficiently collaborative armaments programmes and to strengthen the competitiveness of the European defence technological and industrial base.<sup>11</sup>



*Figure 3: EU Defence Equipment and R&D National/Collaborative Expenditures*

Second, a number of specialised procurement and management organisations or agencies 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) or the NATO Helicopter Management Organisation (NAHEMO), just to name a few.<sup>12</sup>

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

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<sup>10</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, p.4468 (*OCCAR Convention*); see also [www.occar-ea.org](http://www.occar-ea.org)

<sup>11</sup> Cardinali N., “L'OCCAR, un Outil pour les Coopérations Futures en Europe” (2004) 75 CAIA Bulletin 26

<sup>12</sup> *NATO Handbook* (NATO, 2006), Ch.11 and 42; website of the NATO Allied Command Transformation <http://transnet.act.nato.int/WISE/Entities/TNCC/Agency/> accessed on 28 July 2009



capabilities development, armaments cooperation, defence industry strengthening, and research and technology.<sup>13</sup>

Collaborative defence procurement, even though it is sometimes managed by a ‘lead nation’, is currently mostly performed through international organisations or agencies set-up for that purpose, each of them applying different procurement rules that are often at variance with the EU public procurement regime. To make matters worse, the very relationship between EU law and these specific public procurement rules seems quite uncertain.<sup>14</sup>

It would therefore be beneficial, for both practitioners and academics, to clarify the law applicable to collaborative defence procurement performed through international organisations or agencies. This thesis will therefore examine the extent to which EU law applies to such procurement activities, and offer a critique of the current regulatory regimes of these organisations or agencies in light of these findings.

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

There is not much academic literature on the law applicable to collaborative defence procurement performed through international organisations or agencies. The issue has been touched in some articles and books,<sup>15</sup> but no exhaustive research has been performed specifically on this topic. Moreover, not only is there a considerable uncertainty on the law applicable to this field of procurement, but also an appreciable number of collaborative defence procurement organisations or agencies, each of them with freestanding procurement rules. Therefore, the objectives of this thesis are:

- To analyse the impact of EU law on the public procurement regimes of key international organisations or agencies in the field of defence procurement in Europe and the consistency of such rules with EU law;

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<sup>13</sup> Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency, OJ L 245/17, amended by Council Joint Action 2008/299/CFSP of 7 April 2008, OJ 2008 L 102/34, Art.2 and 5

<sup>14</sup> As explained in Heuninckx, “A Primer to Collaborative Defence Procurement”, above, pp.140-142 and in Heuninckx B., “Applicable Law to the Procurement of International Organisations in the European Union” (2011) 20(4) P.P.L.R. 103

<sup>15</sup> For instance in Arrowsmith S., *The Law of Public and Utilities Procurement*, 2<sup>nd</sup> Ed. (Sweet and Maxwell, 2005), §§6.101 et seq.; Trybus, *European Defence Procurement Law*, above, pp.16 et seq. and 31 et seq.; Trybus M., “Procurement for the Armed Forces: Balancing Security and the Internal Market” (2002) 27 E.L.Rev 692; Trybus M., “Defence Procurement: The New Public Sector Directive and Beyond” (2004) 13(4) P.P.L.R. 198; Georgopoulos A., “The New European Defence Agency: Major Development or Fig Leaf” (2005) 14(2) P.P.L.R. 103

- To analyse these regimes and identify the options that might be followed for developing them in compliance with EU law and enhancing the European defence equipment market;
- To identify the possible benefits and drawbacks of these options.

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

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

Meeting the objectives of this thesis requires the analysis of a number of questions raised by collaborative defence procurement through international organisations or agencies. These research questions are identified below.

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

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

The first research questions related to collaborative defence procurement through international organisations or agencies are how it relates to EU law, or more specifically how EU law should and/or does affect it. This requires, specifically, an analysis of the impact of EU law on the procurement activities of international organisations or agencies in the field of defence.

The EU public procurement regime, in addition to the applicable provisions of the EU Treaties, consists of three directives (if we exclude the specific regime applicable to utilities). The applicability of these EU law provisions to defence procurement has been the subject to earlier publications by the author of this thesis,<sup>16</sup> and is only discussed here, as background, from the vantage point of

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<sup>16</sup> Heuinckx B., “Defence Procurement in the EU: Time to listen to the Wake-up Calls” (2006) 7(2) B.L.I. 208; Heuinckx, “Lurking at the Boundaries”, above

collaborative procurement (Section 8), as is the law of international organisations (Section 9).

After having introduced this legal context, we discuss in Chapter 4 this first set of research questions:

- The applicability of EU and domestic law in general to international organisations, which we analyse in Section 10;
- The applicability of EU public procurement law to international organisations, especially in the field of defence, which we analyse in Section 11;
- The impact of the immunities of international organisations on their procurement activities, which we analyse in Section 12.

Such an analysis has been performed for defence procurement activities of the EU Member States,<sup>17</sup> but not in detail at this stage for international organisations. Specifically, a number of key questions have to be resolved, in particular the conditions for the application of the EU Treaties exemption in the light of the recent developments in this area, and if international organisations may invoke that exemption. In addition, we must investigate if international organisations can be considered as contracting authorities within the meaning of the EU procurement directives and the scope and applicability of the exemptions of these directives. Most of these questions have not been addressed much in academic literature, especially when they apply to international organisations.<sup>18</sup>

The answers to these specific questions constitute the framework against which the procurement rules of a few selected international organisations working in the field of defence in Europe can be analysed. One of the key conclusions explains to what extent their rules have to comply with EU law.

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

As we explain in Section 9.1, the public procurement rules of an international organisation are part of its international institutional law, which is specific to each international organisation. The analysis of the first set of research questions only

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<sup>17</sup> Especially in Trybus, *European Defence Procurement Law*, above; and Georgopoulos A., *European Defence Procurement Integration: Proposals for Action within the European Union*, PhD thesis (University of Nottingham, 2004)

<sup>18</sup> A first discussion of these issues was published in Heuninckx, “Applicable Law to the Procurement of International Organisations”, above

provides generic answers that leave a number of issues open, and would in any case need to be applied to each international organisation individually. Therefore, if more concrete conclusions are to be reached on the law of collaborative defence procurement through international organisations, an analysis of the procurement rules of a few selected organisations or agencies has to be performed. If those organisations or agencies play a sufficiently significant role in, and are sufficiently representative of, the EU collaborative defence procurement landscape, such case studies will not only allow us to draw specific conclusions about the procurement rules of important international organisations or agencies involved in these activities, but also to identify and examine issues of relevance for other international organisations and agencies, thereby allowing us to draw more concrete and detailed conclusions than those from the first set of research questions.

For that purpose, based on the above analysis of EU law as it relates to collaborative defence procurement through international organisations, additional questions related to the public procurement rules of some of those international organisations or agencies are addressed. Specifically, the analysis concentrates on the procurement rules of OCCAR, NAMSOC and the EDA for the reasons set-out in Section 4 below.

These international organisations or agencies have different constitutive international agreements and members. The issues discussed during the analysis of the applicability of EU law to international organisations or agencies performing defence procurement are the basis on which we review their procurement rules. Each of these are analysed with the aim to provide answers to the following questions:

- To what extent should their procurement rules be coherent or comply with EU law and to what extent are they in fact coherent or complying with EU law (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 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 have to be dealt with, compliance with EU law, the enforceability of remedies against international organisations or agencies enjoying immunities, the efficiency of the publication of contract notices outside of the EU

framework, the integration procedures of new programmes within the organisation, and the nature of these rules as ‘soft law’ require detailed discussion.

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

### **4.1. Research Methods**

The research performed in this thesis complements the work performed previously by other experts in the field,<sup>19</sup> thereby contributing to the emerging body of scholarly knowledge on European defence procurement law.

This text-based analysis of the regulatory aspects of collaborative defence procurement is limited to a legal analysis and only covers tangentially the economic and political aspects of collaborative procurement. It is based on the body of EU public procurement law, both the rules of primary EU law applicable to procurement and secondary EU public procurement law, the procurement rules of the international organisations under analysis, applicable case law, official documents of the EU 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 does not include empirical work analysing the impact of those procurement rules and practices on the effectiveness of the European defence equipment market. This does not affect our analysis of the compliance of the procurement rules of international organisations with EU Law, and did not prevent reaching conclusions on the generic efficiency of the regulatory regimes of defence procurement organisations, but required making certain assumptions. The main assumptions made for this purpose are the following:

- An internally coherent, transparent and clear set of procurement rules *within* an organisation contributes to 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 also help opening the market, by creating more uniformity in procedures

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<sup>19</sup> Trybus, *European Defence Procurement Law*, above; Georgopoulos, *European Defence Procurement Integration*, above

and reducing the burden on undertakings to participate in procurements managed by different organisations or under different rules;<sup>20</sup>

- Discrimination on the basis of nationality and/or unequal treatment of tenderers without clear justification, when those tenderers are comparable undertakings in a comparable situation, leads to inefficiencies in the procurement process and to lower value for money;<sup>21</sup>
- Procurement processes that involve some form of competition (with or without negotiations, with or without formal tendering) produce more transparency and better value for money than direct negotiations with one supplier, as the competitive pressure of the former tends to reduce the prices and/or increase quality;<sup>22</sup>
- For the purpose of litigation and remedies, independent judicial review of decisions made during the procurement process (even if only in last instance) is generally preferable and more impartial than a review performed by an organ belonging to the organisation performing the procurement.<sup>23</sup>

The fact that this research does not include empirical analysis sometimes led us to make comparisons between the expected qualitative advantages and disadvantages of alternative proposals, such as their economic impact on the European defence equipment market. It did not allow us to quantify these conclusions, but it could entice an open reflexion on the issues raised.

In addition, collaborative procurement – and with whom States want to collaborate – is highly dependent on the political will of the EU Member States. The analysis

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<sup>20</sup> It is on the basis of this principle that the EU public procurement directives (further discussed in this thesis) attempt to coordinate the procedures for the award of public contracts: see e.g. Directive 2009/81/EC, below, Recitals 4-6; see also the discussion in Arrowsmith, *The Law of Public and Utilities Procurement*, above, §§3.2-3.6

<sup>21</sup> See the discussion in Arrowsmith, *The Law of Public and Utilities Procurement*, above, §3.3; P. Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (Oxford University Press, 2004), §3.3

<sup>22</sup> As discussed in details in Trepte, *Regulating Procurement*, above, Ch.2; this is also an assumption of the EU public procurement directives: see e.g. Directive 2004/18/EC, below, Recital 2, as discussed in Arrowsmith, *The Law of Public and Utilities Procurement*, above, §3.10-3.11

<sup>23</sup> This assumption is widely accepted, and is reflected in many international instruments defining procurement systems, as explained in Z. Xinglin, “Forum for review by suppliers in public procurement: an analysis and assessment of the models in international instruments” (2009) 18(5) P.P.L.R. 201; D. Dahlgard Dingel, *Public Procurement: A Harmonization of the National Judicial Review of the Application of European Community Law* (Kluwer Law International, 1999), Ch.18

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. Political aspects will only be considered in assessing the extent to which the recommendations made in the thesis are feasible in practice.

## **4.2. International Organisations to be Analysed**

As mentioned above, the thesis concentrates on the procurement rules of OCCAR, NAMSO and the EDA. These organisations or agencies 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 integrate a number of programmes and award many procurement contracts. Most other NATO agencies are set-up to manage only one programme and therefore award 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 EU Member States. This can allow for an interesting analysis of the obligation of the OCCAR Member States, as EU Member States, to take all appropriate measures to ensure fulfilment of the obligations arising out of the EU Treaties and to abstain from any measure that could jeopardise the attainment of the objectives of the EU Treaties;<sup>24</sup>
- NAMSO is set-up under the umbrella of NATO, an organisation that predates the EU, and includes non-EU Member States (Canada, Norway, Turkey and the United States). Its position towards compliance with EU law is therefore 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 is reflected in its procurement rules;
- The EDA was created within the Common Foreign and Security Policy (CFSP) provisions of the EU Treaties, and all its participating Member States are also EU Member States. The relationship between the EDA

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<sup>24</sup> Consolidated Version of the Treaty on European Union (TEU), [2008] OJ C115/13, Art.4(3) (formerly Art.10(2) EC)

procurement rules and the EU public procurement regime is therefore probably much closer than for any other organisation;<sup>25</sup>

- 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 number of procurement and management organisations created under the umbrella of NATO is impressive.<sup>26</sup> 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 organisations (NAMSO), even though not all conclusions applicable to NAMSO would necessarily 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 this thesis, 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 that 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 that 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 those States are not in a ‘lead nation’ position.

## **5. Outline of the Thesis**

Following Chapter 1 (Sections 1 to 5), Chapter 2 introduces the political and economic context of collaborative defence procurement, focussing first on the European defence equipment market (Section 6), and on collaborative defence procurement itself, highlighting its benefits and drawbacks (Section 7). Chapter 2 clearly demonstrates the need for an analysis of the legal aspects of collaborative defence procurement.

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<sup>25</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>26</sup> *NATO Handbook*, above, Ch.11 and 42



Chapter 3 introduces the legal context of collaborative defence procurement in the EU, providing a summary of the law applicable to defence procurement in the EU (Section 8) and of the law of international organisations from an international law point of view (Section 9). It constitutes the framework against which our research is performed.

Chapter 4 discusses the first set of research questions of this thesis, specifically focussing into a detailed analysis of the applicability of domestic and EU law to international organisations in general terms (Section 10), of the applicability of EU procurement law to international organisations (Section 11), and on the relationship between the privileges and immunities of those organisations and EU law (Section 12).

Chapter 5 analyses in detail the procurement rules of the three international organisations or agencies under analysis in this thesis: OCCAR (Section 13), NAMSOC (Section 14) and the EDA (Section 15), with the aim to answer the second set of research questions identified in this Chapter.

Chapter 6 presents the recommendations of the thesis flowing from the previous chapters, to be taken on for further actions, and Chapter 7 outlines our conclusions.



## Chapter 2 – The Political and Economic Context of Collaborative Defence Procurement

### 6. The European Defence Equipment Market

#### 6.1. Changes since the End of the Cold War

The end of the Cold War saw the nature of the military operations of Western forces evolve radically.<sup>27</sup> Regional conflicts, ethnic struggles, civil wars and the peace enforcement and peacekeeping operations that follow have led the defence establishment to look not only for different types of defence equipment, but also for more operational cooperation, as these types of missions take place abroad and are usually performed by multinational coalitions.<sup>28</sup>

Those evolutions also led the EU Member States to reduce their defence budget in line with the poetic-economic (but maybe overly optimistic) notion of ‘peace dividends’,<sup>29</sup> thereby leading the European defence industry to scale down its

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<sup>27</sup> Flournoy M., Smith J. et al., *European Defense Integration: Bridging the Gap between Strategy and Capabilities* (CSIS, 2005), pp.18 et seq.; Neuman S., *Defense Industries and Dependency: Current and Future Trends in the Global Defense Sector* (International Security Network, 2006), p.6; see further Heuninckx B., “Defence Procurement”, in Arrowsmith S. (Ed.), *EU Public Procurement Law: An Introduction* (Asialink, 2011), Ch.9, pp.260-261

<sup>28</sup> Vlachos K., *Safeguarding European Competitiveness – Strategies for the Future European Arms Production and Procurement*, Occasional Paper No 4 (Institute for Security Studies, 1998), Ch.2.5; Andresson J.J., *Cold War Dinosaurs or High-Tech Arms Providers? The West European Land Armaments Industry at the Turn of the Millennium*, Occasional Paper No 23 (Institute for Security Studies, 2001), p.6; Maulny J-P. et al., *Cooperative Lessons Learned: How to Launch a Successful Co-Operative Programme*, Final Report for Study 06-EDA-008 (IRIS/CER/DGAP/IAI, 2006), pp.10 et seq.; Van Eekelen W., *The Parliamentary Dimension of Defence Procurement – Requirements, Production, Cooperation and Acquisition*, Occasional Paper No 5 (Geneva Center for the Democratic Control of the Armed Forces, 2005), p.1; European Defence Agency, “An Initial Long-Term Vision for European Defence Capability and Capacity Needs” (2006), at <http://www.eda.europa.eu/genericitem.aspx?id=146>, accessed on 20 October 2008, pp.9-11

<sup>29</sup> The Challenges Facing the European Defence-Related Industry, COM(96)10, above, §2.1.1: European defence budget were reduced by 5.3% in real terms, and major equipment procurement by 28.5%, between 1984 and 1996; Schmitt, *From Cooperation to Integration*, above, p.5: the reduction of defence expenditures of France, Germany and UK was respectively 12, 24 and 28% between 1989 and 1998

activities substantially.<sup>30</sup> Those reductions of defence budgets especially led to a reduction in investments for the modernisation of the forces.<sup>31</sup>

Meanwhile, the costs of advanced weapon systems have steadily increased over time.<sup>32</sup> This trend continued despite the increasing use of commercial off-the-shelf equipment in military systems.<sup>33</sup> Therefore, any purely ‘national’ procurement option for major weapon systems became more and more of an illusion for the ‘smaller’ EU Member States.

## **6.2. European Defence Equipment Market Characteristics**

The first characteristic of the European defence equipment market is its industrial fragmentation.<sup>34</sup> It is a consequence of the closed national defence equipment markets of many European countries, and of the use of offsets and the *juste retour* principle. This led to duplications of resources between the industries of each EU Member State, and also sometimes to monopolistic situations. Most people agree that improved cross-border competition could bring about economies of scale and reduce the costs of defence equipment.<sup>35</sup> Even though consolidation happened in

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<sup>30</sup> Dehn G. (Ed.), *Blowing the Whistle on Defence Procurement* (Public Concern at Work, 1995), p.15; The Challenges Facing the European Defence-Related Industry, COM(96)10, above, §1: employment in the defence-related industry was reduced by about 37.5% (from 1.6 million to 1 million, 600,000 of which work on development and production of defence equipment and 400,000 for supplier and services industry) between 1984 and 1996

<sup>31</sup> Flournoy, Smith et al., *European Defense Integration*, above, pp.22-23

<sup>32</sup> Trybus, *European Defence Procurement Law*, above, p.24; Schmitt, *From Cooperation to Integration*, above, pp.6-7: the price of battle tanks was multiplied by three between 1960 and 1980, and the price of combat aircraft was multiplied by seven from 1950 to 1976 and by three between 1980 and 2000 (without taking inflation into account); Heisbourg F., “Public Policy and the Creation of a European Arms Market”, in Creasey P. and May S. (Eds.), *The European Armaments Market and Procurement Cooperation* (St.Martin’s Press: 1988), p.61

<sup>33</sup> Neuman, *Defense Industries and Dependency*, above, p.7; see also the debate in Pugh P. et al. “Our Unaffordable Defence Policy: What Now?”, (2006) 9(2) RUSI Defence Systems 12

<sup>34</sup> The Challenges Facing the European Defence-Related Industry, COM(96)10, above, §2.1.3: For the 1988-1992 period, intra-Community trade amounted only to 3-4% of the procurement of major conventional weapons; Schmitt B., *The European Union and Armaments – Getting a Bigger Bang for the Euro*, Chaillot Paper No 63 (Institute for Security Studies, 2003), p.10; Dehn, *Blowing the Whistle on Defence Procurement*, above, p.18; Georgopoulos A., “The Commission’s Green Paper on Defence Procurement” (2005) 14(2) P.P.L.R. NA34; Creasey P., “The Options and Prospects for Defence Procurement Collaboration”, in Creasey P. and May S. (Eds.), *The European Armaments Market and Procurement Cooperation* (St.Martin’s Press, 1988), pp.165 et seq

<sup>35</sup> Valasek T., “EU Wants More Defence Competition, Lower Costs”, ISN Security Watch, 1 December 2005; Lord Garden, “We Need Capability Integration – Not Equipment Cooperation” (2004) 7(1) RUSI Defence Systems 13; Kirat T. and Bayon D., *Les Marchés Publics de la Défense – Droit du Contrat Public, Pratique Administrative et Enjeux Economiques* (Bruylants, 2006), p.111

some sectors of the European defence industry, especially aerospace and missile, other sectors remain fragmented.<sup>36</sup>

In addition to being fragmented, the European defence industry is also highly concentrated, as the European arms-producing countries do not form a homogenous group. Only six EU Member States (France, Germany, Italy, Spain, Sweden and the United Kingdom) represent 90% of the EU defence industrial capability.<sup>37</sup>

The defence sector was often seen as an opportunity for creating jobs in-country.<sup>38</sup> By contrast, economic rationalisation of the European defence industry would bring job losses and the disappearance of some companies. Employment in the European defence-related industry fell by 37% between 1984 and 1995, without, one has to say, much increase in efficiency.<sup>39</sup>

Another characteristic of the defence equipment market, at least for major equipment, is that it is almost solely ‘demand-driven’ and not ‘supply-driven’. The defence industry usually does not develop and produce major weapon systems of its own initiative to offer them ready to buy on the market: the initiative is usually taken by the State, which drafts requirements based on its defence policy and military doctrine and then requests the defence industry to develop and produce equipment that meets these requirements.<sup>40</sup>

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<sup>36</sup> Communication from the Commission: European defence – industrial and market issues – Towards an EU Defence Equipment Policy, COM(2003)113, p.10; Vlachos, *Safeguarding European Competitiveness*, above, Ch.I.A; Mawdsey J., *The European Union and Defence Industrial Policy*, Paper 31 (Bonn International Center for Conversion, 2003), p.5; Maulny, *Cooperative Lessons Learned*, above, p.20

<sup>37</sup> Georgopoulos, *European Defence Procurement Integration*, above, §1.4.2; Schmitt, *The European Union and Armaments*, above p.10; 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, p.2; see Georgopoulos A., “Commission’s Communication on the Results of the Consultation Process on European Defence Procurement” (2006) 15(4) P.P.L.R. NA119

<sup>38</sup> Vlachos, *Safeguarding European Competitiveness*, above, §2.1; Lorell M., *Multinational Development of Large Aircraft: The European Experience*, Paper R-2596 (RAND, 1980), p.71; Georgopoulos, *European Defence Procurement Integration*, above, §1.5.1; Flournoy, Smith et al., *European Defence Integration*, above, p.73

<sup>39</sup> Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Implementing European Union Strategy on Defence-Related Industry, COM(97)538, p.4; see also Schmitt, *From Cooperation to Integration*, above, p.13, showing reductions in workforce between 1990 and 1995 ranging from 57% in Germany to 21% in France

<sup>40</sup> Jones S., “The Rise of a European Defense” (2006) 121 P.S.Q. 241, p.242; Public Accounts Committee, *Ministry of Defence: Maximising the Benefits of Defence Equipment Co-Operation*, Document number 2001/02 HC 586 (UK House of Commons, 2002), §§29-30, also citing a few counter-examples; see further Heuninckx, “Defence Procurement”, above, pp.262-263

### **6.3. Specific Procurement Requirements**

When faced with strategic decisions related to the procurement of a defence capability (and without considering the impact of any legal constraint, which we discuss in subsequent chapters), the State could adopt one of three approaches<sup>41</sup>:

- Procuring the capability from its national industry, a form of autarky that reinforces the national defence industry and usually ensures security of supply but can lead to economic and technological inefficiencies and the loss of economies of scale;
- Procuring the capability from a company established in another country, which creates foreign dependencies and weakens the national defence industry (if any), but can be more efficient economically and technologically, allowing industry to specialise and achieve economies of scale;
- Procuring the capability through transnational collaboration, which creates mutual dependencies, but can at the same time reinforce the national industry while still achieving efficiencies and economies of scale.

After the budgetary constraints mentioned above, one of the key factors in deciding among these procurement alternatives is the requirement for security of supply. Security of supply aims to ensure the continuing supply of defence materiel and/or services to the armed forces, without regard to external circumstances such as war, international unrest, shifts in alliances, and disruption of the supply chain.<sup>42</sup>

The easiest way, but most disrupting of market efficiency, to accommodate security of supply has often been to award defence contracts only to national companies.<sup>43</sup> Short-sighted enforcement of security of supply is one of the most

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<sup>41</sup> See further the analysis of these options in Jones, "The Rise of a European Defense", above, pp.242-245

<sup>42</sup> See further the discussion in Georgopoulos, *European Defence Procurement Integration*, above, p.37 et.seq.; Heuninckx B., "Towards a Coherent European Defence Procurement Regime? European Defence Agency and European Commission Initiatives" (2008) 17(1) P.P.L.R. 1, p.14

<sup>43</sup> Vlachos, *Safeguarding European Competitiveness*, above, §2.1; Commission Green Paper on Defence procurement, COM(2004)608, §2.2; *The United Kingdom Defence White Paper – Defence Industrial Strategy*, document number Cm 6697 (UK Parliament, 2005), still require the preservation of maintenance and upgrade capability in the UK for a number of major systems; Antonakis N., 'Offset Benefits in Greek Defence Procurement Policy: Developments and Some Empirical Evidence', in Martin S. (Ed.), *The Economics of Offsets: Defence Procurement and Countertrade* (Routledge, 1996), p.163

likely causes of the current European defence equipment market fragmentation.<sup>44</sup> In addition, in the case of major weapon systems, procuring from the national industry is only possible for large arms-producing countries whose industry is able to design and produce a broad range of complex military equipment.

Requiring military offsets (industrial compensations) to build or consolidate a defence equipment capability on national soil can be an alternative solution for smaller States,<sup>45</sup> as licensed production, for instance, requires much less industrial capacity than the development of an entirely new weapon system, whilst still ensuring the existence of a local industrial base to support the national armed forces. Defence procurement contracts therefore very often include offset requirements, whereby the purchasing country requires the contractor to ensure some form of return on investment in the national industry of the purchasing country.<sup>46</sup> Those offsets may be ‘direct’, in the form of orders or transfers of know-how and technology related to the subject matter of the original contract to local companies (such as licensed production), or ‘indirect’ and benefit industrial sectors other than the one covered by the subject matter of the contract in question, even non-military ones.<sup>47</sup> However, the use of offsets often leads to a work allocation that does not lead to the most efficient technological and economic solution.

Finally, we saw in Section 6.1 that the new nature of operations following the end of the Cold War makes operational cooperation through multinational coalitions a necessity. Therefore the interoperability of the forces of different States is a

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<sup>44</sup> See further the discussion in Schmitt, *From Cooperation to Integration*, above, pp.60-62; European defence – industrial and market issues, COM(2003)113, above, p.18; Mezzadri, *L’ouverture des Marchés de la Défense*, above, p.6

<sup>45</sup> Ferguson J., ‘In Search of a Strategy: The Evolution of Canadian Defence Industrial and Regional Benefits Policy’, in Martin S. (Ed.), *The Economics of Offsets: Defence Procurement and Countertrade* (Routledge, 1996), p.107

<sup>46</sup> For a detailed analysis of offsets, see Martin S. (Ed.), *The Economics of Offsets: Defence Procurement and Countertrade* (Routledge, 1996); Brauer J. and Dunne J-P. (Eds.), *Arms Trade and Economic Development: Theory, Policy and Cases in Arms Trade Offsets* (Routledge, 2004); Bourn J., *Ministry of Defence: Collaborative Projects*, document 1990/91 HC 247 (UK House of Commons, 1991), §2.33; Eriksson E.A. et al., *Study on the effects of offsets on the Development of a European Defence Industry and Market* (FOI and SCS, 2007) p.9 and Ch.2, defining offsets as compensations offered by the seller to the buyer of defence equipment, a counterpart of *juste retour* arrangements in collaborative programmes

<sup>47</sup> Commission Green Paper on Defence procurement, COM(2004)608, §2.3; Van Eekelen, *The Parliamentary Dimension of Defence Procurement*, above, pp.6-7; Georgopoulos, *European Defence Procurement Integration*, above, pp.46-47

paramount requirement. Standardisation of the defence equipment used by the States participating in an operation is a way of increasing such interoperability.<sup>48</sup>

## **7. Collaborative Defence Procurement**

### **7.1. Expected Benefits**

Industrial fragmentation and lack of collaboration among EU Member States for the development of defence systems often lead to the concurrent running of similar programmes, which is a clear duplication of efforts.<sup>49</sup> Considering the reduced defence budgets of the EU Member States and the increasing costs of modern military equipment (discussed in Section 6.1), collaborative defence procurement, whereby a number of States cooperate for the development, production and/or support of complex military systems, is seen as a solution to reduce those costs. Moreover, cooperation increases standardisation, and therefore interoperability, which is, as we explained, a requirement of multinational operations.<sup>50</sup>

Collaborative procurement is expected to have cost benefits during the development and the production phase of the system, such as sharing R&D costs and creating economies of scale during production, operational benefits because of interoperability and standardisation of equipment across the participating States, industrial benefits such as technology transfers, and political benefits by helping the participating States foster mutual understanding.<sup>51</sup>

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<sup>48</sup> Lorell, *Multinational Development of Large Aircraft*, above, p.1; European defence – industrial and market issues, COM(2003)113, above, §3; see further Heuninckx, “Defence Procurement”, above, pp.263-264

<sup>49</sup> Kuechle H., *The cost of non-Europe in the area of security and defence*, Document DGExPo/B/PolDep/2005/13 (European Parliament, 2006), §3.1

<sup>50</sup> See also Bourn, *Ministry of Defence: Collaborative Projects*, above, §1.1; Maulny, *Cooperative Lessons Learned*, above, p.8; Lorell, *Multinational Development of Large Aircraft*, above, pp.1-4

<sup>51</sup> Rich M., Stanley W. et al., *Multinational Coproduction of Military Aerospace Systems*, Paper R-2861 (RAND, 1981), p.5; The Challenges Facing the European Defence-Related Industry, COM(96)10, above, §2.1.3; Covington T., Brendley K. and Chenoweth M., *A Review of European Arms Collaboration and Prospects for its Expansion under the Independent European Programme Group*, Note N-2638-ACQ (RAND, 1987), p.30; Flournoy, Smith et al., *European Defense Integration*, above, p.27; Public Accounts Committee, *Ministry of Defence: Maximising the Benefits of Defence Equipment Co-Operation*, above, §6; Fraser S., “European Defence Equipment Collaboration: A View from the UK Ministry of Defence” (2004) 7(1) RUSI Defence Systems 16; Mawdsley J., *The Gap Between Rhetoric and Reality: Weapons Acquisition and ESDP* (Bonn International Center for Conversion, 2002), p.5; Lorell M. and Lowell J., *Pros and Cons of International Weapons Procurement Collaboration* (RAND, 1995), pp.7 et seq.; Keohane D., “Why Collaborate in Europe?” (2004) 7(1) RUSI Defence Systems 15; Hayward K., *Towards a European Weapons Procurement Process – The shaping of common European requirements for new arms programmes*, Chaillot Paper No 27 (Institute for Security Studies, 1997); Rich M., Stanley W. et al., *Cost and Schedule Implications of Multinational Coproduction*, Paper P-6998 (RAND, 1984), p.1; Darnis, *Lessons Learned from European Defence Equipment Programmes*, above, pp.11-14



However, the most important factor encouraging collaborative procurement is likely to be the inability of most European States to procure complex military equipment otherwise than either by buying it from the United States or by sharing its costs with other States. Looking back at the procurement alternatives mentioned in Section 6.3, for the most expensive weapons systems such as fighter aircraft, collaborative procurement is in the end the only one that allows the participating States both to influence the development of the system on the basis of their requirements, and to actually afford the resulting equipment.<sup>52</sup>

Armaments cooperation in Europe has traditionally been difficult, first because the fact that trade in arms can be the subject of exemptions from the EU Treaties could allow the EU Member States to protect their defence industry from market forces for reason of sovereignty and security of supply, second because the EU Member States' armed forces are quite different in terms of size and requirements, thereby making harmonisation difficult, and third because the main Europeans armaments producers are actually competitors on the export market.<sup>53</sup> Some have therefore argued that collaborative defence procurement is a waste of time and money, is unable to deliver the required capability on time and on cost, and should be avoided as much as possible.<sup>54</sup>

We have already published a detailed analysis of the actual benefits and drawbacks of collaborative procurement,<sup>55</sup> and the reader should refer to that article for more information. The present Section therefore only highlights the key conclusions of this article for the purpose of this thesis, and updates these conclusions in the light of recent developments.

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<sup>52</sup> Maulny, *Cooperative Lessons Learned*, above, pp.6-7; Creasey P. and May S., "The Political and Economic Background", in Creasey P. and May S. (Eds.), *The European Armaments Market and Procurement Cooperation* (St.Martin's Press, 1988), p.17; Keohane D., *The EU and Armaments Co-operation* (Centre for European Reform, 2002), p.39

<sup>53</sup> Van Eekelen, *The Parliamentary Dimension of Defence Procurement*, above, pp.24 et.seq.; Taylor C., *UK Defence Procurement Policy*, Research Paper 03/78 (UK House of Commons, 2003), p.26; Mawdsley J., Quille G. et al., *Equipping the Rapid Reaction Force – Options for and Constraints on a European Defence Equipment Strategy*, Paper 33 (Bonn International Center for Conversion, 2003), pp.29-30

<sup>54</sup> Kinkaid B., "We Can't Do Collaborative Projects!" (2004) 7(1) RUSI Defence Systems 12; Cox A., *More bang for the buck – How we can get better value from the defence budget* (Centre for Policy Studies, 2009), pp.5-10

<sup>55</sup> Heuninckx, "A Primer to Collaborative Defence Procurement", above

## **7.2. Issues with Collaborative Procurement**

The analysis we published demonstrated that, in a world of drastically reduced defence budgets and increasingly costly and complex military equipments, collaborative defence procurement is, for most European States, if not the perfect option, at least the most adequate compromise between an often impossible national development and an off-the-shelf purchase from another country. However, European collaborative defence procurement suffers from a number of shortfalls<sup>56</sup>:

- Difficulties in harmonising operational requirements and timelines among the participating States, which tend to delay the start of the programme and to increase the costs of the resulting weapon system;
- The lack of a through-life approach to programme management, with programmes divided in phases (development, production, in-service support), which are sometimes even subdivided in tranches;
- A complex or inefficient decision-making structure, which especially causes delays at the start of the programme or of its phases;
- The use of the *juste retour* principle, or variations thereof, leading to inefficient work allocation and duplication of resources, and in turn to increased development and production costs;
- An unclear and complex legal framework, with many different rules being applied in an uncoordinated manner, and uncertainty on the applicability of EU law, which facilitates the continuing application of protectionist measures such as *juste retour* by the participating States.

Collaborative defence procurement does deliver cost benefits by reducing both development and production costs, even though these benefits are reduced by the use of the *juste retour* principle,<sup>57</sup> which is nothing more than the collaborative version of offsets. Even though 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.

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<sup>56</sup> Heuninckx, “A Primer to Collaborative Defence Procurement”, above, pp.142 et.seq.; see also Darnis, *Lessons Learned from European Defence Equipment Programmes*, above, pp.15-27

<sup>57</sup> Bourn, *Ministry of Defence: Collaborative Projects*, above, §§3.32-3.34

Offset practices and *juste retour* are considered as one of the main obstacles for the creation of a genuine European defence equipment market.<sup>58</sup>

The main shortfalls of collaborative defence programmes seem therefore to be due to the actual collaborative procurement process in its broader sense, including its legal framework, its multinational decision-making, the agreement of multinational technical specifications, and the award principles for the relevant contracts, in particular the use of *juste retour*. All these aspects therefore require improvement if collaborative defence procurement is to deliver its full potential.<sup>59</sup>

### **7.3. Measures Taken to Improve Collaborative Procurement**

Many attempts have been made to rationalise European collaborative procurement and make it more efficient.<sup>60</sup> The creation of OCCAR and of the EDA were the most recent steps to improve collaborative procurement programmes (even though the role of the EDA is not limited to collaborative procurement).<sup>61</sup> However, the overall achievements of most of these initiatives to date remain limited.<sup>62</sup>

In order to promote more effective European armaments co-operation, the EDA approved a European Armaments Cooperation Strategy,<sup>63</sup> with three strategic aims.

The first is to generate, promote and facilitate cooperative programmes to meet capability needs. To achieve this aim, the Member States and the EDA should rely on the EDA Capability Development Plan<sup>64</sup> to identify possibilities for cooperation early in the life-cycle of the requirement.

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<sup>58</sup> Commission Green Paper on Defence procurement, COM(2004)608, §1.3

<sup>59</sup> Maulny, *Cooperative Lessons Learned*, above, pp.27-31; Darnis, *Lessons Learned from European Defence Equipment Programmes*, above, p.31

<sup>60</sup> Covington, Brendley and Chenoweth, *A Review of European Arms Collaboration*, above; Bourn, *Ministry of Defence: Collaborative Projects*, above, §§2.24-2.27; Creasey, "The Options and Prospects for Defence Procurement Collaboration", above, pp.166 et.seq; *Manuel de l'OTAN* (NATO, 1998), p.195 et.seq

<sup>61</sup> For more on OCCAR and its relationship with the EDA, see: Cardinali N., "Collaboration in European Defence Acquisition: Improved Outcomes" (2005) 8(1) RUSI Defence Systems 26; Maffert N., "Bridging the Capability Gap" (2004) 7(1) RUSI Defence Systems 34

<sup>62</sup> Cox A., "The Future of European Defence Policy: The Case for a Centralised Procurement Agency" (1994) 3(2) P.P.L.R. 65, pp.68 et.seq.; Mawdsey, *The Gap Between Rhetoric and Reality*, above, pp.6 et.seq.; Aalto E., "Interpretations of Article 296", in Keohane D. (Ed.), *Toward a European Defence Market*, Chaillot Paper No 113 (Institute for Security Studies, 2008), pp.13-49, p.14

<sup>63</sup> European Defence Agency, European Armaments Co-operation Strategy, 15 October 2008; EDA Press Release, "EU Governments Agree on an Armaments Cooperation Strategy", 16 October 2008

<sup>64</sup> European Defence Agency, "Background Note – Capability Development Plan", 8 July 2008; EDA Press Release, "EU Governments Endorse Capability Plan for Future Military Needs, Pledge Joint Efforts", 8 July 2008

The second aim of the strategy is to ensure that the European Defence Technological and Industrial Base and investments therein are capability-orientated towards the goal of the Capability Development Plan, and supports future cooperative programmes.

The third strategic aim of the strategy is to improve the effectiveness and the efficiency of European armaments cooperation. For that purpose, possible cooperation should be identified as early as possible and the harmonisation of the requirements of the Member States be more effective (no over-specification). The actual management of the programme, after a dedicated preparation phase, should be improved by clarifying and enhancing the working interfaces between the participating Member States, the EDA and the executive programme management agencies and using best practices in programme management.

The contents of the European Armaments Cooperation Strategy are strikingly coherent with the conclusions reached during our analysis of the areas where collaborative procurement in Europe should be improved. If adequately implemented, the strategy would help enhance the pre-contract award phase of collaborative programmes, during which much of the delays and cost increases are created.<sup>65</sup> In addition, it could help moving away from *juste retour* and towards more cost-effectiveness, even though it exhibits a clear European preference in some strategic sectors still to be defined.<sup>66</sup>

However, one of the areas where the Strategy remains silent is the clarification of the legal basis and contract award procedures of collaborative procurement. The European Armaments Cooperation Strategy is focussed on economic, industrial and management issues and does not address directly legal aspects, even though we have identified that an unclear legal framework was one of the issues with collaborative defence procurement in Europe. The research performed in this thesis therefore attempts to fill that gap.

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<sup>65</sup> Heuninckx, “A Primer to Collaborative Defence Procurement”, above, pp.133-134

<sup>66</sup> See further the detailed analysis in: Heuninckx B., “The European Defence Agency Capability Development Plan and the European Armaments Cooperation Strategy: Two Steps in the Right Direction” (2009) 18(4) P.P.L.R. NA136

## **Chapter 3 – The Legal Context of Collaborative Defence Procurement**

### **8. The Law of Defence Procurement in the EU**

#### **8.1. The EU Public Procurement Directives**

##### **8.1.1. Introduction**

After having demonstrated the need for a detailed critical analysis of the law applicable to collaborative defence procurement, we must now introduce the legal background against which those procurement activities could be performed in the EU, namely on the one hand the EU law applicable to defence procurement in general (this Section 8), and on the other hand the international law applicable to international organisations (Section 9).

The principal instruments regulating public procurement law in the EU are a set of directives. This public procurement regime (without considering the specific regime applicable to utilities) now includes:

- Directive 2004/18/EC as amended: the Public Sector Directive,<sup>67</sup> containing the substantive and procedural measures for the harmonisation of public procurement in general;
- Directive 89/665/EEC as amended: the Remedies Directive,<sup>68</sup> containing the measures for the harmonisation of the procedures for appealing decisions of contracting authorities, and of the available remedies, which complements Directive 2004/18/EC;

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<sup>67</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, [2004] OJ L134/114, amended by: Commission Regulation (EC) No 1874/2004 of 28 October 2004, [2004] OJ L326/17; Commission Directive 2005/51/EC of 7 September 2005, [2005] OJ L257/127; Directive 2005/75/EC of the European Parliament and of the Council of 16 November 2005, [2005] OJ L323/55; Commission Regulation (EC) No 2083/2005 of 19 December 2005, [2005] OJ L333/28; Council Directive 2006/97/EC of 20 November 2006, [2006] OJ L363/107; Commission Regulation (EC) No 1177/2009 of 30 November 2009, [2009] OJ L314/64

<sup>68</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, [1989] OJ L395/33, amended by Council Directive 92/50/EEC of 18 June 1992, [1992] OJ L209/1 and Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, [2007] OJ L335/31

- Directive 2009/81/EC as amended: the Defence and Security Directive,<sup>69</sup> containing the substantive and procedural measures for the harmonisation of public procurement and remedies for military equipment.

For the purpose of this thesis, it is fundamental to ascertain if those directives could apply to defence procurement and to international organisations or agencies. This analysis is performed in Sections 10 and 11, and the present section therefore sets-out the necessary background. As we have discussed the applicability of the EU public procurement directives in an academic article,<sup>70</sup> we will here summarise our conclusions, focussing on those that are especially important for this thesis.

The Remedies Directive does not contain specific provisions on defence procurement, and applies as soon as the Public Sector Directive applies.<sup>71</sup> Our analysis can therefore be limited to the Public Sector Directive and the Defence and Security Directive.

### **8.1.2. The EU Public Sector Directive**

#### **8.1.2.1. Applicability to Contracting Authorities Only**

The Public Sector Directive applies only to procurement activities performed by *contracting authorities*.<sup>72</sup> These are defined as the State, regional or local authorities, bodies governed by public law, and associations formed by one or several of such authorities or one or several bodies governed by public law.<sup>73</sup> The Directive will apply whether or not the contract is of a commercial nature or in the public interest, as long as it is concluded by a contracting authority.<sup>74</sup>

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<sup>69</sup> Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, [2009] OJ L216/76, amended by Commission Regulation (EC) No 1177/2009 of 30 November 2009, [2009] OJ L314/64

<sup>70</sup> Heuninckx, “Lurking at the Boundaries”, above

<sup>71</sup> Directive 89/665/EEC, above, Art.1(1)

<sup>72</sup> Directive 2004/18/EC, above, Art.1(2)(a): a public contract, to which the Directive applies, is a contract concluded by a contracting authority

<sup>73</sup> Directive 2004/18/EC, above, Art.1(9), para 1

<sup>74</sup> *Mannesmann Anlagenbau Austria AG and Others v Strohal Rotationsdruck GesmbH* (Case C-44/96) [1998] E.C.R. I-73, [31]-[35]; *Commission v Germany* (Case C-126/03) [2004] E.C.R. I-11197, [18], from which has been concluded that the Directives would also apply when the contracting authority acts as a provider of services and purchases specialised services to support its task: see Dischendorfer M. and Fruhmant M., “Contracting Authorities as Service Providers under the EC Public Procurement Directives” (2005) 14(3) P.P.L.R. NA80

It is important to introduce in detail the concept of contracting authority, as we will have to determine in Section 11 if international organisations or agencies can constitute contracting authorities, and at which conditions.

The definition of the *State* includes all the bodies exercising legislative, executive and judicial powers at national, federal or local level,<sup>75</sup> but has to be applied in functional terms to include bodies which are formally separate from the State administration.<sup>76</sup> Bodies with no distinct legal personality<sup>77</sup> whose composition and functions are laid down by legislation and which depend on the authorities for the appointment of their members, the observance of the obligations arising out of their measures, and the financing of the public contracts they awards are to be regarded as the State.<sup>78</sup>

*Body governed by public law*<sup>79</sup> is further defined as any body established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character, having legal personality, and closely dependent on the State, regional or local authorities or other bodies governed by public law.<sup>80</sup> These conditions are cumulative.<sup>81</sup> The definition of body governed by public law also has to be interpreted in functional terms.<sup>82</sup>

The existence or absence of needs in the general interest not having an industrial or commercial character must be appraised objectively, the legal form of the provisions in which those needs are mentioned being immaterial in that respect.<sup>83</sup>

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<sup>75</sup> *Commission v Belgium* (Case C-323/96) [1998] E.C.R. I-5063, [25]-[29]; *Commission v Germany* (Case C-126/03), above, [18]

<sup>76</sup> *Gemeente Arnhem and Gemeente Rheden v BFI Holding* (Case C-360/96) [1998] E.C.R. I-6821, [62]; *Gebroeders Beentjes B.V. v Netherlands* (Case 31/87) [1988] E.C.R. 4635, [7]-[13]; see also S. Arrowsmith, *Public Procurement in the European Community: Volume II – A Guide to the Procurement Cases of the Court of Justice* (Earlsgate, 1992), pp.74-76

<sup>77</sup> *Connemara Machine Turf Co Ltd v Coillte Teoranta* (Case C-306/97) [1998] E.C.R. I-8761, [27]-[28]; see discussion of that point in Arrowsmith, *The Law of Public and Utilities Procurement*, above, §5.3

<sup>78</sup> *Beentjes*, above, [12]

<sup>79</sup> Directive 2004/18/EC, above, Art.1(9), para 2

<sup>80</sup> *Mannesmann Anlagenbau*, above, [20]; *The Queen v H.M. Treasury, ex parte The University of Cambridge* (Case C-380/98) [2000] E.C.R. I-8035, [20]

<sup>81</sup> *Mannesmann Anlagenbau*, above, [21]; *Adolf Truley GmbH v Bestattung Wien GmbH* (Case C-373/00) [2003] E.C.R. I-1931, [34]; *Arkkitehtuuritoimisto Riitta Korhonen Oy, Arkkitehtitoimisto Pentti Toivanen Oy, Rakennuttajatoimisto Vilho Tervomaa v Varkauden Taitotalo Oy* (Case C-18/01) [2003] E.C.R. I-5321, [32]

<sup>82</sup> *Connemara Machine Turf*, above, [31]; *Commission v Ireland* (Case C-353/96) [1998] E.C.R. I-8565, [36]; *Commission v France* (Case C-237/99) [2001] E.C.R. I-939, [43]; *Commission v Spain (SIEPSA)* (Case C-283/00) [2003] E.C.R. I-11697, [73]

<sup>83</sup> *BFI*, above, [63]

The Court of Justice of the EU (CJEU) has held that a vast number of activities could constitute needs in the general interest.<sup>84</sup> It has been argued that the requirement of meeting needs in the general interest would probably always be satisfied, except when the market already meets those needs.<sup>85</sup> The activities will be considered to be commercial when the body is competing with others and is bearing itself the financial risks of its activities.<sup>86</sup> Activities performed in support of the State and necessary for the exercise of the State's powers are closely linked to public order and are therefore needs of the general interest not having an industrial or commercial character.<sup>87</sup>

The condition of close dependence can be met either if the body:

- Is financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law<sup>88</sup>;
- Is subject to management supervision by public authorities, which renders the body dependent on them in such a way that they are able to influence its decisions in relation to public contracts<sup>89</sup>; or
- Is having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.<sup>90</sup>

Within these conditions, the term 'public authority' is used by the CJEU to cover a wider and more generic concept than 'contracting authority' within the meaning of the Public Sector Directive.<sup>91</sup> We will discuss in more detail the definition of 'public authority' in Section 8.2.2.

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<sup>84</sup> Waste collection: *BFI*, above; funeral services: *Truley*, above; running universities: *University of Cambridge*, above; Providing leisure facilities: *Connemara Machine Turf*, above; Organising exhibitions to promote commerce: *Agorà Srl and Excelsior Snc di Pedrotti Bruna & C. v Ente Autonomo Fiera Internazionale di Milano and Ciftat Soc. coop. arl* (Joined cases C-223/99 and C-260/99) [2001] E.C.R. I-3605; building property to stimulate economic activity: *Korhonen*, above

<sup>85</sup> Arrowsmith, *The Law of Public and Utilities Procurement*, above, §5.13

<sup>86</sup> *BFI*, above, [48]-[49]; *Agorà*, above, [38]; *Korhonen*, above

<sup>87</sup> *SIEPSA*, above, [85]; *Mannesmann Anlagenbau*, above, [24]

<sup>88</sup> See further *University of Cambridge*, above, [26], [33], [36]

<sup>89</sup> See further *Commission v France* (Case C-237/99), above, [48] et.seq.; *Truley*, above, [72]: whole ownership by a contracting authority is sufficient to demonstrate management supervision

<sup>90</sup> Directive 2004/18/EC, above, Art.1(9), para 2(c)

<sup>91</sup> *Wall AG v Stadt Frankfurt am Main and Frankfurter Entsorgungs- und Service (FES) GmbH* (Case C-91/08), judgment of 13 April 2010, not yet reported, [47]-[52] and [60]; *Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* (Case C-26/03) [2005] E.C.R. I-1, [48]-[50] implies that it is possible that some public authorities are not contracting authorities



A list of the bodies meeting these criteria can be found in the annex of the Public Sector Directive.<sup>92</sup> This list is non-exhaustive, but has to be amended on a regular basis.<sup>93</sup> It is not dispositive, and also merely illustrative: entities listed are not in fact covered if they do not properly fall within the definition, whereas entities not listed but falling within the definition are covered. Determining if a body meets the definition of body governed by public law must be done case-by-case.<sup>94</sup>

*Associations* constitute a residual category of contracting authorities that does not overlap with the concept of bodies governed by public law.<sup>95</sup> It has been argued that this covers only entities without separate legal personality.<sup>96</sup>

Even though the Ministries of Defence and related defence procurement agencies of the EU Member States are clearly contracting authorities,<sup>97</sup> we will see in Section 11 that this is not so clear for international organisations. If an international organisation (or any other public body) is found not to be a contracting authority, it would not have to comply with the provisions of the Directive, unless a specific exemption applies.

#### **8.1.2.2. Applicability to Defence Procurement**

The Directive applies to public contracts awarded in the fields of defence and security, with the exception of contracts to which the Defence and Security Directive applies and of contracts to which the Defence and Security Directive does not apply pursuant to its exemptions, subject to Art.346 TFEU (formerly Art.296 EC).<sup>98</sup>

Therefore, for a specific procurement activity, the applicability of the Defence and Security Directive has first to be ascertained. If it applies, then the Public Sector Directive does not apply. If the procurement falls outside the scope of the Defence and Security Directive, then the Public Sector Directive could apply if its applicability is not itself excluded through the use of one of its own exemptions. Finally, if the procurement fits within the scope of the Defence and Security

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<sup>92</sup> Directive 2004/18/EC, above, Annex III

<sup>93</sup> Directive 2004/18/EC, above, Art.1(9), para 3

<sup>94</sup> *SIEPSA*, above, [77]; *Truley*, above, [44]

<sup>95</sup> *BFI*, above, [27]

<sup>96</sup> Arrowsmith, *The Law of Public and Utilities Procurement*, above, §5.20

<sup>97</sup> Listed amongst the central government entities of each EC Member State in Directive 2004/18/EC, above, Annex IV

<sup>98</sup> Directive 2004/18/EC, above, Art.10, as modified by Directive 2009/81/EC, above, Art.71

Directive, but that the latter does not apply because of one of its exemptions, then none of the directives will apply.

In addition, applicability of the Public Sector Directive is subject to Art.346 TFEU, which we discuss in Section 8.3. There have been disagreements in the past over whether this constituted an automatic exemption from the applicability of the procurement directives for contracts related to products on the list of 1958 to which the Art.346 TFEU exemption applies.<sup>99</sup> However, it is unlikely that an automatic exemption could be read in the current wording of the Directive, unless Art.346 TFEU itself would provide for such an automatic exemption, which is not the case.<sup>100</sup> The scope of the Directive now seems to be entirely dependent of the scope of the Art.346 TFEU exemption: if the exemption is validly invoked, the Directive will not apply.<sup>101</sup>

### **8.1.2.3. ‘In-House’ Contracts Exemption**

The Public Sector Directive will not apply to agreements concluded within the same contracting authority (‘in-house’ contracts),<sup>102</sup> although it will apply in principle to contracts with other public authorities or public bodies.<sup>103</sup>

In addition, the Directive will not apply to contracts between a contracting authority and an entity legally distinct from it when the contracting authority exercises over the entity concerned a control which is similar to that which it exercises over its own departments and, at the same time, that entity carries out the essential part of its activities with the controlling contracting authority (‘quasi in-house’ contracts).<sup>104</sup> These two conditions must be interpreted strictly and the

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<sup>99</sup> See the diverging opinions in Trybus, “Procurement for the Armed Forces”, above, pp.697-699 and Georgopoulos, *European Defence Procurement Integration*, above, §3.2; see further Arrowsmith, *The Law of Public and Utilities Procurement*, above, §6.97-6.100

<sup>100</sup> *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* (Case 222/84) [1986] E.C.R. 1651, [26]; *Angela Maria Sirdar v The Army Board and Secretary of State for Defence* (Case C-273/97) [1999] E.C.R. I-7403, [16]; *Tanja Kreil v Germany* (Case C-285/98) [2000] E.C.R. I-69, [16]; for a commentary of that case, see Trybus M., “Sister in Arms: EU Law and Sex Equality in the Armed Forces” (2003) 9(5) E.L.J. 631

<sup>101</sup> See the detailed discussion in Heuninckx, “Lurking at the Boundaries”, above, pp.95-97

<sup>102</sup> *BFI*, above; *Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia* (Case C-107/98) [1999] E.C.R. I-8121, [49]-[50]; *Stadt Halle*, above, [48]; K. Weltzien, “Avoiding the procurement rules by awarding contracts to an in-house entity - scope of the procurement directives in the classical sector” (2005) 14(5) P.P.L.R. 237

<sup>103</sup> *Teckal*, above; *Stadt Halle*, above, [47]; *Commission v Spain* (Case C-84/03) [2005] E.C.R. I-139, [40]; but see the exception defined in *Commission v Germany* (Case C-480/06) [2009] E.C.R. I-4747, discussed below

<sup>104</sup> *Teckal*, above, [50]-[51]; *Stadt Halle*, above, [49] and [52] (in that case, the contracting authority owned more than 75% of the shares of the company): for further discussion, see Brown A.,

burden of proving the existence of exceptional circumstances justifying a derogation from the rules of the Directive lies on the person seeking to rely on those circumstances.<sup>105</sup>

The assessment of the first of those two conditions must take into account all the legislative provisions and relevant circumstances, and must show that the entity concerned is subject to a control enabling the contracting authority to exert a power of decisive influence over strategic objectives and significant decisions.<sup>106</sup> This will be the case if all members or shareholders of the entity in question are contracting authorities<sup>107</sup> and decisions regarding the activities of the entity in question are taken by bodies, created under the statutes of that entity, which are composed of representatives of those contracting authorities. This control may be exercised jointly by those contracting authorities.<sup>108</sup>

The necessary level of control might be found not to exist when the entity in question has become market-oriented and has gained a degree of independence that would render tenuous the control exercised by the contracting authorities. However, this would not be the case if the entity is not of a commercial character and has been set-up to act in the public interest.<sup>109</sup>

In addition, the award of a contract of a non-commercial nature by public authorities to another public authority would not have to comply with EU public procurement law if such contract is the culmination of a process of cooperation between the parties that aims to ensure the efficient completion of a public task that they all have to perform, even if the public authorities awarding the contract do not

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“Application of the Procurement Directives to Contracts Awarded by Public Bodies to Subsidiaries and the Scope of the Remedies Directive: A Note on Case C-26/03 *Stadt Halle*” (2005) 14(3) P.P.L.R. NA72; *Commission v Spain* (Case C-84/03), above, [39]; *Commission v Italy (Agusta Helicopters)* (Case C-337/05) [2008] E.C.R. I-2173, [39]-[41]; see B. Heuninckx, “A Note on Case *Commission v Italy* (Case C-337/05) (Agusta Helicopters Case)” (2008) 17(5) P.P.L.R. NA187 p.NA188 and Trybus M., “Case C-337/05, *Commission v Italy* (Agusta and Agusta Bell Helicopters)” (2009) 46(3) C.M.L.Rev. 973; *Sea Srl v Comune di Ponte Nossa* (Case C-573/07) [2009] E.C.R. I-8127, [38]; K. Wauters, “In-house Provision and the Case Law of the European Court of Justice”, conference paper, 4<sup>th</sup> Public Procurement PhD Conference, Nottingham, 7-8 September 2009

<sup>105</sup> *Stadt Halle*, above, [46]; *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG* (Case C-458/03) [2005] E.C.R. I-8585, [63]

<sup>106</sup> *Parking Brixen*, above, [65]

<sup>107</sup> *Stadt Halle*, above, [49]; *Coditel Brabant SA v Commune d’Uccle and Région de Bruxelles-Capitale* (Case C-324/07) [2008] E.C.R. I- 8457, [30]

<sup>108</sup> *Coditel Brabant*, above, [42] and [54]; *Sea*, above, [54]-[63]; this conclusion had been foreshadowed in Arrowsmith, *The Law of Public and Utilities Procurement*, above, §§6.178

<sup>109</sup> *Parking Brixen*, above, [67]-[70]; *Coditel Brabant*, above, [36]-[38]

exercise any control over the other public authority.<sup>110</sup> This specific aspect of the ‘in-house’ contracts exemption is very relevant to collaborative procurement.

We will see in Section 8.2.2 that this court-created exemption also applies to the procurement principles flowing from the EU Treaties. It is important in the analysis of the relationship between EU Member States and international organisations performing collaborative defence procurement. This issue will be discussed further in Section 11.4.

#### **8.1.2.4. Other Exemptions from Applicability of the Directive**

Additionally, a number of exemptions from the applicability of the Public Sector Directive may have specific relevance to defence procurement and to international organisations. When analysing these exemptions, one must keep in mind that the list of exclusions of the Directive is exhaustive and has to be interpreted restrictively.<sup>111</sup>

First, the Directive does not apply to secret contracts, those requiring special security measures, or when required by protection of the essential interests of a Member State.<sup>112</sup> Even though this exemption, which in fact comprises three separate exemptions,<sup>113</sup> could apply to some collaborative procurement contracts, it does not in principle exclude collaborative defence procurement from applicability of the Directive, and applies equally to collaborative defence procurement and to any other form of procurement. It will therefore not be discussed further.

In addition, the Directive does not apply to public contracts governed by different procedural rules and awarded pursuant to an international agreement concluded between an EU Member State and one or more third countries.<sup>114</sup> The scope of this exemption is in fact quite limited by its own wording. Even though it could apply to some collaborative defence procurement activities, such as some services

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<sup>110</sup> *Commission v Germany* (Case C-480/06) [2009], above, [36]-[45]; for an analysis of the case, see Pedersen K. and Olsson E., “*Commission v Germany* – a new approach to in-house providing?” (2010) 19(1) P.P.L.R. 33

<sup>111</sup> *Commission v Italy (Data Processing)* (Case C-3/88) [1989] E.C.R. 4035, [23]-[24]; *Commission v Spain* (Case C-71/92) [1993] E.C.R. I-5923, [7]-[18], and especially [10], and [22]; *Commission v Spain* (Case C-328/92) [1994] E.C.R. I-1569, [15]

<sup>112</sup> Directive 2004/18/EC, above, Art.14

<sup>113</sup> See the detailed discussion in Heuninckx, “Lurking at the Boundaries”, above, pp.102-104

<sup>114</sup> Directive 2004/18/EC, above, Art.15(a)

contracts awarded in cooperation with third countries,<sup>115</sup> it does not in principle exclude collaborative defence procurement as a whole from the scope of the Directive.

Lastly, the Public Sector Directive will not apply to contracts awarded pursuant to the particular procedure of an international organisation.<sup>116</sup> As this exemption is directly related to the law of international organisations and is a key element of our analysis, it is discussed in detail in Section 11.

### **8.1.3. The EU Defence and Security Directive**

#### **8.1.3.1. Applicability and Scope**

The Defence and Security Directive applies to the supply of military equipment, to works, supplies and services directly related to such equipment during its whole life cycle, and to works and services procured for specifically military purposes, subject to Art.36, 51, 52, 62 and 346 TFEU (formerly Art.30, 45, 46, 55 and 296 EC).<sup>117</sup> ‘Military equipment’ is defined as equipment specifically designed or adapted for military purposes and intended for use as an arm, munitions or war material.<sup>118</sup>

For the purposes of the Directive, military equipment should be understood in particular as the product types included in the list of arms, munitions and war material to which Art.346 TFEU applies (otherwise known as ‘the 1958 list’).<sup>119</sup> This list is to be interpreted broadly in the light of the evolving character of technology, procurement policies and military requirements, for instance on the basis of the Common Military List of the EU to which the EU Code of Conduct on Arms Exports applies.<sup>120</sup> For the purposes of the Directive, military equipment should also cover products which, although initially designed for civilian use, are

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<sup>115</sup> See the detailed discussion in Heuninckx, “Lurking at the Boundaries”, above, pp.105-106; See further Arrowsmith, *The Law of Public and Utilities Procurement*, above, §6.109

<sup>116</sup> Directive 2004/18/EC, above, Art.15(c); see also the detailed discussion in Heuninckx, “Lurking at the Boundaries”, above, pp.106-107

<sup>117</sup> Directive 2009/81/EC, above, Art.2

<sup>118</sup> Directive 2009/81/EC, above, Art.1(6)

<sup>119</sup> Council Decision 255/58 of 15 April 1958(1) defining the list of products (arms, munitions and war material) to which the provisions of Article 223(1)(b) of the [EC] Treaty [now Art.346 TFEU] apply (not published)

<sup>120</sup> Common Military List of the European Union adopted by the Council on 15 February 2010 (equipment covered by Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment), [2010] OJ C69/03

later adapted for military purposes to be used as arms, munitions or war material.<sup>121</sup> This probably means that the Directive would apply to products to which the Art.346 TFEU exemption could apply, but does not, either because the Member State concerned decides not to invoke the exemption, or because the other conditions for invoking it are not met.<sup>122</sup>

The Directive applies to public contracts concluded by contracting authorities,<sup>123</sup> being defined on the basis of the definitions found in the Public Sector Directive, so the discussions we conducted in Sections 8.1.2.1 and 8.1.2.3, concerning the contracting authorities and the in-house contracts exemption most likely also apply.

A contract that could be covered both by the Defence and Security Directive and by the Public Sector Directive is to be awarded in accordance with the Defence and Security Directive. Likewise, when a contract would be partly covered by the Defence and Security Directive, with the other part not being subject to either Directive, this contract will not be subject to any of the Directives.<sup>124</sup>

#### **8.1.3.2. Exemptions from Applicability of the Directive**

Like the Public Sector Directive, the applicability of the Defence and Security Directive is subject to a number of exemptions, in addition to the exemptions from applicability of EU law in general (such as Art.346 TFEU), the invocation of which also means that the Directive does not apply.<sup>125</sup> As discussed above, if the Defence and Security Directive is not applicable to a particular procurement because of one of these exemptions, the Public Sector Directive also does not apply.<sup>126</sup>

The most relevant of those exemptions for the purpose of this thesis are listed below. Even though some of these exemptions are similar to those of the Public Sector Directive they are sometimes drafted differently, and therefore potentially have a different scope. We have discussed these exemptions in detail in our article on the subject.<sup>127</sup>

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<sup>121</sup> Directive 2009/81/EC, above, Recital 10

<sup>122</sup> See the detailed discussion in Heuninckx, “Lurking at the Boundaries”, above, pp.98-100

<sup>123</sup> Directive 2009/81/EC, above, Art.1(2), 1(17), and 2

<sup>124</sup> Directive 2009/81/EC, above, Art.3 and Directive 2004/18/EC, above, Art.10 (as amended by Art.71 of Directive 2009/81/EC)

<sup>125</sup> Directive 2009/81/EC, above, Art.2

<sup>126</sup> Directive 2004/18/EC, above, Art.10 (as amended by Art.71 of Directive 2009/81/EC)

<sup>127</sup> See the detailed discussion in Heuninckx, “Lurking at the Boundaries”, above, pp.108-114

The Directive will not apply to contracts governed by specific procedural rules pursuant to an international agreement or arrangement concluded between one or more EU Member States and one or more third countries.<sup>128</sup> The scope of this exemption is wider than the ‘international agreement’ exemption of the Public Sector Directive, as the purpose of the relevant international agreement or arrangement is not specified in the exemption.

The Directive also does not apply to contracts governed by specific procedural rules of an international organisation purchasing for its purposes, or to contracts which must be awarded by a Member State in accordance with those rules.<sup>129</sup> This exemption is probably narrower than the international organisation exemption of the Public Sector Directive.

Particularly significant for the purpose of this thesis, the Defence and Security Directive does not apply to contracts awarded in the framework of a cooperative programme based on research and development, conducted jointly by at least two EU Member States for the development of a new product and, where applicable, the later phases of the life-cycle of this product.<sup>130</sup> Research and development is defined as all activities comprising fundamental research, applied research and experimental development.<sup>131</sup> This exemption, even though arguably partially similar to the international organisation exemption of the Public Sector Directive, is on the one hand broader (it could cover collaborative procurement through a lead nation), on the other hand narrower (it only covers collaborative procurement based on R&D), but also more precise. It is discussed again in Section 11.

In addition, the Directive does not apply to contracts awarded by a government to another government and to which the Directive would otherwise apply.<sup>132</sup> This is an important exception for defence procurement, as a lot of procurement is

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<sup>128</sup> Directive 2009/81/EC, above, Art.12(a)

<sup>129</sup> Directive 2009/81/EC, above, Art.12(c); it is interesting to note that the French version of the Directive mentions that this exemption concerns “les règles de procédures spécifiques d’une organisation internationale achetant pour l’accomplissement de ses missions” (the specific procedural rules of an international organisation purchasing for the accomplishment of its missions), which would seem to be wider than the English version, as for instance operational procurement performed for the benefit of its Member States by a collaborative defence procurement organisation would probably be found to be performed for the accomplishment of its missions

<sup>130</sup> Directive 2009/81/EC, above, Art.13(c) and Recital 28

<sup>131</sup> Directive 2009/81/EC, above, Art.1(27)

<sup>132</sup> Directive 2009/81/EC, above, Art.13(f)

performed between States, for instance through the United States Foreign Military Sales.<sup>133</sup>

The Directive also does not apply to contracts for which the application of its rules would oblige an EU Member State to supply information the disclosure of which it considers contrary to the essential interests of its security.<sup>134</sup>

It is also worth noting that the Directive does not include exemptions similar to the ‘contract secrecy exemption’, the ‘security measures’ exemption, and the ‘essential interests’ exemption that are found in the Public Sector Directive.

#### ***8.1.4. Impact of Compliance with the EU Public Procurement Directives***

Would the public procurement directives apply to defence procurement, the contracting authority would have to comply with the detailed substantive rules of the directive, such as advertisement, drafting of technical specifications, time limits, quantitative selection of candidates, contract award criteria and the provision of adequate remedies. It is not the aim of this thesis to delve in detail at this stage into these provisions, but their application would have a major impact on both the procedures of an international organisation and the potential contractors.<sup>135</sup>

### **8.2. The Procurement Principles of the EU Treaties**

#### ***8.2.1. Introduction***

Even for procurement activity or types of procurement to which the EU public procurement directives do not apply, the CJEU identified a number of principles that flow from the EU Treaties and have to be complied with for any public procurement activities.

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<sup>133</sup> Defence Security Cooperation Agency, *Security Assistance Management Manual*, DoD 5105.38-M, (US Department of Defence, 2003)

<sup>134</sup> Directive 2009/81/EC, above, Art.13(a)

<sup>135</sup> See further Arrowsmith, *The Law of Public and Utilities Procurement*, above; For an analysis of the advantages of using the Public Sector Directive in the field of defence, see Georgopoulos, *European Defence Procurement Integration*, above, p.94; For a discussion of the substantive provisions of the Defence and Security Directive, see B. Heuninckx, “The EU Defence and Security Procurement Directive: Trick or Treat?” (2011) 20(1) P.P.L.R. 9



These principles are based on the EU Treaties provisions prohibiting discrimination on the grounds of nationality,<sup>136</sup> customs duties, quantitative restrictions, and measures having equivalent effect on the trade of goods,<sup>137</sup> restrictions of the right of establishment,<sup>138</sup> and restrictions of the freedom to provide services.<sup>139</sup> It is very likely that these principles would have to be complied with in all cases where the EU public procurement directives do not apply, as long as an EU Treaties exemption has not been invoked.<sup>140</sup>

As we show in our detailed analysis of the applicability of the EU public procurement directives to international organisations and collaborative defence procurement (see Section 11.2), it is not certain that those directives would apply. It is therefore extremely important to analyse the principles that would apply if the directives do not.

### **8.2.2. *Applicability of EU Treaties Principles to Public Procurement***

The procurement principles flowing from the EU Treaties only apply if three conditions are met.

First, these principles will have to be complied with only if the given contract, in the light of its particular characteristics, has a link with intra-EU trade. Such a link will be presumed if the contract in question has ‘a certain cross-border interest’ and can therefore attract operators from other Member States.<sup>141</sup> It is in principle for the contracting authority to assess whether there may be cross-border interest in a contract, even though legislation may lay down objective criteria indicating in

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<sup>136</sup> Art.18 TFEU (formerly Art.12 EC); the principle of non-discrimination is considered equivalent to the WTO notion of ‘national treatment’, but limited to citizens of EC Member States: see Trepte, *Regulating Procurement*, above, p.251

<sup>137</sup> Art.28-32 TFEU (formerly Art.23-31 EC)

<sup>138</sup> Art.49-55 TFEU (formerly Art.43-48 EC)

<sup>139</sup> Art.56-62 TFEU (formerly Art.49-55 EC)

<sup>140</sup> *Sea*, above, [38]; Sundstrand A., “Procurement Outside the EC Directives”, conference paper, 4<sup>th</sup> Public Procurement PhD Conference, Nottingham, 7-8 September 2009, §5; Szydło M., “Contracts beyond the scope of the EC procurement directives - who is bound by the requirement for transparency?” (2009) 34(5) E.L.Rev. 720, p.722

<sup>141</sup> *Commission v Ireland* (Case C-507/03) [2007] E.C.R. I-9777, [25]-[31]; *Commission v Italy* (Case C-119/06) [2007] E.C.R. I-168; *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni* (Case C-380/05) [2008] E.C.R. I-349, [67]; *SECAP SpA and Santorso Soc. coop. arl v Comune di Torino* (Joined Cases C-147/06 and C-148/06) [2008] E.C.R. I-3565, [21], [24]-[26]; *Commission v Italy* (Case C-412/04) [2008] E.C.R. I-619, [65]-[66]; *Wall*, above, [34]; see Sundstrand, “Procurement Outside the EC Directives”, above, §4; Arrowsmith, *The Law of Public and Utilities Procurement*, above, §§4.25 and 4.34

which cases a certain cross-border interest should be found.<sup>142</sup> This cross-border interest may result from a number of factors, combined to varying degrees, which include the value of the contract, the object and technical complexity of the contract, and the location at which the contract is to be carried out.<sup>143</sup>

Second and most significantly, only some entities have to abide by the procurement principles flowing from the EU Treaties when they perform purchasing.<sup>144</sup> It seems clear that contracting authorities that generally have to comply with the EU public procurement directives also have to comply with the procurement principles flowing from the EU Treaties, even when the Directives do not apply.<sup>145</sup> In addition, entities that are not contracting authorities, referred to by the CJEU as ‘public authorities’, also have to comply with the principles. In the relevant case law, the term ‘public authority’ covers a wider concept than ‘contracting authority’ within the meaning of the Public Sector Directive.<sup>146</sup>

To establish whether an entity is a public authority, some aspects of the definition of ‘contracting authority’ should be taken as guidance: the entity in question must be effectively controlled by the State or another public authority, and may not compete in the market. Control can be found if the State or another public authority owns a controlling majority in the entity. On the other hand, the entity will be found to compete on the market if it provides goods or services through normal commercial relations formed by bilateral contracts freely negotiated (even if the entity was initially created for public purposes), and obtains more than half its turnover from those bilateral contracts, but the elements of that definition are only

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<sup>142</sup> *SECAP*, above, [30]-[31]; *Consorzio Aziende Metano (Coname) v Comune di Cingia de’ Botti* (Case C-231/03) [2005] E.C.R. I-7287, [20]

<sup>143</sup> See the analysis in Raimundo M-A., “Direct Awarding of Public Contracts: The New Portuguese Public Contract Code in Light of European Law”, conference paper, 4<sup>th</sup> Public Procurement PhD Conference, Nottingham, 7-8 September 2009, pp.7-8

<sup>144</sup> See *Parking Brixen*, above, [49]-[50]; *Telaustria and Telefonadress v Telekom Austria* (Case C-324/98) [2000] E.C.R. I-10745, [60]; *Commission v Italy* (Case C-412/04), above, [66]; *Commission v Ireland* (Case C-507/03), above, [30]; *Commission v France* (Case C-264/03) [2005] E.C.R. I-8831, [32]; *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado* (Case C-220/06) [2007] E.C.R. I-12175, [71] and [75]; *Wall*, above, [47]

<sup>145</sup> *Commission v Ireland* (Case C-507/03), above, [30]; *Commission v France* (Case C-264/03), above, [32]; *Commission v Italy* (Case C-412/04), above, [66]; *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia*, above, [71]; See Szydło, “Contracts beyond the scope of the EC procurement directives”, above, pp.724-726; Arrowsmith, *The Law of Public and Utilities Procurement*, above, §§4.23-4.24 and 4.33; Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, [2006] OJ C179/2, §1.1

<sup>146</sup> *Wall*, above, [47]-[52] and [60]; *Stadt Halle*, above, [48]-[50] implies that it is possible that some public authorities are not contracting authorities; Wauters, “In-house Provision and the Case Law of the European Court of Justice”, above

to be considered as guidance.<sup>147</sup> As it uses terms similar but not identical to those used for the definition of bodies governed by public law, it is unclear if they cover the same or similar concepts. This definition will therefore have to be applied flexibly.

In addition, it has been argued that entities that do not qualify as contracting authorities or public authorities should still have to comply with the EU Treaties procurement principles when EU Member States have such a direct involvement in their procurement activities that the procurement decisions can be imputed to those States.<sup>148</sup> This reasoning seems sound, as any other interpretation would provide EU Member States with an easy way of avoiding their obligation under the EU Treaties by performing procurement activities by proxy.

Finally, those principles have only to be complied with if the contract is awarded to an entity over which the public authority does not exercise a control similar to that which it exercises over its own departments, and if that entity does not carry out the essential part of its activities with the controlling authority.<sup>149</sup> This is the same court-created ‘quasi in-house’ exemption that also applies to the public procurement directives and that we discussed in Section 8.1.2.3.

### **8.2.3. The EU Treaties Principles Applicable to Procurement**

The first procurement principle that the CJEU derived from EU Treaties provisions is that of *non-discrimination on the grounds of nationality*, whereby direct, indirect or covert discrimination is prohibited.<sup>150</sup> This precludes for instance reserving some public contracts to undertakings established in particular regions,<sup>151</sup> forbidding the movement of workers across borders to perform a public contract or imposing obligations to recruit manpower in-situ,<sup>152</sup> or requiring the contractor to maximise the use of national materials or labour.<sup>153</sup>

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<sup>147</sup> *Wall*, above, [47]-[52] and [60]

<sup>148</sup> Arrowsmith, *The Law of Public and Utilities Procurement*, above, §4.24

<sup>149</sup> *Teckal*, above, [50]; *Stadt Halle*, above, [49]; *Parking Brixen*, above, [62]; *Sea*, above, [36]-[37]; see Arrowsmith, *The Law of Public and Utilities Procurement*, above, §§6.166-6.172; Wauters, “In-house Provision and the Case Law of the European Court of Justice”, above

<sup>150</sup> Art.18 TFEU (ex-Art.12 EC); *Data Processing*, above, [8]; Charter of Fundamental Rights of the European Union, [2010] C83/389, Art.21

<sup>151</sup> *Du Pont de Nemours Italiana S.p.A. v Unità Sanitaria Locale No. 2 di Carrara* (Case 21/88) [1990] E.C.R. I-889, [18]

<sup>152</sup> *Rush Portuguesa Lda v Office national d'immigration* (Case C-113/89) [1990] E.C.R. I-1417, [19]

<sup>153</sup> *Commission v Denmark (Storebaelt Bridge)* (Case C-243/89) [1993] E.C.R. I-3353, [45]

That principle also implies a positive *obligation of transparency* in order to enable the contracting authority to satisfy itself that the principle has been complied with. Transparency must ensure, for the benefit of any potential tenderer, *sufficient advertising* to enable the market to be opened up to competition (in essence allowing potential tenderers from other Member States an opportunity of expressing their interest in obtaining that contract, even though no formal tendering process would necessarily be required), and allow the review of the impartiality of the procurement procedures.<sup>154</sup> This positive obligation of sufficient advertising is a contentious issue, and many academics and practitioners disagree with the CJEU analysis.<sup>155</sup>

The second principle is a basic *mutual recognition* of technical standards and professional licenses applying to all goods, persons or undertakings, unless justified by imperative reasons relating to the public interest.<sup>156</sup> Goods certified under a particular technical standard, or services provided by a person holding a particular license, cannot be rejected solely because the technical specification of the invitation to tender required another standard or licence, without a comparison of the actual specifications of the goods or qualification of the person with the required standard or license.

The third of such principles is *proportionality*, by virtue of which measures may not exceed what is appropriate and necessary to attain the objective pursued.<sup>157</sup>

A fourth principle is that of *effective judicial protection* of the rights that individuals receive from EU law.<sup>158</sup> Under that principle, individuals have a

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<sup>154</sup> *Commission v Ireland (Dundalk Water Pipes)* (Case 45/87) [1988] E.C.R. 4929, [16]; *Unitron Scandinavia A/S and 3-S A/S, Danske Svineproducenters Serviceselskab v Ministeriet for Fødevarer, Landbrug og Fiskeri* (Case C-275/98) [1999] E.C.R. I-8291, [31]; *Telaustria*, above, [60]-[62]; *Coname*, above, [16]; *Commission v Italy* (C-260/04) [2007] E.C.R. I-7083, [22]-[24]; *Wall*, above, [36]; Szydło, “Contracts beyond the scope of the EC procurement directives”, above, pp.723-724; Treumer S. and Werlauff E., “The leverage principle: secondary Community law as a lever for the development of primary Community law” (2003) 28(1) E.L.Rev. 124, p.126

<sup>155</sup> For a detailed discussion, see Brown A., “Seeing through Transparency: The Requirement to Advertise Public Contracts and Concessions under the EC Treaty” (2007) 16(1) P.P.L.R. 1; McGowan D., “Clarity at Last? Low Value Contracts and Transparency Obligations” (2007) 16(4) P.P.L.R. 274

<sup>156</sup> *Irène Vlassopoulou v Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg* (Case C-340/89) [1991] E.C.R. I-2357; *Manfred Säger v Dennemeyer & Co. Ltd* (Case C-76/90) [1991] E.C.R. I-4421, [15]; *Bent Moustén Vestergaard v Spøttrup Boligselskab* (Case C-59/00) [2001] E.C.R. I-9505 (interim order), [23]; *Dundalk water pipes*, above, [22]

<sup>157</sup> *SA Buitoni v Fonds d'orientation et de régularisation des marchés agricoles* (Case 122/78) [1979] E.C.R. 677, [16]; *Fromançais SA v Fonds d'orientation et de régularisation des marchés agricoles (FORMA)* (Case 66/82) [1983] E.C.R. 395, [8]; *Denkavit Nederland BV v Hoofdprodukschap voor Akkerbouwprodukten* (Case 15/83) [1984] E.C.R. I-2171, [25]

fundamental right of access to court, the legality of the reasons for any final administrative decisions must be capable of judicial review, and those reasons must be provided to the individuals concerned.<sup>159</sup> Specifically for public procurement, it must be possible to review the impartiality of procurement procedures.<sup>160</sup>

In addition, the principle of *equal treatment* (of which the principle of non-discrimination is a specific expression, and which is a broader concept that requires identical situations or people to be treated in identical way, unless duly justified<sup>161</sup>) also flows from the EU Treaties. Not only does equal treatment ‘lies at the very heart of the public procurement directives’,<sup>162</sup> but this principle also requires that equality of opportunity be provided to all tenderers when formulating their tenders, even when the directives do not apply, which would prevent the award of public contracts without any call for competition.<sup>163</sup> Moreover, this principle requires the use of the words ‘or equivalent’ when the contract documents refer to a particular brand.<sup>164</sup>

Even though these specific rulings referred to services concessions, the reasoning of the CJEU, based on the EU Treaties, seems to be equally applicable to the award of other public contracts to which the directives do not apply. This could have a major impact on public procurement, as it could arguably create a positive *obligation of competition* (or at least some form of competition) in any public procurement.

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<sup>158</sup> Charter of Fundamental Rights of the EU, above, Art.47; Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, as amended by Protocol No. 11, with Protocol Nos. 1, 4, 6 and 7, November 1998, Art.6 and 13; Joint Declaration by the European Parliament, the Council and the Commission concerning the protection of fundamental rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, [1977] OJ C103/1; *Johnston*, above, [18]-[19]; *Union nationale des entraîneurs et cadres techniques professionnels du football (UNECTEF) v Georges Heylens and others* (Case 222/86) [1987] E.C.R. 4097, [14]

<sup>159</sup> *Von Colson and Kamann v Land Nordrhein-Westfalen* (Case 14/83) [1984] E.C.R. 1891; *Johnston*, above, [18]; and especially *Heylens*, above, [14]-[16]

<sup>160</sup> *Telaustria*, above, [62]; *Coname*, above, [21]

<sup>161</sup> Trepte, *Regulating Procurement*, above, p.176

<sup>162</sup> *Storebaelt Bridge*, above, [33]

<sup>163</sup> *Data Processing*, above, [8]; *Parking Brixen*, above, [46]-[49]; *Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v Comune di Bari and AMTAB Servizio SpA* (Case C-410/04) [2006] E.C.R. I-3303, [18]-[23]

<sup>164</sup> *Vestergaard*, above, [22] and [24]; *Commission v Netherlands* (Case C-359/93) [1995] E.C.R. I-157, [27]; Treumer and Werlauff, “The leverage principle”, above, p.127

#### **8.2.4. Position of the European Commission**

The CJEU rulings in which the principles above were defined are in line with a long-held view of the Commission,<sup>165</sup> but were strongly criticised on the grounds that they create legal uncertainty and an administrative burden not in accord with the wishes of the EU legislator, while at the same time potentially breaching the principle of subsidiarity.<sup>166</sup>

In order to clarify the issue, the Commission published an interpretative communication on the EU law applicable to contract awards not or not fully subject to the provisions of the public procurement directives.<sup>167</sup> It generally summarises the relevant judgments, but also includes some useful indications, such as the fact that advertising on a contracting authority's website would be sufficient to satisfy the requirements of the EU Treaties.<sup>168</sup> Although this communication purports to cover only some types of contracts excluded from the applicability of the Directives, there does not seem to be any reason why the Commission would not apply the same principles to any contract excluded from the scope of the Directives.<sup>169</sup>

### **8.3. Exemptions from the EU Treaties**

#### **8.3.1. General Principles of EU Treaties Exemptions**

We have seen in Section 8.2 that, even when the EU public procurement directive do not apply to some procurement activities, procurement principles flowing from the EU Treaties would still apply. However, in certain circumstances, EU Member States may invoke exemptions found in the EU Treaties or justifications defined by

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<sup>165</sup> Commission Green Paper: Public Procurement in the European Union: Exploring the Way Forward, COM(96)583, §§3.24 et seq.; Commission Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions, COM(2004)327, §30

<sup>166</sup> Braun P., "A Matter of Principle(s) – The Treatment of Contracts Falling Outside the Scope of the European Public Procurement Directives" (2000) 9(1) P.P.L.R. 29; Pijnacker Hordijk E. and Meulenbelt M., "A Bridge Too Far: Why the European Commission's Attempts to Construct an Obligation to Tender outside the Scope of the Public Procurement Directives should be dismissed" (2005) 14(3) P.P.L.R. 123; supported by Treumer S., "Recent Trends in the Case Law of the European Court of Justice", in Nielsen R. and Treumer S. (Eds.), *The New EU Public Procurement Directives* (Ojof, 2005), p.25

<sup>167</sup> Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, above; for a critical analysis of the document, see Williams R., "Contracts Awarded Outside the Scope of the Public Procurement Directives" (2007) 16(1) P.P.L.R. NA1

<sup>168</sup> Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, above, §2.1.2

<sup>169</sup> Sundstrand, "Procurement Outside the EC Directives", above, §5

the CJEU in order not to comply with EU law. Within the scope of this thesis, the main reasons for which EU Member States may wish to invoke exemptions to the applicability of the EU Treaties is the protection of their public security.<sup>170</sup>

Some of the derogations provided for by the EU Treaties only allow deviations from specific rules of the Treaties (such as free movement of goods, persons, capital or freedom to provide services), and not from the other provisions of the EU Treaties.<sup>171</sup> However, the derogations provided under Art.346-347 TFEU (formerly Art.296-297 EC) can apply to the whole EU Treaties, and are considered ‘safeguard clauses’.<sup>172</sup> Art.346 TFEU, which we mentioned a number of times before and which is the main public security exemption of the Treaties, is discussed in detail in Section 8.3.2 after setting out in the present Section the general principles identified by the CJEU for invoking EU Treaties exemptions.

It has been convincingly argued that, if procurement related to ‘hard’ defence material could not be excluded from the scope of the EU Treaties by exemptions such as Art.346 TFEU, uses of the *juste retour* principle would be *prima facie* in breach of the procurement principles of the Treaties as measures having equivalent effect to quantitative restrictions on imports, and would also breach the right of establishment and the freedom to provide services.<sup>173</sup> The correct use of exemptions from the EU Treaties is therefore critical to the legality of collaborative defence procurement.

It should first be noted that, within the scope of the EU Treaties, the concept of public security covers both a Member State’s internal security and its external security.<sup>174</sup> EU Member States are, in principle, free to determine the requirements

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<sup>170</sup> See further Heuninckx, “Defence Procurement”, above, pp.265-267; Trybus M., “The EC Treaty as an instrument of European defence integration: judicial scrutiny of defence and security exceptions” (2002) 39(6) C.M.L.Rev. 1347

<sup>171</sup> *Alexander Dory v Germany* (Case C-186/01) [2003] E.C.R. I-2479, [33]; for a commentary of that case, see Trybus M., “Case C-186/01, *Alexander Dory v Federal Republic of Germany*” (2003) 40(5) C.M.L.Rev. 1269; *Sirdar*, above, [18]; *Kreil*, above, [18], referring to Art.36 TFEU (formerly Art.30 EC), Art.45(3) and 72-73 TFEU (formerly Art.39(3) and 64 EC), Art.65 TFEU (formerly Art.58 EC), and Art.51-52 (formerly Art.45-46 EC); For more details on these specific exemptions, see Arrowsmith, *The Law of Public and Utilities Procurement*, above, §§4.17 and 4.31; P. Craig and G. De Búrca, *EU Law, Text, Cases and Materials*, 3<sup>rd</sup> Ed. (Oxford University Press, 2003), pp.626-672, 722-728 and 814-819

<sup>172</sup> Lenaerts K. and Van Nuffel P., *Constitutional Law of the European Union* (Sweet & Maxwell, 1999), p.267

<sup>173</sup> Trybus, *European Defence Procurement Law*, above, p.40, on the basis of *Du Pont de Nemours*, above

<sup>174</sup> *Dory*, above, [32]; *Alfredo Albore* (Case C-423/98) [2000] E.C.R. I-5965, [18], discussed in Trybus, “The EC Treaty as an instrument of European defence integration”, above; *Criminal proceedings against Aimé Richardt and Les Accessoires Scientifiques SNC* (Case C-367/89) [1991]

of public policy and public security in the light of their national needs, but those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the EU institutions.<sup>175</sup>

Measures taken by the EU Member States are not excluded in their entirety from the application of EU Law solely because they are taken in the interests of public security or national defence.<sup>176</sup> Specific exemptions contained in the EU Treaties have to be invoked.

The only articles in which the EU Treaties provide for derogations in situations which involve public security are Art.36, 45, 51-52, 65, 72-73, 346 and 347 TFEU (Formerly Art.30, 39, 45-46, 58, 64, 296 and 297 EC), which all deal with exceptional and clearly defined cases. It cannot be inferred from those articles that the EU Treaties contain an inherent general exemption excluding all measures taken for reasons of public security from the scope of EU law.<sup>177</sup> Public policy and public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society,<sup>178</sup> and aims of a purely economic nature cannot justify restricting the free movement of goods or capital, or the freedom to provide services.<sup>179</sup> Moreover, the requirements of public security cannot justify derogations from the EU Treaties rules unless the principle of proportionality is observed, which means that any derogation must remain within the limits of what is appropriate and necessary for achieving the aim considered.<sup>180</sup>

In addition, relying on one of those exemptions would not authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms that form an integral part of the general principles of EU

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E.C.R. I-4621, [22]; *Criminal proceedings against Peter Leifer, Reinhold Otto Krauskopf and Otto Holzer* (Case C-83/94) [1995] E.C.R. I-3231, [26]; *Sirdar*, above, [17]; *Kreil*, above, [17]

<sup>175</sup> *Rutili v Minister for the Interior* (Case 36/75) [1975] E.C.R. 1219, [26]-[27]; *Association Église de Scientologie de Paris and Scientology International Reserves Trust v The Prime Minister* (Case C-54/99) [2000] E.C.R. I-01335, [17]

<sup>176</sup> *Dory*, above, [30]; *Agusta Helicopters*, above, [42] – for commentaries of that case, see Heuninckx “A Note on Case *Commission v Italy*”, above and Trybus, “Case C-337/05, *Commission v Italy* (Agusta and Agusta Bell Helicopters)”, above

<sup>177</sup> *Dory*, above, [31]; *Johnston*, above, [26]; *Sirdar*, above, [16]; *Kreil*, above, [16]; *Agusta Helicopters*, above, [43]

<sup>178</sup> *Rutili*, above, [28]; *Criminal proceedings against Donatella Calfa* (Case C-348/96) [1999] E.C.R. I-11, [21]; *Église de Scientologie de Paris*, above, [17]

<sup>179</sup> *Commission v Italy* (C-260/04), above, [35]; *Deutscher Apothekerverband eV v 0800 DocMorris NV and Jacques Waterval* (C-322/01) [2003] E.C.R. I-14887, [122]; *Rutili*, above, [30] and [32]; *Église de Scientologie de Paris*, above, [17]

<sup>180</sup> *Commission v Italy* (C-260/04), above, [33]; *Albore*, above, [19]; *Johnston*, above, [38]; *Église de Scientologie de Paris*, above, [18]



law.<sup>181</sup> In particular, any person affected by a restrictive measure based on those exemptions must have access to legal redress.<sup>182</sup>

### **8.3.2. The Art.346 TFEU (ex Art.296 EC) Exemption**

We have seen in Sections 8.1.2.2 and 8.1.3.1 that the applicability of the EU public procurement directives to defence procurement is subject to Art.346 TFEU,<sup>183</sup> which is also a generic exemption from the applicability of EU law.<sup>184</sup> We will now investigate the scope of that Article, as it has a major impact on defence procurement within the EU. Article 346(1) TFEU states that:

“(a) No Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security.

(b) Any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes”.<sup>185</sup>

Moreover, “the Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958,<sup>186</sup> of the products to which the provisions of paragraph 1(b) apply”.<sup>187</sup> A loose procedure, involving the Commission’s oversight and a direct *in camera* review by the CJEU,

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<sup>181</sup> *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* (Joined Cases C-402/05 P and C-415/05 P) [2008] E.C.R. I-6351, [302]-[303]; see Art 6(1) EU

<sup>182</sup> *Heylens*, above, [14]-[15]

<sup>183</sup> Directive 2004/18/EC, above, Art.10 and Directive 2009/81/EC, above, Art.2

<sup>184</sup> Aalto, “Interpretations of Article 296”, above, p.16; on the Art.346 TFEU exemption, see further Heuninckx, “Defence Procurement”, above, pp.267-271 and Trybus M. “The Limits of European Community Competence for Defence” (2004) 9(2) E.F.A.Rev. 189

<sup>185</sup> A similarly worded exclusion can be found in the WTO Government Procurement Agreement: see Uruguay Round of Multilateral Trade Negotiations (1986-1994) – Annex 4 – Agreement on Government Procurement (WTO) (*GPA 1994*) [1994] OJ L336/273, Art.XXIII(1), which states that “nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes”, but the actual scope of this exemption is yet unclear and might be different from the Art.346 TFEU exemption: see Arrowsmith S., *Government Procurement in the WTO* (Kluwer, 2003), pp.148-150

<sup>186</sup> Decision 255/58, above

<sup>187</sup> Art.346(2) TFEU (formerly Art.296(2) EC)

exists to correct abusive uses of these provisions.<sup>188</sup> This procedure was invoked only once for an alleged infringement of Art.347 TFEU (formerly Art.297 EC), to which it also applies, and this case was later struck from the Court report.<sup>189</sup>

There have not been any CJEU ruling related to Art.346(1)(a) TFEU (formerly Art.296(1)(a) EC), and its actual scope is still relatively unclear, even though it does not seem limited by the 1958 list.<sup>190</sup> It has been argued, however, that it can probably not be invoked within the scope of at least some proceedings before the CJEU, such as Art.348 TFEU, aiming to review the use of the exemption, where secrecy should be ensured.<sup>191</sup>

The 1958 list, although never officially published, but widely available,<sup>192</sup> generally covers all ‘warlike’ or ‘hard’ defence material, but remains very general, thereby allowing diverging interpretations.<sup>193</sup> Despite broadly abusive uses of the exemption by the EU Member States,<sup>194</sup> the list was never amended, making it somewhat obsolete in the eyes of some commentators,<sup>195</sup> even though some others consider it sufficiently broad to be still up-to-date.<sup>196</sup>

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<sup>188</sup> Art.348 TFEU (formerly Art.298 EC)

<sup>189</sup> *Commission v. Greece* (Case C-120/94) [1996] E.C.R. I-1513; see Eikenberg K., “Article 296 (ex 223) EC and External Trade in Strategic Goods” (2000) 25 E.L.Rev. 116, p.123

<sup>190</sup> Aalto, “Interpretations of Article 296”, above, p.17

<sup>191</sup> Trybus M., *European Union Law and Defence Integration* (Hart, 2005), pp.163-166

<sup>192</sup> Trybus, *European Defence Procurement Law*, above, pp.14-15; Eikenberg K., “Article 296 (ex 223) EC and External Trade in Strategic Goods”, above, p.129; Trybus M., “The List of Hard Defence Products under Article 296 EC” (2003) 12(3) P.P.L.R. NA15; Written Question E-1324/01 by Bart Staes (Verts/ALE) to the Council, [2001] OJ C364E/85, but these lists do not seem to be complete; The list also circulates as a public but unpublished document of the Council: “Extract of the Council Decision 255/58 of 15 April 1958”, document 14538/4/08 Rev 4

<sup>193</sup> Trybus, *European Defence Procurement Law*, above, p.94; Eikenberg, “Article 296 (ex 223) EC and External Trade in Strategic Goods”, above, p.129: this raises problems of legal certainty

<sup>194</sup> The Challenges Facing the European Defence-Related Industry, COM(96)10, above, §3.1.1, p.14; Communication on the results of the consultation launched by the Green Paper on Defence Procurement, COM(2005)626, above, §II 3; Schmitt B. (Ed.), *European Armaments Cooperation – Core Documents*, Chaillot Paper No 59 (Institute for Security Studies, 2003), p.10; Schmitt, *The European Union and Armaments*, above, p.9; Michel and Rivière, *Rapport d'Information sur les nouveaux défis de la construction de l'Europe de la défense*, above, pp.41-42; Mezzadri, *L'ouverture des Marchés de la Défense*, above, §I.1.2

<sup>195</sup> Eikenberg, “Article 296 (ex 223) EC and External Trade in Strategic Goods”, above, p.128; Schmitt, *European Armaments Cooperation*, above, p.10; Communication on the results of the consultation launched by the Green Paper on Defence Procurement, COM(2005)626, above, §II.3; Van Eekelen, *The Parliamentary Dimension of Defence Procurement*, above, p.54

<sup>196</sup> Trybus, *European Union Law and Defence Integration*, above, p.147

In answer to arguments raised by the EU Member States arguing that ‘hard’ defence material was automatically excluded from the scope of the EC Treaty,<sup>197</sup> the CJEU confirmed that Art.346 TFEU deals with clearly defined and exceptional cases and does not lend itself to any wide interpretation.<sup>198</sup> Moreover, it does not create a general or automatic exemption,<sup>199</sup> and an EU Member State seeking to rely on Art.346 TFEU must provide evidence that it does not go beyond the limits of what is necessary for the protection of the essential interests of its security.<sup>200</sup> Nevertheless, the exemption has a general effect affecting all the EU Treaties provisions.<sup>201</sup>

Member States have, depending on the circumstances, a certain degree of discretion when adopting measures which they consider necessary to guarantee public security but, in the circumstances of the case, the measures taken must in fact have the purpose of guaranteeing public security and be appropriate and necessary to achieve that aim.<sup>202</sup>

The Art.346 TFEU exemption cannot apply to activities relating to products that are not listed in the 1958 list,<sup>203</sup> and are not intended for specific military purposes.<sup>204</sup> This does not seem to entirely exclude dual-use goods from the application of the exemption, but requires that the common market for their civilian applications not be affected by the use of the exemption. Moreover, the exemption may not be invoked for the procurement of equipment the use of which for military

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<sup>197</sup> Trybus, “Procurement for the Armed Forces”, above, p.696; Wheaton J. B., “Defence Procurement and the European Community: The Legal Provisions” (1992) 1(6) P.P.L.R. 432; Georgopoulos, *European Defence Procurement Integration*, above, p.82; Aalto, “Interpretations of Article 296”, above, pp.14 and 21; Eisenhut D., “The special security exemption of Article 296 EC: time for a new notion of “essential security interests”?” (2008) 33(4) E.L.Rev. 577

<sup>198</sup> *Commission v Spain* (Case C-414/97) [1999] E.C.R. I-5585, [21]; *Johnston*, above, [26]

<sup>199</sup> *Johnston*, above, [26]; *Sirdar*, above, [16]; *Kreil*, above, [16]

<sup>200</sup> *Agusta Helicopters*, above, [44]; *Commission v Italy (Agusta Helicopters II)* (Case C-157/06) [2008] E.C.R. I-7313, [23]; *Commission v Spain* (Case C-414/97), above, [22]; for an analysis of the case, see Trybus M., “The Recent Judgment in *Commission v. Spain* and the Procurement of Hard Defence Material” (2000) 9(4) P.P.L.R. NA99 and Trybus M., “Case Comment: On the Application of the EC Treaty to Armaments” (2000) 25 E.L.Rev. 663; Mezzadri, *L’ouverture des Marchés de la Défense*, above, p.8; Eisenhut, “The special security exemption of Article 296 EC”, above, p.579; this position has been criticised for lack of legal grounds in Bratanova E., *Legal Limits of the National Defence Privilege in European Union*, Paper 34 (Bonn International Center for Conversion, 2003), p.19

<sup>201</sup> *Fiocchi munizioni SpA v Commission* (Case T-26/01) [2003] E.C.R. II-3951, [58]-[59]

<sup>202</sup> *Sirdar*, above, [27]-[28]; *Kreil*, above, [24]-[25]

<sup>203</sup> *Fiocchi munizioni*, above, [61]

<sup>204</sup> *Agusta Helicopters*, above, [47]; *Agusta Helicopters II*, above, [26]; *Fiocchi munizioni*, above, [62]

purposes is hardly certain or only a possibility.<sup>205</sup> This reasoning seems to show that indirect civil offsets could not be justified on the basis of Art.346 TFEU.<sup>206</sup>

If the use of the exemption could distort the conditions of competition in the common market for products capable of being put to civilian use or destined for export, the Commission has to apply the review procedure of Art.348 TFEU (formerly Art.298 EC) by derogation from the usual procedures.<sup>207</sup>

The CJEU therefore clearly endorsed a restrictive interpretation of the Art.346 TFEU exemption, and assumed the power to review Member States decisions related to its application. However, not only did the CJEU leave a number of issues unsolved, but EU Member States in addition continue to ignore this case law.<sup>208</sup>

In an attempt to provide clarifications on the use of the Art.346 TFEU exemption, the Commission produced an interpretative communication on the application of the exemption to defence procurement.<sup>209</sup> Of course, such a communication is not legally binding,<sup>210</sup> but its weight is nevertheless significant.

The Commission clarified that, in its view, the 1958 list is sufficiently generic to cover new technology, but that the Art.346(1)(b) TFEU exemption could only apply to equipment developed and procured specifically for military security needs. On the other hand, Art.346(1)(a) may be invoked in relation to dual-use goods or goods to be used for non-military security purpose.<sup>211</sup>

According to the Commission, Art.346 TFEU does not provide an automatic exemption, and can only apply to measures *necessary* to protect *essential* interests of the *security* of the Member States, considered from a European perspective, and

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<sup>205</sup> *Agusta Helicopters*, above, [47]-[48]: see Heuninckx, “A Note on Case *Commission v Italy*”, above, p.NA189; *Agusta Helicopters II*, above, [26]-[28]; Aalto, “Interpretations of Article 296”, above, pp.41-42

<sup>206</sup> Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement (presented by the Commission), COM(2006)779, p.7; see Georgopoulos A., “The Commission's Interpretative Communication on the Application of Article 296 EC in the Field of Defence Procurement” (2007) 16(3) P.P.L.R. NA43; Georgopoulos A., “Revisiting Offset Practices in European Defence Procurement: The European Defence Agency's Code of Conduct on Offsets” (2011) 20(1) P.P.L.R 29

<sup>207</sup> *Fiocchi munizioni*, above, [62]-[64]

<sup>208</sup> Schmitt, *Defence Procurement in the European Union*, above, p.17; Kuechle, *The Cost of non-Europe in the Area of Security and Defence*, above, pp.42 et.seq.

<sup>209</sup> COM(2006)779, above; Georgopoulos, “The Commission's Interpretative Communication on the Application of Article 296 EC”, above; see also Schmitt, *Defence Procurement in the European Union*, above, pp.17 et.seq., for a prospective analysis of the potential impact of such interpretative communication

<sup>210</sup> See further Aalto, “Interpretations of Article 296”, above, pp.27 et.seq.

<sup>211</sup> COM(2006)779, above, §3

not those taken to protect non-essential or general economic interests, which means, for instance, that indirect offsets could not be exempted.<sup>212</sup> This view of the Commission would make sense in an EU Common Market where most Member States are also Members of NATO, but this is not the case,<sup>213</sup> even though indirect civil offsets are clearly unjustifiable on the face of Art.346 TFEU. The Commission defined a four-part test to be applied case-by-case in order to validly invoke the Art.346(1)(b) TFEU exemption.<sup>214</sup>

The Commission confirmed that the definition of the security interests of the Member States was their prerogative, but stated that it reserved the right to investigate in confidence the uses of the exemption. Within the scope of these investigations, the Member States would be required to provide the Commission with evidence of their decisions to invoke Art.346 TFEU when requested.<sup>215</sup>

The actions the Commission will take following the publication of their interpretative communication are not known, but its past actions could shed light on the future.

In one earlier state aid case, the Commission reviewed the use of the Art.346(1)(b) TFEU exemption to justify aid measures that might not have been compatible with the common market.<sup>216</sup> First, the Commission did not state that the Member State should have notified it in advance of its intention to invoke Art.346(1)(b) TFEU. It also accepted easily (on the basis of a letter from the Member State's Ministry of Defence) the argument that the aid measures were justified to maintain a minimum manufacturing capacity in the defence equipment concerned as part of the essential security interests of the Member State. However, it investigated in detail each aspect of the aid to see if any of them could adversely affect the conditions of competition in the common market regarding products not intended for specifically military purposes (e.g. uses to which funds were to be used, employment of human

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<sup>212</sup> Ibid, §4

<sup>213</sup> Aalto, "Interpretations of Article 296", above, pp.32-33

<sup>214</sup> COM(2006)779, above, §5: (1) Which essential security interest is concerned?, (2) What is the connection between this security interest and the specific procurement decision?, (3) Why is the non-application of the Public Procurement Directive in this specific case necessary for the protection of this essential security interest?, (4) Does the use of the exemption adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes?

<sup>215</sup> Ibid, §6

<sup>216</sup> Commission Decision 1999/763/EC of 17 March 1999 on the measures, implemented and proposed, by the Federal State of Bremen, Germany, in favour of Lürssen Maritime Beteiligungen GmbH & Co. KG, [1999] OJ L301/8

resources for other purposes). However, in a more recent controversy, the Commission's scrutiny of the essential security interests of the Member States was clearly more intense when it argued that the production of weapons intended for export could not be considered as coming within the essential security interests of a Member State.<sup>217</sup>

#### **8.4. Defence Procurement Initiatives within the EDA**

We have seen that, even when the EU public procurement directives do not apply, public authorities still need to abide by principles flowing from the EU Treaties when performing procurement, unless an exemption from applicability, in particular Art.346 TFEU for defence procurement, is validly invoked (See Sections 8.2 and 8.3). When this is the case, neither the directives nor the EU Treaties apply to this procurement. Studies have shown that more than 50% of defence equipment procurement performed by the EU Member States was performed outside the framework of the EU rules on public procurement because of the Art.346 TFEU exemption.<sup>218</sup> In order to provide some regulation of this type of procurement, measures were taken within the EDA.

The EDA was created to support the Council and the EU Member States in their effort to improve the EU defence capabilities in the field of crisis management and to sustain the CSDP.<sup>219</sup> To that end, its responsibilities cover capabilities development, armaments cooperation, defence industry strengthening, and research and technology.<sup>220</sup> All EU Member States, except Denmark, participate in the EDA and are referred to as 'participating Member States'.<sup>221</sup>

One of the concrete actions taken by the EDA has been the adoption of an intergovernmental voluntary and non-binding regime for defence procurement activities to which the Art.346 TFEU exemption applies. This regime has already

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<sup>217</sup> *Fiocchi munizioni*, above, [77]

<sup>218</sup> European Defence Agency Press Release, 'EU Governments Agree Voluntary Code for Cross-Border Competition in Defence Equipment Market', 21 November 2005; European Defence Agency Press Release, 'EDA Welcomes European Commission Move on Defence Procurement Rules', 6 December 2005

<sup>219</sup> Joint Action 2004/551/CFSP, above, Art.2

<sup>220</sup> Ibid, Art.5; see also Dufour, *Intra-Community Transfers of Defence Products*, above, §3.2.5; Georgopoulos, "The New European Defence Agency", above; A. De Neve, *L'Agence européenne de Défense dans le Paysage européen de la Coopération en Matière d'équipements de Défense, Sécurité & Stratégie* N° 103 (IRSD, 2009), Ch.1-2; Schmitt, *The European Union and Armaments*, above, pp.40 et seq., actually submitted a blueprint for the work of a European Armaments, Research and Capability Agency that is eerily similar to the current structure and working of the EDA

<sup>221</sup> Art.45(2) TEU; Joint Action 2004/551/CFSP, above, Recital 21 and Art.3

been discussed in detail in other publications.<sup>222</sup> Therefore, the present Section will be limited to a generic introduction of its features, pointing to those relevant for collaborative procurement.

The EDA regime is based on a voluntary and non-binding Code of Conduct aiming to increase cross-border competition in the European defence equipment market, and that could be applied by the subscribing Member States invoking the Art.346 TFEU exemption.<sup>223</sup> This Code of Conduct does not give guidelines as to the circumstances when the exemption itself could be used, or define procurement rules in any details, but sets-out a number of principles that the subscribing Member States should comply with, in particular, equal treatment of tenderers, competitive procurement except in certain cases, mutual transparency and accountability, mutual support for security of supply, and a complementary Code of Best Practice in the Supply Chain to achieve mutual benefits, especially for Small and Medium Enterprises (SME). It allows the use of offsets, which are subject to their own code of conduct, as contract award criteria.<sup>224</sup> Transparency is provided by publishing notices on an Electronic Bulletin Board.<sup>225</sup>

The Code of Conduct may be applied to all defence procurement opportunities of €1 million or more where the conditions for application of Art.346 TFEU are met, except for the procurement of research and technology, of nuclear weapons and nuclear propulsion systems, of chemical, bacteriological and radiological goods and services, of cryptographic equipment and, more significantly for the purpose of this thesis, collaborative procurement, including collaborative procurement performed through the EDA.<sup>226</sup>

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<sup>222</sup> See in particular Heuninckx, "Towards a Coherent European Defence Procurement Regime?", above; Heuninckx B., "The European Defence Agency Electronic Bulletin Board: A Survey after Two Years" (2009) 18(3) P.P.L.R. 43; Georgopoulos A., "The European Defence Agency's Code of Conduct for Armament Acquisitions: A Case of Paramnesia?", (2006) 15(2) P.P.L.R. 55; Georgopoulos A., "European Defence Agency: The New Code of Best Practice in the Supply Chain" (2006) 15(5) P.P.L.R. NA145; De Neve, *L'Agence européenne de Défense*, above, pp.71-73; European Defence Agency, *A guide to the EDA's new European Defence Equipment Market* (EDA, 2007); Heuninckx, "Defence Procurement", above, pp.280-284

<sup>223</sup> EDA Steering Board Decision on an Intergovernmental Regime to Encourage Competition in the European Defence Equipment Market, 21 November 2005; The Code of Conduct on Defence Procurement of the EU Member States Participating in the European Defence Agency, 21 November 2005, found at <http://www.eda.europa.eu/genericitem.aspx?id=153>, accessed on 31 July 2010

<sup>224</sup> EDA, *Code of Conduct on Offsets*, Brussels, 2009, at <http://www.eda.europa.eu/offsets/>, accessed on 27 December 2010

<sup>225</sup> Found at <http://www.eda.europa.eu/ebbweb/>, accessed on 31 August 2010; see Heuninckx, "The European Defence Agency Electronic Bulletin Board", above

<sup>226</sup> Georgopoulos, "The European Defence Agency's Code of Conduct", above, p.57

Therefore, the collaborative defence procurement activities of international organisations will not be covered by the Code of Conduct, despite the fact that some had advocated that this should be the case.<sup>227</sup> However, it is not certain that, if one State requests an international organisation to perform some procurement on its sole behalf, this would constitute collaborative procurement.<sup>228</sup> Even though all Member States of the international organisation usually have to agree that this procurement may be undertaken (mainly for liabilities reasons), it is doubtful whether this would be sufficient to qualify the procurement as collaborative.

## **9. The Law of International Organisations**

### **9.1. Definition of International Organisation**

The previous section was dedicated to the law applicable to defence procurement in the EU and was the first part of our summary of the legal context of collaborative defence procurement in Europe. The present section constitutes the second part of that analysis, as it summarises the part of the international law of international organisations that is relevant to this thesis.

Strangely enough, there is no commonly accepted definition of an international organisation,<sup>229</sup> and it has been argued with some reason that attempting to find an elaborate definition of the concept raises more problems than it is worth.<sup>230</sup> Therefore, we will not dwell extensively on the subject, and simply clarify that we will focus, in this thesis, on:<sup>231</sup>

*Organisations established by an international agreement, having international legal personality, whose membership consists principally of*

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<sup>227</sup> Schmitt, *Defence Procurement in the European Union*, above, p.42; Maulny, *Cooperative Lessons Learned*, above, pp.26-29

<sup>228</sup> Such as the French Roland Life Extension programme (FROLE) of the Roland ground-to-air missile, which was managed by OCCAR for the sole benefit of France

<sup>229</sup> See further White N.D., *The Law of International Organisations*, 2<sup>nd</sup> Ed. (Manchester University Press, 2005), Ch.1; Reinisch A., *International Organisations before National Courts* (Cambridge University Press, 2006), p.5; Schermer H.G. and Blokker N.M., *International Institutional Law*, 4<sup>th</sup> Ed. (Nijhoff, 2003), §§29-32; Klabbbers J., *An Introduction to International Institutional Law* (Cambridge University Press, 2006), p.7

<sup>230</sup> J.E. Alvarez, *International Organizations as Law-makers* (Oxford University Press, 2006), pp.4-17

<sup>231</sup> This definition is inspired by the Report of the ILC, 55<sup>th</sup> Session (2003), UN Doc. A/58/10, at 38; American Law Institute, *Restatement of the Law – The Foreign Relation Law of the United States*, 3<sup>rd</sup> Ed. (American Law Institute Publishers, 1987), §221; Schermer and Blokker, *International Institutional Law*, above, §33-45; White, *The Law of International Organisations*, above, pp.1-2; Klabbbers, *An Introduction to International Institutional Law*, above, pp.7-13



*States, and having a permanent institutional element with a will independent of its individual Member States.*

International organisations are subjects of international law and therefore have to comply with the applicable international law.<sup>232</sup> The term *international institutional law* has been coined to refer to the body of law that regulates the structure and operations of international organisations.<sup>233</sup> The main peculiarity of this area of international law is that it is specific to each organisation. The institutional law of an international organisation will be based on: its founding instrument, international agreements to which it is party or that apply to it, its legislative texts (internal and external), its law-creating practice, as well as general principles of law, customary international law and rules of *jus cogens* (which are capable of invalidating conflicting treaty rules), and finally judicial decisions of general application.<sup>234</sup>

## **9.2. Constitutive International Agreement**

International organisations are normally set-up by international agreements, almost always in the form of a written agreement, or treaty, even though the terminology used to call such an agreement is irrelevant.<sup>235</sup> Treaties between States are ruled by the 1969 Vienna Convention on the Law of Treaties,<sup>236</sup> which also applies to the constituent instrument of an international organisation and to any treaty adopted within an international organisation, without prejudice to any relevant rules of the organisation.<sup>237</sup>

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<sup>232</sup> International Court of Justice, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, ICJ Reports 1980, p.89

<sup>233</sup> Amerasinghe C.F., *Principles of the Institutional Law of International Organizations*, 2<sup>nd</sup> Ed. (Cambridge University Press: 2003), pp.13-15; Klabbers, *An Introduction to International Institutional Law*, above, p.2; Combacau J. and Sur S., *Droit International Public*, 7th Ed. (Montchrestien: 2006), pp.706-718

<sup>234</sup> Amerasinghe, *Principles of the Institutional Law of International Organizations*, above, pp.15-21; American Law Institute, *The Foreign Relation Law of the United States*, above, §223; Ahmed T. and Butler I., “The European Union and Human Rights: An International Law Perspective” (2006) 17(4) E.J.I.L. 771, at 776-777; Combacau and Sur, *Droit International Public*, above, pp.704-705

<sup>235</sup> Reinisch, *International Organisations before National Courts*, above, p.7; Amerasinghe, *Principles of the Institutional Law of International Organizations*, above, p.20; Schermer and Blokker, *International Institutional Law*, above, §§34-43; but see the discussion of ‘contractual’ and ‘constitutional’ treaties in White, *The Law of International Organizations*, above, pp.14-23

<sup>236</sup> Vienna Convention on the Law of Treaties of 1969, United Nations, *Treaty Series*, vol.1155, p.331; Aust A., *Modern Treaty Law and Practice* (Cambridge University Press: 2000), pp.6-13; Klabbers, *An Introduction to International Institutional Law*, above, p.83; On treaties in general, see Combacau and Sur, *Droit International Public*, above, pp.75-85

<sup>237</sup> *Ibid*, Art.5 and Art.2

A special type of international agreement is the Memorandum of Understanding (MOU), a form of ‘informal’ international agreement concluded between States that is generally considered not to be legally binding.<sup>238</sup> The agreement of the Participating States to launch a collaborative defence procurement programme is often enshrined in an MOU. The simple fact that an international agreement is called ‘MOU’ is not dispositive as to whether or not it is legally binding. An international agreement called ‘MOU’ will be binding in international law if its content reflects an intent to be bound.<sup>239</sup> Alternatively, some have argued that MOU are in fact binding treaties as soon as they contain commitments for the signatories.<sup>240</sup> Even though this position is disputed,<sup>241</sup> it seems to be supported by the International Law Commission, whose view is that the 1969 Vienna Convention also covers MOU.<sup>242</sup>

In general terms, an international agreement cannot, as such, directly create rights for private individuals, except if its object is the adoption by the contracting Parties of some definite rule creating individual rights and obligations that are enforceable in national courts. The latter has to be determined based on the intention of the Parties, which is to be ascertained from the contents of the agreement, taking into consideration the manner in which it has been applied.<sup>243</sup> When this test is not met, enforcement of international law has to be sought at the international level, and national courts are therefore usually only competent to deal with narrowly-defined issues of international law, such as immunities and jurisdiction.<sup>244</sup>

EU law is, of course, an exception to this general rule, as evidenced by the doctrine of direct effect, whereby provisions of EU law may be relied upon by individuals before national courts if they create rights for individuals and are sufficiently clear,

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<sup>238</sup> Aust, *Modern Treaty Law and Practice*, above, p.26

<sup>239</sup> Aust, *Modern Treaty Law and Practice*, above, pp.26-30 and Appendix G

<sup>240</sup> Klabbbers J., *The Concept of Treaties in International Law* (Springer: 1996); Marsia, “La Base Légale des Accords de Coopération”, above, p.8

<sup>241</sup> Aust, *Modern Treaty Law and Practice*, above, pp.41-44

<sup>242</sup> Draft Articles on the Law of Treaties with commentaries 1966, YB ILC 1966, Vol.II, p.187, at 188

<sup>243</sup> Permanent Court of International Justice, *Jurisdiction of the Courts of Danzig*, Advisory Opinion of 3 March 1928, Series B No 15, pp.17-18; Combacau and Sur, *Droit International Public*, above, p.155; For more on the doctrine of direct effect generally, see Trachtman J.P., “Bananas, Direct Effect and Compliance” (1999) 10(4) E.J.I.L. 655

<sup>244</sup> Beltem G. and Nollkaemper A., “Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation” (2003) 14(3) E.J.I.L. 569, p.570

precise and unconditional.<sup>245</sup> In addition, even though directives do not have horizontal direct effect in suits between individuals, national legislation conflicting with sufficiently clear and precise provisions of an EU directive cannot be applied in such suits (incidental effect),<sup>246</sup> and national courts are required to interpret their national law, as far as possible, in the light of the wording and purpose of EU law (indirect effect), even though *contra legem* interpretation constitutes the limit of this duty of conform interpretation.<sup>247</sup>

When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, another treaty concluded earlier or later, the provisions of that other treaty prevail. If this is not the case, and if the earlier treaty is not terminated or suspended, the earlier treaty applies to the parties to the earlier treaty that are also parties to the later treaty only to the extent that its provisions are compatible with those of the later treaty. As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.<sup>248</sup>

The principles applicable to the procurement rules of an international organisation, especially those that we will analyse in this thesis, are usually defined in their constitutive agreement, and detailed in their procurement rules, which are adopted by the organs of the organisation. Moreover, the ‘law’ generated by international organisations, which we discuss in more details below (Section 9.4), is subject to the rules of treaties interpretation.<sup>249</sup>

The founding instruments and the decisions of the non-judicial organs of an international organisation have to be interpreted in good faith in accordance with the ordinary meaning of the words in their context and in the light of the object and

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<sup>245</sup> See e.g. *Flaminio Costa v ENEL* (Case 6/64) [1964] E.C.R. 585; *N.V. Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* (Case 26/62) [1963] E.C.R. 1; *Defrenne v SABENA* (Case 43/75) [1976] E.C.R. 455; *Van Duyn v Home Office* (Case 41/74) [1974] E.C.R. 1337

<sup>246</sup> See e.g. *CIA Security International SA v Signalson SA and Securitel SPRL* (Case C-194/94) [1996] E.C.R. I-2201; *Criminal Proceedings against Rafael Ruiz Bernáldez* (Case C-129/94) [1996] E.C.R. I-1829; and *Panagis Pafitis v Trapeza Kentrikis Ellados AE* (Case C-441/93) [1996] E.C.R. I-1347; *Unilever Italia SpA v Central Food SpA* (Case C-443/98) [2000] E.C.R. I-7535; *Lemmens* (Case C-226/97) [2000] E.C.R. I-3711

<sup>247</sup> *Von Colson and Kamann*, above, [26]; *Marleasing SA v La Comercial Internationale de Alimentacion SA* (Case C-106/89) [1990] E.C.R. I-4135; *Wagner Miret v Fondo de Garantia Salarial* (Case C-334/92) [1993] E.C.R. I-6911; *Centrosteeel v Adipol* (Case C-456/98) [2000] E.C.R. I-6007

<sup>248</sup> Vienna Convention on the Law of Treaties, above, Art.30; See also P. Manzini, “The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law” (2001) 12(4) E.J.I.L. 781; Combacau and Sur, *Droit International Public*, above, p.162

<sup>249</sup> Alvarez, *International Organizations as Law-makers*, above, p.120

purpose of the organisation, as well as of the subsequent practice followed by the organisation.<sup>250</sup> Decisions have in addition to be interpreted in conformity with the organisation's founding treaty.<sup>251</sup> Importantly, subsequent practice may be found to make a treaty "evolve" when it is of sufficient weight to demonstrate that all signatories agreed to the evolution. However, subsequent practice may never be contrary to the actual text of the treaty.<sup>252</sup>

### **9.3. Legal Personality**

#### **9.3.1. Under Public International Law**

An international organisation is usually seen as an independent actor on the international stage if it has a 'separate will' from that of its Member States. This is expressed as 'having an independent international legal personality', which is usually held to mean that the organisation possesses rights, duties, powers, and liabilities at international law that are distinct from those of its Member States. Legal personality is either present or not, and is to be distinguished from the legal personality of the organisation in national legal systems, an issue that we discuss in the next section.<sup>253</sup> Legal personality gives rise to a responsibility whereby the organisation may bring international claims and be sued in international courts.<sup>254</sup>

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<sup>250</sup> International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons (WHO)*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p.66, [21]; Vienna Convention on the Law of Treaties, above, Art.31-33; see further Aust, *Modern Treaty Law and Practice*, above, pp.184-206; Amerasinghe, *Principles of the Institutional Law of International Organizations*, above, pp.39-59 and 61-65; Combacau and Sur, *Droit International Public*, above, pp.168-178; Alvarez, *International Organizations as Law-makers*, above, pp.82-100 and 120; Klabbers, *An Introduction to International Institutional Law*, above, pp.96-100

<sup>251</sup> Amerasinghe, *Principles of the Institutional Law of International Organizations*, above, pp.61-65; Alvarez, *International Organizations as Law-makers*, above, p.120

<sup>252</sup> Amerasinghe, *Principles of the Institutional Law of International Organizations*, above, p.54 and 59; White, *The Law of International Organisations*, above, pp.26-28

<sup>253</sup> International Court of Justice, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, above, pp.73, et 89-90; International Court of Justice, *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Reports 1949, p.174; White, *The Law of International Organisations*, above, pp.30 and 40-41; Schermer and Blokker, *International Institutional Law*, above, §1562-1571 and 1599; Combacau and Sur, *Droit International Public*, above, pp.711-713; Amerasinghe, *Principles of the Institutional Law of International Organizations*, above, p.78; Reinisch, *International Organisations before National Courts*, above, p.12; American Law Institute, *The Foreign Relation Law of the United States*, above, §223; Higgins R. et al., "The Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their Obligations toward Third Parties", Institut of International Law – Yearbook, volume 66-I, 1995, p.258

<sup>254</sup> International Court of Justice, *Reparations for Injuries*, above; For the case of NATO, see E. Stein and D. Carreau, "Law and Peaceful Change in a Subsystem: "Withdrawal" of France from the North Atlantic Treaty Organization" (1968) 62 A.J.I.L. 577, p.602; Higgins R. et al., "The Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their

International legal personality can be granted through the express terms of the founding treaty of the organisation, but this is often not the case (the United Nations Charter, for instance, does not include explicit provisions granting international legal personality to the UN, despite the fact that it includes provisions that grant it legal personality in the legal systems of its Member States). When the founding international agreement does not include such provisions, the existence of international legal personality will have to be determined by courts.<sup>255</sup>

In some cases, international organisations have been created that do not have an independent international legal personality.<sup>256</sup> The existence of international legal personality is therefore not always necessary to recognise an international organisation as such. Moreover, current international law doctrine tends to recognise that each organisation is considered to have an independent international legal personality, even when this is not explicitly mentioned in its founding instrument, unless there is clear evidence to the contrary.<sup>257</sup> In our definition of international organisations, above, international legal personality is therefore not an indispensable condition.

### **9.3.2. Under National Law**

As for international law, the fact that an international organisation has legal personality in a domestic legal order means that it has an existence as a subject of law within that legal order, with similar rights and duties as those flowing from its international legal personality, but this time within the relevant domestic legal order.<sup>258</sup> However, the concept of legal personality can differ substantially between countries and be applied in various ways.<sup>259</sup>

The legal personality of an international organisation in a domestic legal system can be provided for in its constituting instrument (giving it legal personality in the legal systems of its Member States). Alternatively, national courts can, for instance

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Obligations toward Third Parties” YB ILC 1995, Vol.66-I, p.258; Schermer and Blokker, *International Institutional Law*, above, §§1572-1590

<sup>255</sup> International Court of Justice, *Reparations for Injuries*, above, pp.178-179; White, *The Law of International Organisations*, above, p.32; see also the discussion in Klabbers, *An Introduction to International Institutional Law*, above, pp.52-57; Amerasinghe, *Principles of the Institutional Law of International Organizations*, above, pp.77-86

<sup>256</sup> Schermer and Blokker, *International Institutional Law*, above, §44 and Ch.11

<sup>257</sup> Schermer and Blokker, *International Institutional Law*, above, §1569; Klabbers, *An Introduction to International Institutional Law*, above, pp.55-56, supported by International Court of Justice, *Reparations for Injuries*, above

<sup>258</sup> Combacau and Sur, *Droit International Public*, above, p.713-714

<sup>259</sup> Reinisch, *International Organisations before National Courts*, above, pp.12-13

based on the principle of comity, recognise in their own legal system the existence of the organisation's legal personality in another legal system, or do the same based on international law.<sup>260</sup>

The legal personality of an international organisation under national law is a critical element: if an organisation has no legal personality under national law, it will not be able to sue or be sued before a national court.<sup>261</sup>

#### **9.4. Rule-Making Powers**

As we mentioned above, the detailed procurement rules of international organisations are usually adopted by a decision of the organs of the organisation. Those rules are almost always internal rules that have to be followed by the organisation's staff members. Moreover, the organs of the organisation make a number of decisions during the procurement process. It is therefore fundamental to ascertain the legal status of the decisions made by the organs of an international organisation.

International organisations are subjects of international law, but do not, unlike States, possess a general competence. International organisations are governed by the *principle of speciality*: they are invested with 'powers' by the States that create them.<sup>262</sup> International organisations have no competence to determine their own competences.<sup>263</sup> The competences of an international organisation are limited to the powers expressly granted to it in its constitutive instrument,<sup>264</sup> customary powers,<sup>265</sup> and the implied powers that are conferred upon it by necessary

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<sup>260</sup> Klabbers, *An Introduction to International Institutional Law*, above, pp.49-52; Combacau and Sur, *Droit International Public*, above, p.714; Amerasinghe, *Principles of the Institutional Law of International Organizations*, above, pp.69-77; Schermer and Blokker, *International Institutional Law*, above, §§1591-1598

<sup>261</sup> Wellens K., *Remedies Against International Organisations* (Cambridge University Press, 2002), p.115

<sup>262</sup> International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons (WHO)*, above, [25]

<sup>263</sup> Schermer and Blokker, *International Institutional Law*, above, §209

<sup>264</sup> Permanent Court of International Justice, *Jurisdiction of the European Commission of the Danube*, Advisory Opinion of 8 December 1927, Series B No.14, p.64; International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons (WHO)*, above, [25]; see Sarooshi D., *International Organizations and their Exercise of Sovereign Power* (Oxford University Press, 2005), Ch.2; Schermer and Blokker, *International Institutional Law*, above, §209; White, *The Law of International Organisations*, above, pp.80-83; Klabbers, *An Introduction to International Institutional Law*, above, pp.63-67

<sup>265</sup> International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons (WHO)*, above, [21]; Vienna Convention on the Law of Treaties, above, Art.31; Schermer and Blokker, *International Institutional Law*, above, §232; White, *The Law of International Organisations*, above, pp.26-28; Amerasinghe, *Principles of the Institutional Law of International Organizations*, above, p.50

implication as being essential to the performance of its duties (functional necessity).<sup>266</sup>

Action taken by an international organisation outside the scope of its powers are considered *ultra vires*, or beyond the scope of the organisation's competence, and therefore unlawful.<sup>267</sup> However, in line with the implied powers doctrine, when the organisation takes actions that are considered appropriate for the fulfilment of one of its stated purposes, the presumption is that such actions are not *ultra vires* the organisation.<sup>268</sup> When a decision of an international organisation is found to be *ultra vires*, courts will usually declare the decision null and void, even though other remedies, such as money damages, are sometimes granted, especially in staff cases.<sup>269</sup>

Almost every international organisation has the power to make 'decisions' that enshrine the results of the debates of its organs.<sup>270</sup> Those decisions can be legally binding or not depending on the case,<sup>271</sup> but legally binding decisions bind both the organisation and its Member States including, when the decision-making process

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<sup>266</sup> International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons (WHO)*, above, [25]; for a discussion of the case, see Akande D., "The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice" (1998) 9 E.J.I.L. 473, pp.443 et.seq.; Permanent Court of International Justice, *Competence of the ILO to Regulate Incidentally the Personal Work of the Employer*, Advisory Opinion of 23 July 1926, Series B No.13, p.18 (applying this principle to the International Labour Organisation); International Court of Justice, *Reparations for Injuries*, above, p.182 (applying this principle to the United Nations); International Court of Justice, *Effect of Award of Compensation made by the UN Administrative Tribunal*, Advisory Opinion of 13 July 1954, ICJ Reports 1956, p.47; Schermer and Blokker, *International Institutional Law*, above, §§232-236; Klabbers, *An Introduction to International Institutional Law*, above, pp.67-81; White, *The Law of International Organisations*, above, pp.83-89

<sup>267</sup> Schermer and Blokker, *International Institutional Law*, above, §§206-208; Sarooshi, *International Organizations and their Exercise of Sovereign Power*, above, p.108; Amerasinghe, *Principles of the Institutional Law of International Organizations*, above, Ch.7

<sup>268</sup> International Court of Justice, *Certain Expenses of the United Nations*, Advisory Opinion of 20 July 1962, ICJ Report 1963, p.151, at 168; Schermer and Blokker, *International Institutional Law*, above, §207; Klabbers, *An Introduction to International Institutional Law*, above, p.70

<sup>269</sup> Amerasinghe, *Principles of the Institutional Law of International Organizations*, above, pp.208-216; Sarooshi, *International Organizations and their Exercise of Sovereign Power*, above, p.108 (citing the case of the regulation of tobacco advertising by the EC); Klabbers, *An Introduction to International Institutional Law*, above, pp.196-200; Schermer and Blokker, *International Institutional Law*, above, §§911-916

<sup>270</sup> The actual definition of the word "decision" is not always clear: see Schermer and Blokker, *International Institutional Law*, above, §§706 and 1322

<sup>271</sup> Schermer and Blokker, *International Institutional Law*, above, §706 and 924; Alvarez, *International Organizations as Law-makers*, above, p.141; Amerasinghe, *Principles of the Institutional Law of International Organizations*, above, p.173-175; Klabbers, *An Introduction to International Institutional Law*, above, pp.202 et.seq

does not require unanimity, those who voted against it.<sup>272</sup> Of course, decisions of an international organisation must fall within the scope of its powers, and within those of the organ making the decision, in order not to be found *ultra vires* and therefore void.<sup>273</sup> Especially, the constitutive instrument of the organisation should provide the organisation with the power to make binding decisions for those decisions to be adopted,<sup>274</sup> even though it has been argued that such a power can also be implied.<sup>275</sup> As we explained above, this ‘law’ generated by international organisations is generally subject to the rules of treaties interpretation.<sup>276</sup> Adoption of the decision can be by consensus, or by voting, with adoption requiring either unanimity or some form of majority.<sup>277</sup>

The detailed procurement rules of international organisations are almost always internal rules that have to be followed by the organisation’s staff members. The internal rules of the organisation may include, as a minimum, its rules of procedure, of membership, the creation, membership and functioning of its organs, the budget and financing of the organisation, administrative regulations, and any other rule as defined in the constituting agreement of the organisation.<sup>278</sup> It is interesting to note that it seems that no authors refer to procurement rules among the internal rules of organisations.

Even though internal rules are clearly binding on the organs of the organisation – including the Member States when they sit in these organs – they will not always bind the organisation itself, or its Member States in their individual capacity outside of the organisation. This will depend on the organisation, its procedures and the rule concerned. Moreover, the organ adopting the internal rules is usually still free to modify them or decide on a deviation.<sup>279</sup>

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<sup>272</sup> International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, ICJ Reports 1971, p.16, [115]-[116]

<sup>273</sup> International Court of Justice, *Presence of South Africa in Namibia*, above, [115]-[116]; Schermer and Blokker, *International Institutional Law*, above, §§708 and 920; Alvarez, *International Organizations as Law-makers*, above, p.120-121; Klabbers, *An Introduction to International Institutional Law*, above, pp.196-200

<sup>274</sup> Schermer and Blokker, *International Institutional Law*, above, §708; White, *The Law of International Organisations*, above, p.162

<sup>275</sup> Alvarez, *International Organizations as Law-makers*, above, p.141

<sup>276</sup> Alvarez, *International Organizations as Law-makers*, above, p.120

<sup>277</sup> Schermer and Blokker, *International Institutional Law*, above, §§771-887

<sup>278</sup> Schermer and Blokker, *International Institutional Law*, above, §1201; Klabbers, *An Introduction to International Institutional Law*, above, p.200

<sup>279</sup> Schermer and Blokker, *International Institutional Law*, above, §§1203-1204



Some decisions of international organisations are only intended to have external effects, but rules and decisions of an international organisation that are primarily intended to have internal effects can also have external effects.<sup>280</sup> For instance, decisions adopting procurement rules and those made in the course of the procurement processes, such as contract award decisions, which obviously affect candidates, tenderers and contractors, are good example of internal decisions with external effect.

Specifically, organisations whose role is not entirely administrative may engage in what is called operational activities, which are those that relate to the functions and achievement of the aims of the organisation.<sup>281</sup> The distinction between “administrative” and “operational” activities is not always easy to make,<sup>282</sup> but in the case of collaborative defence procurement organisations, administrative activities would include for instance those required for the coordination of the policy of their Member States, the adoption of internal rules, and to ensure the good internal working of the organisation, whilst operational activities would cover those related to the management of the collaborative procurement programmes under their responsibility. It is with operational procurement activities that this thesis is concerned, as administrative procurement does not fit within our definition of defence procurement.

## **9.5. Financing**

The expenditures of international organisations are usually subdivided between “administrative” and “operational” expenditures depending on the kind of activities they intend to cover. Administrative expenditures cover the costs of running the organisation, such as staff wages and purchase of office equipment. Operational expenditures cover the costs of projects performed by the organisation to achieve its aims, such as economic assistance or peacekeeping.<sup>283</sup> As far as procurement

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<sup>280</sup> Alvarez, *International Organizations as Law-makers*, above, p.122-139 and 143-144; Schermer and Blokker, *International Institutional Law*, above, §1206; White, *The Law of International Organisations*, above, p.159

<sup>281</sup> Amerasinghe, *Principles of the Institutional Law of International Organizations*, above, p.164

<sup>282</sup> Schermer and Blokker, *International Institutional Law*, above, §1208; Alvarez, *International Organizations as Law-makers*, above, p.143; Combacau and Sur, *Droit International Public*, above, p.722; Amerasinghe, *Principles of the Institutional Law of International Organizations*, above, p.164, calls administrative acts “institutional” or “organisational” acts; see also the ruling in International Court of Justice, *Certain Expenses of the United Nations*, Advisory Opinion of 20 July 1962, ICJ Report 1963, p.151

<sup>283</sup> International Court of Justice, *Certain Expenses of the United Nations*, above; see the discussion of the case in Amerasinghe, *Principles of the Institutional Law of International Organizations*, above,

activities are concerned, the renting of facilities and the procurement of office equipment would be administrative expenditures, whilst the procurement of military equipment for the benefits of the Member States' armed forces will be operational expenditures.

Expenditures of international organisations are funded through income from various sources, the largest part of which usually being mandatory contributions from its Member States, the sharing of which amongst the Member States varies between organisations.<sup>284</sup> Other means of financing include gifts (usually not applicable to collaborative defence procurement organisations), income from financial sources such as interests, or incomes generated by the organisation itself, such as payments for services rendered.<sup>285</sup>

## **9.6. Privileges and Immunities**

We saw above that the legal personality of an international organisation in the legal system of its Member States gives it rights and obligations such as the power to bring claims or be sued. As a generic principle, international organisations are liable under national law for their own unlawful conduct.<sup>286</sup> However, international organisations are usually granted some form of privileges and immunities that alter this generic rule.

The distinction between 'privileges' and 'immunities' is sometimes blurred, even in the instruments granting the privileges and immunities.<sup>287</sup> In general terms, 'privileges' release the organisation from some obligations, rendering a legal provision inapplicable to it, whilst 'immunities' prevent the adjudication of the applicable laws against the organisation in the courts that would otherwise have

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p.365-375; Schermer and Blokker, *International Institutional Law*, above, §938; Klabbers, *An Introduction to International Institutional Law*, above, p.131

<sup>284</sup> Schermer and Blokker, *International Institutional Law*, above, §§966 et seq.; Amerasinghe, *Principles of the Institutional Law of International Organizations*, above, pp.359 et seq.

<sup>285</sup> Schermer and Blokker, *International Institutional Law*, above, §§1039 et seq.; Amerasinghe, *Principles of the Institutional Law of International Organizations*, above, p.364; Klabbers, *An Introduction to International Institutional Law*, above, pp.140 et seq.

<sup>286</sup> B. Malmendier, "The liability of international development banks in procurement proceedings: the example of the International Bank for Reconstruction and Development (IBRD), the European Bank for Reconstruction and Development (EBRD) and the Inter-American Development Bank (IADB)" (2010) 19(4) P.P.L.R. 135, at 140

<sup>287</sup> American Law Institute, *The Foreign Relation Law of the United States*, above, §467, comment a; Reinisch, *International Organisations before National Courts*, above, p.13; The OCCAR Convention, above, Annex I is titled "Privileges and Immunities" and lists those without making the distinction between the two; Schermer and Blokker, *International Institutional Law*, above, §323

jurisdiction.<sup>288</sup> Privileges could be seen as exemptions from a State's jurisdiction to prescribe, and immunities as exemptions from the State's jurisdiction to adjudicate and/or jurisdiction to enforce.<sup>289</sup>

A privilege would for instance exempt an organisation from compliance with the laws of direct taxation or from search and seizures by the local law enforcement agencies (inviolability of its premises and assets). Immunities usually include immunity from jurisdiction (a limitation of the adjudicatory power of national courts) and from execution of judgment (a restriction on the enforcement powers of the State),<sup>290</sup> extending sometimes to immunity from 'every form of legal process'.<sup>291</sup> Immunities do not, however, free their beneficiary from complying with applicable law.<sup>292</sup>

Privileges and immunities are important for the discussions held in this thesis, as privileges could exempt an international organisation from compliance with procurement law (see our discussion in Section 11), and immunities could affect the remedies available to economic operators involved in the procurement process (an issue discussed in Section 12).

Those privileges and immunities are usually found in the constituting instrument of each organisation or in a separate international agreement. However, they are also occasionally granted when not expressly mentioned in an international agreement, such as by specific national legislation, or by customary international law (in which case we will speak about *customary privileges* or *immunities*).<sup>293</sup> Because of that,

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<sup>288</sup> Schermer and Blokker, *International Institutional Law*, above, §1610-1612

<sup>289</sup> Reinisch, *International Organisations before National Courts*, above, p.14; American Law Institute, *The Foreign Relation Law of the United States*, above, Part IV, Ch.1-3

<sup>290</sup> A. Reinisch, "European Court Practice Concerning State Immunity from Enforcement Measures" (2006) 17(4) E.J.I.L. 803; Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States" (1951) 28 BYIL 220

<sup>291</sup> NAMS0 Charter 2nd Revision [PO/2000/167, 30 August 2000] approved by the NATO Council on 15 September 2000 (Action Sheet to PO/2000/167, 27 September 2000), §III.8, and Agreement On the Status of the North Atlantic Treaty Organization, National Representatives And International Staff, 20 September 1951 (*Ottawa Agreement*), Art.V

<sup>292</sup> J. Foakes and E. Wilmschurst, "U.N. Convention on Jurisdictional Immunities of States and Their Property" (2006) 7(2) B.L.I. 105; Schermer and Blokker, *International Institutional Law*, above, §1612; Reinisch, *International Organisations before National Courts*, above, p.14

<sup>293</sup> Schermer and Blokker, *International Institutional Law*, above, §§325 and 1601-1609; American Law Institute, *The Foreign Relation Law of the United States*, above, §467, Reporter's Note 4 and Comments a and b; Klabbers, *An Introduction to International Institutional Law*, above, pp.147 155; Amerasinghe, *Principles of the Institutional Law of International Organizations*, above, p.315

the law of privileges and immunities of international organisations is difficult to analyse in general terms and is often specific to each international organisation.<sup>294</sup>

Customary international law is the body of international law binding on all States that derives from the practice of States themselves, accompanied by legal opinion, that is sufficiently widespread within the international community and observed with the required consistency for a sufficient duration under the belief that the practice is obligatory under international law. It may emerge without express consent of all States concerned.<sup>295</sup>

For States, jurisdictional immunity is not absolute: it is usually only granted for acts of *iure imperii* (performed by the State in sovereign authority), and not for acts of *iure gestionis* (performed by the State as a private person), whilst immunity from execution is prevailing only granted for property serving a sovereign purpose.<sup>296</sup> Likewise, privileges and immunities of international organisations are usually considered as not absolute (even though the jurisprudence on that topic is sometimes confusing):<sup>297</sup> they are granted only because it is generally recognised that domestic laws and courts should not be used as a lever to affect the proper functioning and independence of the organisation.<sup>298</sup> Therefore, they have to be interpreted restrictively and are usually held to apply only to the ‘functional acts’ of the organisation: those that are related to its function or mission.<sup>299</sup> The test used for upholding a privilege or granting immunity to an international organisation is therefore prevailing whether the privilege or immunity is necessary for the

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<sup>294</sup> Klabbers, *An Introduction to International Institutional Law*, above, p.155

<sup>295</sup> Bobbit P., “Public International Law”, in Patterson D., Ed., *A companion to Philosophy of Law and Legal Theory* (Blackwell: 1999), p.109; Combacau and Sur, *Droit International Public*, above, pp.54-74; White, *The Law of International Organisations*, above, p.24; Akehurst, “Custom as a Source of International Law” (1974–75) BYbIL 47, p.53; Ahmed and Butler, “The European Union and Human Rights”, above, p.778

<sup>296</sup> Reinisch, “European Court Practice Concerning State Immunity from Enforcement Measures”, above, p.807; American Law Institute, *The Foreign Relation Law of the United States*, above, §451

<sup>297</sup> Reinisch, *International Organisations before National Courts*, above, pp.391-392; Schermer and Blokker, *International Institutional Law*, above, §1611; Wellens, *Remedies Against International Organisations*, above, p.123; American Law Institute, *The Foreign Relation Law of the United States*, above, §467, Reporter’s Note 4

<sup>298</sup> Combacau and Sur, *Droit International Public*, above, p.715; Schermer and Blokker, *International Institutional Law*, above, §§1602, 1608 and 1610; American Law Institute, *The Foreign Relation Law of the United States*, above, §467, Comment c; Reinisch, *International Organisations before National Courts*, above, pp.14-15 argues that, whilst this principle is true, it should not be read as providing a broad range of customary privileges to international organisations

<sup>299</sup> Reinisch, *International Organisations before National Courts*, above, p.342; Schermer and Blokker, *International Institutional Law*, above, §1608

fulfilment of the organisation's functions and purposes.<sup>300</sup> This is the principle of 'functional necessity', which seems to be quite widely recognised.<sup>301</sup>

The privileges and immunities of international organisations are usually widely upheld by courts, with only few exceptions, as long as the relevant acts of the organisation are considered necessary to accomplish its functions.<sup>302</sup> Therefore, in order to mitigate the injurious effects of its immunities towards third parties, an international organisation may waive its immunity from jurisdiction, even though a judgment against it would then still be unenforceable because of its immunity from execution of judgment as well as the inviolability of its premises and assets. Alternatively, the organisation can provide for forums for the settlement of disputes, which are very often arbitral tribunals or internal claims boards within the organisation itself.<sup>303</sup>

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<sup>300</sup> Reinisch, *International Organisations before National Courts*, above, p.206; Klabbers, *An Introduction to International Institutional Law*, above, pp.146-149; Schermer and Blokker, *International Institutional Law*, above, §324; American Law Institute, *The Foreign Relation Law of the United States*, above, §467 and Reporter's Note 4; Amerasinghe, *Principles of the Institutional Law of International Organizations*, above, pp.321-323

<sup>301</sup> Reinisch, *International Organisations before National Courts*, above, p.331 and 342; Klabbers, *An Introduction to International Institutional Law*, above, pp.149-153; Schermer and Blokker, *International Institutional Law*, above, §1608

<sup>302</sup> D. Ruzié, *Droit International Public*, 13th Ed. (Dalloz: 1997), pp.158 et seq.; American Law Institute, *The Foreign Relation Law of the United States*, above, §467; Schermer and Blokker, *International Institutional Law*, above, §1610; Amerasinghe, *Principles of the Institutional Law of International Organizations*, above, pp.323 et seq.; Wellens, *Remedies Against International Organisations*, above, pp.114-125

<sup>303</sup> Combacau and Sur, *Droit International Public*, above, p.715; Schermer and Blokker, *International Institutional Law*, above, §1612; Reinisch, *International Organisations before National Courts*, above, p.266; Amerasinghe, *Principles of the Institutional Law of International Organizations*, above, p.328



## **Chapter 4 – The Law Applicable to the Procurement of International Organisations**

### **10. Generic Applicability of Domestic and EU Law**

#### **10.1. Applicability of Domestic Law**

Having discussed the legal context of collaborative defence procurement, we now enter the substantive part of this thesis, discussing the first set of our research questions, namely the applicability of domestic and EU law in general to international organisations (Section 10), the applicability of public procurement law to international organisations, especially in the field of defence (Section 11), and the impact of the immunities of international organisations on their procurement activities (Section 12), before summarising the answers to our first set of research questions (Section 13).

As a general principle of international law, most rules of domestic law, especially the law of the State in which organisations have their headquarters or conduct other activities, are applicable to international organisations in the same way as to other subjects within the national jurisdiction as long as they are not excluded, even if the organisations are immune from legal process to enforce these laws. Likewise, international organisations are liable under national law for their own unlawful conduct, the applicable law being the law of the place where the act was committed, often the headquarters of the organisation.<sup>304</sup> It is generally recognised, however, that it should not be possible to use domestic laws as a lever to affect the proper functioning and independence of the organisation.<sup>305</sup>

Therefore, as we have seen in Section 9.6, international organisations are granted ‘privileges’ that release the organisation from the obligations imposed by some provisions of domestic law but, through the principles of functional necessity,

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<sup>304</sup> Malmendier, “The liability of international development banks in procurement proceedings”, above, at 140-141; Amerasinghe, *Principles of the Institutional Law of International Organizations*, above, p.465; Wellens, *Remedies Against International Organisations*, above, p.160

<sup>305</sup> Combacau and Sur, *Droit International Public*, above, p.715; Schermer and Blokker, *International Institutional Law*, above, §1602, 1608 and 1610; American Law Institute, *The Foreign Relation Law of the United States*, above, §467, Comment c; Reinisch, *International Organisations before National Courts*, above, pp.14-15 argues that, whilst this principle is true, it should not be read as providing a broad range of customary privilege to international organisations

those privileges only apply to the acts that are related to the organisation's function or mission.<sup>306</sup> In addition, even though international organisations are also usually granted immunities, the latter do not provide exemptions from compliance with the applicable law.<sup>307</sup>

Therefore, domestic law will, in general terms, apply to international organisations, subject to their privileges. We will analyse in Section 11.1 the specific case of domestic public procurement law, but we must now consider the case of EU law.

## **10.2. Applicability of EU Law**

### ***10.2.1. Obligations of International Organisations***

It has often been assumed that international organisations created outside the EU framework were not subjected to EU law at all.<sup>308</sup> Under that line of reasoning, as international organisations are, under international law, legal subjects different from the EU and not party to the EU Treaties, they cannot be bound by decisions made by the EU, including EU legislation. This is an application of the generic international law principle that treaties are only binding on their parties.<sup>309</sup> Even if EU Member States could incur individual liability for breaching their EU law obligations by granting powers to an international organisation in such a way that

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<sup>306</sup> Klabbers, *An Introduction to International Institutional Law*, above, pp.146 et.seq.; Schermer and Blokker, *International Institutional Law*, above, §§1608, 1610-1612; Reinisch, *International Organisations before National Courts*, above, p.342;

<sup>307</sup> See for instance the analysis of State immunity made in Foakes and Wilmshurst, "U.N. Convention on Jurisdictional Immunities of States and Their Property", above; Schermer and Blokker, *International Institutional Law*, above, §1612; American Law Institute, *The Foreign Relation Law of the United States*, above, §467, Comment c

<sup>308</sup> This seems to be the position of Eurocontrol: *SELEX Sistemi Integrati SpA v Commission* (Case T-155/04) [2006] E.C.R. II-4797, [41]; *SELEX Sistemi Integrati SpA v Commission* (Case C-113/07 P) (*SELEX II*) [2009] E.C.R. I-2207, [56] and [58]; of France: *Livre Vert sur les Marchés Publics de Défense*, No JMD/jf/544, MICA/182/2005 (Représentation Permanente de la France Auprès de l'Union Européenne, 2005), pp.4-5; but probably not of the UK: *UK Government Response to the Commission Green Paper on Defence Procurement* (United Kingdom Permanent Representation to the European Union, 2005), p.7, which, by arguing that defence procurement contracts for 'hard' defence material concluded by an international organisations could fit within the Art.346 TFUE exemption, implicitly agrees that EU law would otherwise apply to the organisation's activities, and not of the Netherlands: *COM (2004)608 DEF.*, *Groenboek Overheidsopdrachten op Defensiegebied (Reactie Nederland)* (2005), p.7, or Spain: *Spanish Ministry of Defence Answers to Green Paper Defence Procurement Brussels, 19.7.2004 com(2004) 608 final* (2005), p.4

<sup>309</sup> Vienna Convention on the Law of Treaties, above, Art.26 and 34; Aust, *Modern Treaty Law and Practice*, above, Ch.14; Vincenzi C. and Fairhurst J., *Law of the European Community*, 3<sup>rd</sup> Ed. (Pearson: 2002), pp.180 et.seq.; Kaczorowska A., *EU Law for Today's Lawyers* (Old Bailey Press, 2000), Ch.6; Alvarez, *International Organizations as Law-makers*, above, p.120



prevents them from fulfilling these obligations, this would not imply that the organisation itself should be subject to these obligations.<sup>310</sup>

Even though this point of view is correct when reference is made to ordinary treaties, the EU Treaties are a particular case. In contrast with other international agreements, they have created their own legal system that penetrates the national legal order of its Member States, as evidenced by the doctrines of supremacy, direct applicability and direct effect of EU law.<sup>311</sup> Therefore, their impact on international organisations could differ from that of other treaties.

The number of cases in which the CJEU has been confronted to the status of international organisations is very small.<sup>312</sup> However, despite the fact that the Court has never explicitly stated that EU law, in principle, applied to international organisations, it held that the question whether specific rules of EU law may be relied upon against an international organisation has to be answered based on the substance of each case.<sup>313</sup> The CJEU has in fact a few times applied EU law to international organisations or their staff members. In competition law cases, the Court proceeded to determine if EU competition law applied to the international organisation involved in the suit by following the same legal reasoning it applies to determine the status of any body under EU competition law, without considering the status of the party as an international organisation to be, in itself, an issue affecting the result.<sup>314</sup>

Nevertheless, the CJEU also ruled that EU law must be interpreted, and its scope limited, in the light of the relevant rules of international law, including customary international law.<sup>315</sup> Rules of international law are binding on the EU and form part

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<sup>310</sup> Ahmed and Butler, “The European Union and Human Rights”, above, at 788

<sup>311</sup> As articulated in *Costa v ENEL*, above; *van Gend en Loos*, above; Craig and De Búrca, *EU Law, Text, Cases and Materials*, above, pp.178-179

<sup>312</sup> The CJEU held, for instance, that employees of international organisations retain their status of workers as defined in the EU Treaties, and that EU law on the free movement of workers would therefore apply: *GBC Echternach and A. Moritz v Minister van Onderwijs en Wetenschappen* (Joined Cases 389/87 and 390/87) [1989] E.C.R. 723, [11]; *Hugo Schmid v Belgian State, represented by the Minister van Sociale Voorzorg* (Case C-310/91) [1993] E.C.R. I-3011, [20]; *Angelo Ferlini v Centre hospitalier de Luxembourg* (Case C-411/98) [2000] E.C.R. I-8081, [42]; *Georgios Alevizos v Ypourgos Oikonomikon* (Case C-392/05) [2007] E.C.R. I-3505, [72]; The CJEU reviewed the applicability of EC Competition Law to an international organisation in *SAT Fluggesellschaft mbH v European Organisation for the Safety of Air Navigation (Eurocontrol)* (Case C-364/92) [1994] E.C.R. I-43; *SELEX*, above, *SELEX II*, above

<sup>313</sup> *SAT v Eurocontrol*, above, [11]; *SELEX II*, above, [62]

<sup>314</sup> *SAT v Eurocontrol*, above; *SELEX*, above; *SELEX II*, above

<sup>315</sup> *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp.* (Case C-286/90) [1992] E.C.R. I-06019, [9]-[10]; *A. Racke GmbH & Co. v Hauptzollamt Mainz* (Case C-162/96)

of the EU legal order, and the EU must comply with those rules when adopting EU law.<sup>316</sup> Therefore, even though applicability of EU law to an international organisation cannot be excluded *a priori* and must be analysed case-by-case based on the contents of the EU substantive law itself, this analysis also has to consider the relevant rules of international law.<sup>317</sup>

International law, both treaties law and customary international law, widely recognises the privileges and immunities of international organisations (as we will discuss further in Section 12.2),<sup>318</sup> and it is therefore likely that EU law, just as national law, would have to be applied in light of the privileges granted to international organisations (either in their founding agreement, by custom, or otherwise).

This would mean that, as a generic principle, the applicability of EU law to international organisations would not be excluded, but that it would have to be ascertained based on the EU law provisions concerned, but also on the basis of the relevant provisions of international law, such as the privileges and immunities of the organisations. This is in fact the same conclusion as for domestic law.

### **10.2.2. Obligations of EU Member States**

We have seen in Section 9.2 that international organisations are created by international agreements. We must therefore analyse the relationship between the obligations of States as Members of the EU and their obligation under other international agreements. This relationship is ruled by Art.351 TFEU (formerly Art.307 EC).<sup>319</sup>

Under international law, an earlier treaty applies only to the parties to the earlier treaty that are also parties to a later treaty to the extent that its provisions are compatible with those of the later treaty. As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are

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[1998] E.C.R. I-03655, [45]; Ahmed and Butler, “The European Union and Human Rights”, above, at 777; B. Kunoy and A. Dawes, “Plate Tectonics in Luxembourg: The *Ménage à Trois* between EC Law, international law, and the European Convention of Human Rights following the UN Sanctions Cases” (2009) 46(1) C.M.L.Rev. 73, p.84

<sup>316</sup> *Racke*, above, [45]-[46]; *Kadi and Al Barakaat*, above, [291]

<sup>317</sup> Kunoy and Dawes, “Plate Tectonics in Luxembourg”, above, pp.99 and 103

<sup>318</sup> American Law Institute, *The Foreign Relation Law of the United States*, above, §467, comments a and d, and reporter’s notes 1 and 2

<sup>319</sup> See also the discussion of that Article in Lenaerts and Van Nuffel, *Constitutional Law of the European Union*, above, pp.559 et.seq. and Ahmed and Butler, “The European Union and Human Rights”, above, pp.783 et.seq.

parties governs their mutual rights and obligations. However, when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.<sup>320</sup> Art.351 TFEU is the embodiment of the latter subordination clause.

The EU Treaties may not adversely affect the rights and obligations of EU Member States in relation to *third countries* which arise from agreements concluded *before* 1958<sup>321</sup> or, as the case may be, before their accession to the EU,<sup>322</sup> and the institutions of the EU may not impede the performance of those obligations, even though they are not bound by those prior agreements.<sup>323</sup> Likewise, an EU Member State may not simply rely on an EU Treaties principle in order to evade performance of its obligations under an earlier international agreement.<sup>324</sup>

However, EU Member States parties to an international agreement concluded before 1958 or their accession to the EU are under a duty not to enter into any commitment within the framework of that agreement that could hinder the EU in carrying out its tasks, but also to proceed by common action within the framework of that agreement.<sup>325</sup> When an international agreement allows, but does not require, an EU Member State to adopt a measure contrary to EU law, the Member State must refrain from adopting such a measure.<sup>326</sup>

In addition, Art.351 TFEU does not authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms. The Article may in no circumstances permit any challenge to the principles that form part of the very foundations of the EU legal order, one of which is the protection of

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<sup>320</sup> Vienna Convention on the Law of Treaties, above, Art.30; See also Manzini, “The Priority of Pre-Existing Treaties of EC Member States”, above

<sup>321</sup> *Commission v Italy* (Case 10/61) [1962] E.C.R. 1, §II.B; *The Queen v SE.C.R.etary of State for Home Department, ex parte Evans Medical Ltd and Macfarlan Smith Ltd* (Case C-324/93) [1995] E.C.R. I-563, [27]; *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England* (Case C-124/95) [1997] E.C.R. I-81, [56]; *Budějovický Budvar, národní podnik v Rudolf Ammersin GmbH* (Case C-216/01) [2003] E.C.R. I-13617, [164], [173]; *Ahmed Ali Yusuf and Barakaat International Foundation v Council and Commission* (Case T-306/01) [2005] E.C.R. II-3533, [236]-[237]; *Yassin Abdullah Kadi v Council and Commission* (Case T-315/01) [2005] E.C.R. II-3649, [185]-[187]

<sup>322</sup> *Commission v Finland* (Case C-118/07) [2009] E.C.R. I-10889, [27]; *Commission v Austria* (Case C-205/06) [2009] E.C.R. I-1301, [33]; Manzini, “The Priority of Pre-Existing Treaties of EC Member States”, above, at2

<sup>323</sup> *Attorney General v Juan C. Burgoa* (Case 812/79) [1980] E.C.R. 2787, [11]; see also Van Raepenbusch S., *Droit Institutionnel de l’Union et des Communautés européennes*, 2<sup>nd</sup> Ed. (De Boek, 1998), pp.308 et.seq.

<sup>324</sup> *Criminal proceedings against Jean-Claude Levy* (Case C-158/91) [1993] E.C.R. I-4287, [17]

<sup>325</sup> *Cornelis Kramer and others* (Joined Cases 3, 4 and 6/76) [1976] E.C.R. 1279, [44]-[45]; Manzini, “The Priority of Pre-Existing Treaties of EC Member States”, above, p.786

<sup>326</sup> *Evans Medical*, above, [32]; *Centro-Com*, above, [60]

fundamental rights.<sup>327</sup> Some even think that the CJEU could soon start subjecting the validity of customary international law to the respect of the constitutional principles of EU law.<sup>328</sup>

Moreover, EU Member States have the obligation to take all appropriate steps to eliminate incompatibilities with EU law in prior international agreements.<sup>329</sup> An incompatibility will be found where, first, the international agreement does not contain provisions allowing the EU Member State concerned to meet its rights and obligations under EU law and, second, there is also no international law mechanism which allows meeting those rights and obligations despite the agreement's provisions.<sup>330</sup> Even though EU Member States may choose the appropriate means of rendering the agreement compatible with EU law, an obligation to denounce an agreement cannot be excluded if an EU Member State encounters difficulties which make the adjustment of the agreement impossible, as long as a denunciation is possible under international law.<sup>331</sup> It has been argued that the obligation of cooperation between the EU Member States in that respect goes further than the generic obligation found in Art.4(3) of the Treaty on European Union (TEU),<sup>332</sup> but it is not entirely clear what 'appropriate steps' EU Member States have the obligation to take to bring the international agreement in line with EU law.<sup>333</sup>

The previous paragraphs concerned international agreements concluded before 1958 or the accession of the EU Member State concerned to the EU. In addition, EU Member States may not, after 1957, conclude international agreements in matters that are within the exclusive competence of the EU without specific

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<sup>327</sup> *Kadi and Al Barakaat*, above, [301], [303], [304]; see D. Halberstan and E. Stein, "The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order" (2009) 46(1) C.M.L.Rev. 13, pp.46-50

<sup>328</sup> Gattini A., "Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*" (2009) 46(1) C.M.L.Rev. 213, p.228

<sup>329</sup> Art.351(2) TFEU (formerly Art.307(2) EC); *Commission v Finland* (Case C-118/07), above, [28]; *Commission v Austria* (Case C-205/06), above, [34]

<sup>330</sup> *Commission v Finland* (Case C-118/07), above, [31]; *Commission v Austria* (Case C-205/06), above, [37]; *Commission v Sweden* (Case C-249/06) [2009] E.C.R. I-1335, [38]

<sup>331</sup> *Commission v Portugal* (Case C-62/98) [2000] E.C.R. I-5171, [49]-[50]; *Commission v Portugal* (Case C-84/98) [2000] E.C.R. I-5215, [58]-[59]; see J. Klabbers, "Moribund on the Fourth of July? The Court of Justice on Prior Agreements of the Member States" (2001) 26 E.L.Rev. 187; See also *Commission v Belgium* (Case C-170/98) [1999] E.C.R. I-5493, [42]; Manzini, "The Priority of Pre-Existing Treaties of EC Member States", above, pp.788 et.seq.

<sup>332</sup> Van Raepenbusch, *Droit Institutionnel de l'Union et des Communautés européennes*, above, p.310

<sup>333</sup> Gattini, "Joined Cases C-402/05 P and C-415/05 P", above, p.235

authorisation.<sup>334</sup> Conversely, even though EU Member States may conclude, after 1957, international agreements with third countries in respect to matters that do not fall within the exclusive competence of the EU,<sup>335</sup> such agreements, even when they amend or replace a prior agreement, have to be drafted in line with EU law.<sup>336</sup> When rules are promulgated for the attainment of the objectives of the EU Treaties, the Member States cannot, outside the framework of the EU institutions, assume obligations which might affect those rules or alter their scope.<sup>337</sup> An EU Member State concluding with third parties international agreements contrary to EU law would be found to have failed to perform its EU law obligations.<sup>338</sup>

When a new agreement replaces after 1957 an existing agreement, even if some of the terms of both agreements are the same, the new agreement will not be exempted from compliance with EU law by Art.351 TFEU.<sup>339</sup> Also, that Article cannot apply to amendments made to an existing agreement after 1957 when such amendments include new commitments.<sup>340</sup> Such amendments must be compatible with EU law.

Finally, in matters governed by the EU Treaties, the latter takes precedence over all international agreements concluded *between* EU Member States, even if such agreements were concluded *before* 1958. Any such agreement must be drafted in line with EU law or, if it entered into force before 1958, be amended to comply with EU law.<sup>341</sup>

### **10.2.3. Direct Applicability and Direct Effect of EU Law**

EU regulations are directly applicable in all EU Member States,<sup>342</sup> meaning that they become part of the domestic law of the Member States without need for

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<sup>334</sup> As explained in Lenaerts and Van Nuffel, *Constitutional Law of the European Union*, above, p.558; for the exhaustive list of areas over which the EU has exclusive competence, see Art.3 TFEU

<sup>335</sup> For the non-exhaustive list of principal areas over which the EU has shared competence with its Member States, see Art.4(2) TFEU

<sup>336</sup> See e.g. *Commission v UK* (Case C-466/98), above; *Commission v Belgium and Luxembourg* (Joined Cases C-176/97 and C-177/97) [1998] E.C.R. I-3557

<sup>337</sup> *Commission v Council (AETR)* (Case 22/70) [1971] E.C.R. 263, [21]-[22]; *Commission v Sweden* (Case C-468/98) [2002] E.C.R. 9575

<sup>338</sup> *Commission v Belgium and Luxembourg* (Joined Cases C-176/97 and C-177/97), above

<sup>339</sup> *Commission v United Kingdom* (Case C-466/98) [2002] E.C.R. I-9427, [26]-[29]

<sup>340</sup> *Commission v Germany* (Case C-476/98) [2002] E.C.R. I-9855, [69]

<sup>341</sup> *Commission v Italy* (Case 10/61), above, para II.B; *Jean-Louis Thévenon and Stadt Speyer-Sozialamt v Landesversicherungsanstalt Rheinland-Pfalz* (Case 475/93) [1995] E.C.R. I-3813

<sup>342</sup> Art.288 TFEU (ex-Art.249(2) EC)

further implementing legislation. Therefore, in line with the generic conclusion of the Section 10.2.1, international organisations would have to comply with regulations applicable to the case at hand, unless exempted by a privilege or another relevant rule of international law.

In addition, provisions of the EU Treaties<sup>343</sup> and of regulations<sup>344</sup> can have direct effect in the national legal system of the EU Member States. This means that they may be relied upon by individuals before national courts if they create rights for such individuals and are sufficiently clear, precise and unconditional.<sup>345</sup> The direct effect of EU Treaties provisions and regulations is both vertical (individuals can rely on them in suits against the State) and horizontal (they can be relied on in suits between individuals).

Therefore, building on the generic conclusion reached in the sections above, it seems that individuals could rely upon the EU Treaties and EU regulations in suits against an international organisation, as long as these provisions apply to the organisation, based on the circumstances of the case. This has indeed already been the case,<sup>346</sup> and therefore reinforces the generic conclusion of the Section 10.2.1.

Contrary to regulations, an EU directive is binding on the EU Member States as to the result to be achieved, but leaves to the national authorities the choice of form and methods.<sup>347</sup> This means that the EU Member States have the obligation to transpose the directives into their national legal system within a specified timeframe.<sup>348</sup> A directive is therefore only binding on EU Member States,<sup>349</sup> and an international organisation with a separate legal personality from its Member States would therefore not have the obligation to implement it in its internal procedures, such as its public procurement rules.<sup>350</sup>

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<sup>343</sup> *van Gend en Loos*, above for suits between individuals and the State (vertical direct effect); later extended to suits between individuals (horizontal direct effect) in *Defrenne v SABENA*, above

<sup>344</sup> *Leonesio v Italian Ministry of Agriculture* (Case 93/71) [1972] E.C.R. 287 for vertical direct effect, and Case 43/71 *Politi v Italy*, above, for horizontal direct effect; see also *Commission v Italy* (Case 39/72) [1973] E.C.R. 101

<sup>345</sup> *van Gend en Loos*, above

<sup>346</sup> *SAT v Eurocontrol*, above; *SELEX*, above; *SELEX II*, above

<sup>347</sup> Art.288(3) TFEU (formerly Art.249(3) EC)

<sup>348</sup> *Commission v Germany (Re Nursing Directives)* (Case 29/84) [1985] E.C.R. 1661, [23]

<sup>349</sup> *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* (Case 152/84) [1986] E.C.R. 723, [48]

<sup>350</sup> See the reasoning in *Società generale lavori manutenzioni appalti Srl. (Sogelma) v European Agency for Reconstruction (EAR)* (Case T-411/06) [2008] E.C.R. II-2771, [115]-[116]; Ahmed and Butler, “The European Union and Human Rights”, above, at 788

Nevertheless, EU Member States have the obligation to take all appropriate measures to ensure fulfilment of the obligations arising from the EU Treaties or resulting from actions taken by the institutions of the EU, and have to abstain from any measure which could jeopardise the attainment of the objectives of the EU Treaties.<sup>351</sup> Moreover, we have seen in Section 10.2.2 that EU Member States have to draft or amend international agreements in line with EU law, as well as to take positions within the scope of those agreements (such as when they make decisions) that are in line with their EU law obligations.

Therefore, when EU Member States, with the same obligation to implement directives, control the decision-making process of an international organisation (such as when decisions are taken by a majority of Member States and EU Member States hold such a majority, or when unanimity is required, but all Member States of the organisation are also Members of the EU), they could be found to have failed to fulfil their obligation of implementing a directive by not making sure that the organisation's rules, which are usually adopted through decisions, comply with it. This obligation of course is subject to the applicability of the directive itself to the organisation and/or its activities, and to relevant international law such as the privileges of the organisation.

EU Member States could even be held liable for damages caused by their failure to implement a directive in the rules of the international organisation. This is already the case for national law,<sup>352</sup> even though it might be difficult for a third party to prove that losses it incurred were caused by the non-implementation of a directive in the rules of an international organisation.

However, when Member States of the international organisation that are not EU Member States hold a majority or a blocking minority in the decision-making process of the organisation, the international organisation's Member States that are also EU Member States should not be found to have failed to fulfil their obligation if the organisation's rules and practice are not amended to comply with a directive, as long as they take appropriate steps in good faith to try to amend those rules. Even though we saw above that an obligation to denounce an international agreement could not be excluded, it seems unlikely that, in the current stage of EU

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<sup>351</sup> Art.4(3) TEU (formerly Art.10(2) EC)

<sup>352</sup> *Francovich & Bonifaci v Italy* (Joined Cases C-6/90 and C-9/90) [1991] E.C.R. I-5357; See further Craig and De Búrca, *EU Law, Text, Cases and Materials*, above, pp.257-271

law, the CJEU would request EU Member States to leave an international organisation if they were not able to amend its rules in line with an EU directive.

Some have even suggested that wherever States transfer powers to an international organisation, the organisation may ‘succeed to’ or be ‘substituted’ for these States insofar as the powers transferred by them are subject to existing international obligations, for instance if those States had previously concluded, in the area where they transferred powers to the organisation, a treaty whereby they agreed to take international obligations.<sup>353</sup> For these authors this would mean that, based on international law, if EU Member States transfer to an international organisation some power in an area of EU competence (for instance, public procurement), the organisation would have the same obligation as its Member States, not only to comply with EU law, but also to implement applicable EU directives. It is not entirely clear if the transfer of competence to the organisation has to be exclusive for this succession principle to apply, or if competences shared with the Member States suffice,<sup>354</sup> even though some have argued that succession occurs in international law irrespective of whether the transfer of competence is exclusive or shared.<sup>355</sup>

Provisions of a non-implemented or incorrectly implemented directive may, after the end of its transposition period, have direct effect, which means that it can be relied upon by individuals before national courts, but only if they create rights for individuals and are sufficiently clear, precise and unconditional.<sup>356</sup> However, the

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<sup>353</sup> Cheyne, “International Agreements and the European Community Legal System” (1994) 19 E.L.R. 581, p.587; McGoldrick D., *International Relations Law of the European Union* (Longman, 1996), pp.121-123; Kuyper, “The Community and State Succession in Respect of Treaties”, in Curtin D. and Heukels T. (Eds.), *Institutional Dynamics of European Integration: Essays in Honour of H.G. Schermers* (1994), ii, p.640; Ahmed and Butler, “The European Union and Human Rights”, above, at 788; for an analysis of these arguments, see Schermer and Blokker, *International Institutional Law*, above, §1574

<sup>354</sup> Ahmed and Butler, “The European Union and Human Rights”, above, at 789, explains that, in the case of the EU, the CJEU upheld the principle of succession for the exclusive competences of the EC, and that the CFI did so for shared competences in *Yusuf*, above, [248], [253]-[254] and in *Kadi*, above, [203]-[204], but these two cases were partially overruled by the CJEU in *Kadi and Al Barakaat*, above, and it is therefore unclear if the ruling of the CFI (now the General Court) on this particular issue stands

<sup>355</sup> See, e.g., Barber, “The Limited Modesty of Subsidiarity” (2005) 11 E.L.J. 308; Dashwood, “The Relationship between the Member States and the European Union/European Community” (2004) 41 C.M.L.Rev. 335

<sup>356</sup> For a more detailed discussion, refer to the following cases: *Van Duyn*, above; *Jean Reyners v Belgium* (Case 2/74) [1974] E.C.R. 631; *Rutili*, above; *Enka BV v Inspecteur der Invoerrechten en Accijnzen Arnhem* (Case 38/77) [1977] E.C.R. 2203; *Ursula Becker v Finanzamt Münster-Innenstadt* (Case 8/81) [1982] E.C.R. 53; *Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen* (Case 51/76) [1977] E.C.R. 113; *Fratelli Costanzo SpA v Comune di Milano* (Case 103/88) [1989] E.C.R. 1839; *van Gend en Loos*, above; *Francovich*, above; see further Craig and De Búrca, *EU Law, Text, Cases and Materials*, above, pp.202-227



direct effect of directives can only be pleaded in suits between individuals and the State and not in suits between individuals,<sup>357</sup> because directives are only binding on EU Member States, and therefore cannot impose obligations upon individuals if they are not adequately implemented.<sup>358</sup>

As we saw in Section 9.3, international organisations usually have a legal personality separate from that of their Member States. Therefore, one could argue that, if a directive is not implemented or incorrectly implemented by an EU Member State into a law or legal rule with which an international organisation has to comply, this directive cannot have direct effect in a suit by a third party against that organisation.<sup>359</sup> However, the CJEU has interpreted widely the concept of the State, and directives were held to have vertical direct effect against a wide variety or ‘emanations of the State’,<sup>360</sup> in particular for the purpose of this thesis, bodies, whatever their legal form, subject to the authority or control of the State, or with special powers beyond those which result from the normal rules applicable to relations between individuals, such as to provide public services under State control.<sup>361</sup>

Considering that case law, and even though the CJEU did not yet hold that an international organisation was an ‘emanation’ of EU Member States, and it remains unclear what type of control the State needs to exert over a body for the latter to be so considered,<sup>362</sup> it is quite possible that an international organisation could be found to be an ‘emanation of the State’ if EU Member States control the organisation. Therefore, one should not discount the possibility that unimplemented or incorrectly implemented directives could have direct effect against an international organisation in suits between individuals and that organisation, provided the directive’s provisions are sufficiently clear, precise and unconditional. However, even a ruling contrary to this conclusion would not affect the obligation of EU Member States to achieve the objectives of the directive.

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<sup>357</sup> *Marshall*, above, for national law inconsistent with a directive; confirmed in *Paola Faccini Dori v RE.C.R. eb Srl* (Case C-91/92), [1994] E.C.R. I-3325, for an unimplemented directive

<sup>358</sup> *Marshall*, above, [48]; *Sogelma*, above, [115]

<sup>359</sup> The CFI (now the General Court) did not develop this line of argument in *Sogelma*, above

<sup>360</sup> *Vincenzi and Fairhurst*, *Law of the European Community*, above, p.190; *Helmut Kampelmann and Others v Landschaftsverband Westfalen-Lippe* (Joined Cases C-253/96 to C-258/96) [1997] E.C.R. I-6907, [46]; *Becker*, above; *ECSC v Busseni* (Case 221/88), [1990] E.C.R. I-429; *Marshall*, above, [51]; *Johnston*, above; *Fratelli Costanzo*, above, [31]

<sup>361</sup> *A. Foster and Others v British Gas plc* (Case C-188/89) [1990] E.C.R. I-3313, [20]

<sup>362</sup> *Craig and De Búrca*, *EU Law, Text, Cases and Materials*, above, p.211

#### **10.2.4. Invoking EU Treaties Exemptions**

The CJEU never explicitly decided if the exemptions from the applicability of the EU Treaties, which we discussed in Section 8.3, could be invoked by third parties to justify their conduct. Academic literature never discussed this issue for international organisations, even though it is an important one: we have seen that, in principle, EU law would apply to international organisations, but could an international organisation invoke an EU Treaties exemption such as Art.346 TFEU to avoid compliance with EU law?

In one case the CJEU seemed to imply that the exemption, whose use was advocated by an undertaking, should have been invoked by the Member State where that undertaking was located, and not by the undertaking itself.<sup>363</sup> In a competition case, the Commission seemed also to consider that Art.346 TFEU could only be invoked by the relevant EU Member State, and not by undertakings themselves.<sup>364</sup> In other such cases, invocation of Art.346 TFEU was clearly done by each EU Member State concerned, who then instructed the undertakings on their territory not to notify information related to their military activities to the Commission (which did not press the matter further).<sup>365</sup>

Allowing private parties to invoke Art.346 TFEU would certainly be abusive, as they are not privy to, and should not be able to define, what amounts to the essential security interests of an EU Member State. Moreover, Art.346 TFEU explicitly refers only to the EU Member States. From the face of the exemptions and the little applicable case law, it seems therefore fairly clear that undertakings and private citizens cannot invoke Art.346 TFEU themselves. However, in some international organisations, EU Member States hold a controlling majority of the

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<sup>363</sup> *Breda Fucine Meridionali SpA (BFM) and Ente partecipazioni e finanziamento industria manifatturiera (EFIM) v Commission* (Joined Cases T-126/96 and C-127/96) [1998] E.C.R. II-3437, [89]

<sup>364</sup> *GEC-Siemens v Plessey* (Case IV/33.018) [1990] OJ C239/2: see Trybus, *European Defence Procurement Law*, above, pp.81-82; Wheaton, “Defence Procurement and the European Community”, above, pp.433 and 437, supports that view, but does not read that rule in the Commission decision

<sup>365</sup> Commission Decision of 28 August 1998 declaring a concentration to be compatible with the common market (Case No IV/M.1258 - GEC MARCONI/ALENIA) according to Council Regulation (EEC) No 4064/89, [1998] OJ C306/12; Commission Decision of 15 May 1996 declaring a concentration to be compatible with the common market (Case No IV/M.724 - GEC / Thomson-CSF (II)) according to Council Regulation (EEC) No 4064/89, [1996] OJ C186/2; Commission Decision of 07 December 1994 declaring a concentration to be compatible with the common market (Case No IV/M.529 - GEC / VSEL) according to Council Regulation (EEC) No 4064/89, [1994] OJ C368/20; Commission Decision of 24 November 1994 declaring a concentration to be compatible with the common market (Case No IV/M.528 - British Aerospace / VSEL) according to Council Regulation (EEC) No 4064/89, [1994] OJ C348/6

decision-making process and they could therefore decide to invoke an exemption such as Art.346 TFEU in the name of the organisation.

This possibility raises two issues. The first is an EU law issue. As mentioned above, Art.346 TFEU only refers, on its face, to the EU Member States. For an international organisation to be able to decide which measures are necessary for the protection of the essential interests of the security of an EU Member State, that State would have to formally delegate to the organisation the power to make those decisions. As we have seen in Section 10.2.3, the CJEU has adopted a fairly wide view of the concept of ‘the State’ when ruling on the direct effect of directives and, reasoning by analogy, it cannot be excluded that it would identify an international organisation as an emanation of the EU Member States if the latter chose to delegate the authority to decide which measures are necessary for the protection of the essential interests of their security to an international organisation. However, this is not at all certain.

The second issue is an international law issue. We have seen in Section 9.4 that international organisations only have the powers which are attributed to them.<sup>366</sup> The competences of an international organisation are limited to the powers expressly granted to it in its constitutive instrument,<sup>367</sup> customary powers,<sup>368</sup> and the implied powers related to express powers and necessary for the organisation to exercise its functions.<sup>369</sup> Decisions taken by the organisation outside the scope of these powers will be *ultra vires*, or beyond the scope of the organisation’s competence, and therefore unlawful.<sup>370</sup> To date, no State has delegated to an international organisation the power to decide which measures were necessary for the protection of the essential interests of its security. Even the North Atlantic Treaty, which is the founding instrument of NATO, leaves decision-making on this

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<sup>366</sup> Schermer and Blokker, *International Institutional Law*, above, §209

<sup>367</sup> International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons (WHO)*, above, [25]; see Sarooshi, *International Organizations and their Exercise of Sovereign Power*, above, Ch.2; Schermer and Blokker, *International Institutional Law*, above, §209; White, *The Law of International Organisations*, above, pp.80-83; Klabbers, *An Introduction to International Institutional Law*, above, pp.63-67

<sup>368</sup> Schermer and Blokker, *International Institutional Law*, above, §232

<sup>369</sup> International Court of Justice, *Effect of Award*, above, p.77; International Court of Justice, *Certain Expenses of the United Nations*, above, p.245; International Court of Justice, *Reparations for Injuries*, above, pp.182 et.seq.; Schermer and Blokker, *International Institutional Law*, above, §§232-236; Klabbers, *An Introduction to International Institutional Law*, above, pp.67-81; White, *The Law of International Organisations*, above, pp.83-89

<sup>370</sup> Schermer and Blokker, *International Institutional Law*, above, §§206-208; Sarooshi, *International Organizations and their Exercise of Sovereign Power*, above, p.108; Amerasinghe, *Principles of the Institutional Law of International Organizations*, above, Ch.7

subject to its individual Member States.<sup>371</sup> Therefore, at this point in time, as international organisations in Europe do not have the power to decide which measures are necessary for the protection of the essential interests of the security of their Member States, any decision they would make on that topic would be unlawful from the point of view of international law.

Would EU Member States find that the protection of the essential interests of their security requires the non-applicability of EU law to an international organisation, for instance to some of its procurement activities related to products on the 1958 list, they would therefore have to invoke the exemption themselves for the benefit of the international organisation, in line with the CJEU case law we explained in Section 8.3.

## **11.Law Applicable to Procurement in the Field of Defence**

### **11.1.Domestic Public Procurement Law**

We have seen in Section 10.1 that domestic law will, in general terms, apply to international organisations, subject to their privileges, explicit or customary. We will now analyse the specific case of domestic public procurement law.

First, as shown in the analysis of the procurement rules of the international organisations under analysis in this thesis (Sections 14-16), there is in all the cases investigated no explicit privilege in the founding instrument of those international organisations exempting them from compliance with domestic public procurement law.

However, mandating compliance with national administrative law and, as a likely consequence, the rulings of the relevant administrative tribunals, could affect the policy and functional independence of international organisations.<sup>372</sup> For this reason, international organisations usually do not apply the body of national rules that regulate the relationship between States and their citizens, and apply their own rules for their internal legislative and administrative acts, which form the ‘internal law’ of the organisation and is usually assumed to include its rulemaking

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<sup>371</sup> North Atlantic Treaty, Washington D.C., 4 April 1949

<sup>372</sup> Combacau and Sur, *Droit International Public*, above, p.715; Schermer and Blokker, *International Institutional Law*, above, §1601-1602

procedures and the employment rules of its staff.<sup>373</sup> There is no judicial or academic authority on whether the procurement rules of international organisations or agencies are part of such ‘internal law’,<sup>374</sup> but this conclusion would be somewhat logical. Moreover, those procurement rules seem to be almost universally made of internal rules that do not follow domestic legislation, even though there is usually no provision to that effect in the express privileges granted to the international organisations in their constituting instruments.<sup>375</sup>

We have seen in Section 9.6 that a widespread and uniform practice that is accepted as law becomes a customary rule of international law, even without a court ruling to that effect.<sup>376</sup> The use of subsequent practice is especially common in constructing the institutional law of an international organisation, where it often fills the gaps of, and can even ‘develop’, the constituting instrument of the organisation.<sup>377</sup> Considering that all States seem to consider that they have an obligation to exempt international organisations from compliance with domestic public procurement law, this practice can probably be classified as a feature of customary international law, a customary privilege.

A ruling by an international court would be required to confirm the existence of such custom. Alternatively, more systematic research, which is beyond the scope of

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<sup>373</sup> Amerasinghe, *Principles of the Institutional Law of International Organizations*, above, pp.271-274; Reinisch, *International Organisations before National Courts*, above, p.378; Schermer and Blokker, *International Institutional Law*, above, §1196

<sup>374</sup> Schermer and Blokker, *International Institutional Law*, above, §1201 do not identify operational procurement rules amongst the fields where international organisations may regulate their own functioning, even though their list is not exhaustive and they mention rules for ‘budget approval and financial regulations’ and some organisations include – somewhat deviously – their procurement rules in their financial regulations; There is only a very small number of procurement-related cases found in the detailed study of Reinisch, *International Organisations before National Courts*, above

<sup>375</sup> See e.g. the UN: United Nations Procurement Rules, Rev.6, March 2010, found at <http://www.un.org/Depts/ptd/manual.htm>, accessed on 20 February 2011; NATO operations: Non-Article 5 NATO led Operations – NSIP Procurement Regulations – Framework Document, AC/4-WP(2007)0001-REV3, 6 June 2007; Eurocontrol: Contract Regulations of the Eurocontrol Organisation, approved by Measure No. 02/87 of the Permanent Commission, 2 April 2002, found at [http://www.eurocontrol.int/corporate/public/standard\\_page/bwu\\_guidelines.html](http://www.eurocontrol.int/corporate/public/standard_page/bwu_guidelines.html), accessed on 20 February 2011; the EC: Council Regulation No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, [2002] OJ L248/1, Title V; and of course the procurement rules of our three international organisations case studies, which we will analyse in detail – the author did not find any international organisation applying domestic public procurement law to their procurement activities

<sup>376</sup> Statute of the International Court of Justice, Art.38(1)(b), in S. Rosenne, *Documents on the International Court of Justice*, 3<sup>rd</sup> Ed. (1991), p.77; Combacau and Sur, *Droit International Public*, above, pp.54-65: a court that rules that a practice has become a custom is only confirming the existence of such custom. The court ruling itself does not create the custom, which existed prior to it

<sup>377</sup> Amerasinghe, *Principles of the Institutional Law of International Organizations*, above, pp.49-55; White, *The Law of International Organisations*, above, pp.27-28; Aust, *Modern Treaty Law and Practice*, above, pp.194-195; Alvarez, *International Organizations as Law-makers*, above, pp.87-92; Schermer and Blokker, *International Institutional Law*, above, §1339

this thesis, could confirm the universality of the practice and the fact that the States involved consider this practice as obligatory under international law.

Moreover, to be upheld, such privilege would have to comply with the principle of functional necessity discussed in Section 9.6. Some have argued for a restrictive approach to the recognition of customary privileges, whereby only matters of a nature purely internal to the organisation would be exempted from compliance with domestic law without being expressly mentioned as a privilege in a legal instrument.<sup>378</sup> As public procurement rules affect the relationship between the organisation and third parties, one could indeed question if they are really only an internal matter.<sup>379</sup> Under this restrictive view, the procurement activities of international organisations, in particular their operational procurement, should comply with the domestic law of the host State, as they have an effect on the legal situation of third parties.

Still, a number of activities of international organisations have been recognised as internal and not subject to domestic law, even though they have some external effect, such as employment relations and the delivery of personal services to the organisation.<sup>380</sup> The fact that an internal activity has external consequences is therefore, in itself, probably not sufficient to make it subject to domestic law.

Moreover, should the procurement activities of an international organisation be performed in line with domestic law, there would be a risk that one State might want to affect the organisation's procurement decisions for the benefit of its own industry or to further its own policy aims. This issue is most critical for operational procurement activities, and even more so for the type of multinational collaborative procurement organisations under analysis in this thesis, of which procurement is the main function. Therefore, out of the functional necessity principle, a good case can be made that the procurement rules and decisions of international organisations should be left solely to the decision-making bodies of the organisation, where all its Member States are represented and their potentially competing interests can be balanced in line with the organisation's internal procedures.<sup>381</sup>

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<sup>378</sup> Reinisch, *International Organisations before National Courts*, above, p.15

<sup>379</sup> See Alvarez, *International Organizations as Law-makers*, above, p.143; Schermer and Blokker, *International Institutional Law*, above, §1206

<sup>380</sup> European Court of Human Rights: Case of *Waite and Kennedy v Germany*, Application no. 26083/94, judgment of 18 February 1999, Reports 1999-I, [72]; Case of *Beer and Regan v Germany*, Application no. 28934/95, judgment of 18 February 1999, Reports 1999, [62]

<sup>381</sup> Reinisch, *International Organisations before National Courts*, above, p.379: this author built his reasoning on a parallel between international organisations and the fact that the administrative law of

In addition, the EU General Court explicitly ruled that public contracts awarded by organisations set-up by the Council of the EU were not subject to the legislation of EU Member States, even though it did not say on what grounds.<sup>382</sup> Nothing in this ruling seems to show that the Court would consider this principle inapplicable to other international organisations or agencies in the EU. Even though the CJEU does not have jurisdiction to rule on the applicability of domestic law, or to authoritatively declare the existence of international law custom, it can acknowledge such a custom in the context of the application of EU law.

## **11.2. The EU Public Procurement Directives**

### ***11.2.1. The EU Public Sector Directive***

#### **11.2.1.1. International Organisations as Contracting Authorities**

As we have seen in Section 10.2.1, EU law would in general term apply to international organisations, subject to the scope of the EU law concerned and to any relevant provisions of international law, such as the privileges of international organisations. We will now analyse, from the point of view of EU law, the specific case of procurement law, starting with the public procurement directives.

As we saw in Section 8.1, the Public Sector Directive applies only to procurement activities performed by contracting authorities, defined as the State, regional or local authorities, bodies governed by public law, and associations formed by one or several of such authorities or one or several of such bodies governed by public law,<sup>383</sup> and we presented in that Section the case law of the CJEU on the definition of a contracting authority.

Based on that definition, international organisations could be found to be bodies governed by public law. The fact that no international organisation is listed in the annex of the Directive is not dispositive, as the annex is merely illustrative, even though we should note that the list only includes entities created on the basis of the national law of EU Member States, and no subjects of international law.<sup>384</sup>

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a State cannot be adjudicated in the courts of another State; even though he was referring to the administrative law of international organisations in general, and not specifically to procurement, his reasoning applies entirely

<sup>382</sup> *Sogelma*, above, [115]

<sup>383</sup> Directive 2004/18/EC, above, Article 1(9), para 1; see further Heuninckx, “Lurking at the Boundaries”, above, pp.93-95

<sup>384</sup> Even though these were not procurement cases, it is interesting to note that the CJEU seems to consider that there can be “national” and “international” bodies governed by public law, international

A body governed by public law must be established to meet needs in the general interest that do not have an industrial or commercial character. Most international organisations are set-up to meet such needs. This is certainly the case for defence procurement organisations, which operate as agents of their Member States as not-for-profit organisations. Procurement of armaments for the armed forces is certainly a need in the general interest. Not only do these organisations not compete against each other in any commercial sense, as the selection of an organisation for the procurement of a defence equipment is usually made by the Member States on an ad-hoc basis, but also their Member States usually provide most, if not all of their financing (as we explained in Section 9.5).

A body governed by public law must also have legal personality. We have seen in Section 9.3 that most international organisations, especially those whose main purpose is to conduct procurement activities, have legal personality in the legal system of their Member States.

Lastly, a body governed by public law must be closely dependent on the State, which can be met either if the body is financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law; is subject to management supervision by those bodies; or is having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

Most international organisations, and certainly those operating in the defence sector, are financed solely by their Member States (as we explained in Section 9.5), even though this is not always the case, as we explain in Section 15 dealing with NAMSO. The Member States, in addition, supervise their management, and the governing and supervisory bodies of those organisations are usually solely constituted by members appointed by their Member States. So, if the Member States of an international organisation are all EU Member States, it seems that each of these conditions would often be met.

On its face, it would even seem that the condition that more than half of the members of the organisation's management or supervisory board must be appointed by EU Member States would also cover organisations of which some (but less than half) Member States are not EU Member States. However, it is likely

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organisations falling within the latter category: *LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol* (Case 29/76) [1976] E.C.R. 1541, [4]; *Verein für Konsumenteninformation v Karl Heinz Henkel* (Case C-167/00) [2002] E.C.R. I-8111, [27]



that this condition is based on the premise that the decisions of most of such boards are made by majority voting. If decisions have to be made unanimously, which is often the case (as explained in Section 9.4), or if non-EU Member States constitute a blocking minority, it is submitted that this condition would not be met. Non-EU Member States would in this case have a veto power on the organisation's decisions, making EU Member States Member of the organisation unable to influence the organisation's decisions related to public contracts.<sup>385</sup> This could sever the close dependency link with EU Member States required by the definition of body governed by public law. However, the other alternative conditions for such close dependency (financing or management supervision) could still be met, depending on the case.

In addition, the definition of 'central purchasing body' in the Defence and Security Directive, states that such a body is a contracting authority or a 'European public body',<sup>386</sup> and mentions the EDA as an example of European public body.<sup>387</sup> The meaning of 'European public body' is not defined. It would almost certainly cover bodies set-up by the EU institutions, but could also include independent international organisations of which only EU Member States are Members, such as OCCAR. It is not certain, on the other hand, that it would cover international organisations of which non-EU Member States are Members, such as NAMSO. Nevertheless, the important point for the purpose of our discussion is that the definition of a central purchasing body implies that the EU legislator considers that European public bodies could in some cases not be contracting authorities, even though it does not say that such bodies would never qualify as contracting authorities.

Even though our theoretical analysis would have to be confirmed on a case-by-case basis for each international organisation, it seems that most organisations of which EU Member States control the decision-making (such as when all the Members of the organisation are also EU Member States) would meet all the criteria of a body governed by public law, and would therefore be contracting authorities. This would mean that the EU public procurement directives could apply to the procurement activities of those international organisations, unless an exemption applies. However, this conclusion could potentially not be valid if non-EU Member States

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<sup>385</sup> See *Commission v France* (Case C-237/99), above, [48]-[49]

<sup>386</sup> Directive 2009/81/EC, above, Art.1(18)

<sup>387</sup> Directive 2009/81/EC, above, Recital 23

hold at least a blocking minority in the decisions-making process of the organisation. Such an organisation would arguably not be a contracting authority.

#### **11.2.1.2. The International Organisations Exemption**

As we briefly said in Section 8.1.2.4, the Public Sector Directive will not apply to contracts awarded pursuant to the particular procedure of an international organisation,<sup>388</sup> but the terms ‘international organisation’ are not defined in the Directive.

In the absence of any definition of a term in EU law, the meaning and scope of a term must be determined by considering the general context in which it is used and its usual meaning in everyday language.<sup>389</sup> As we saw in Section 9.1, there is not one single agreed definition of international organisations, but in the case of the directive exemption, it seems widely accepted that this concept only covers organisations of which only States (and maybe also other international organisations) are members.<sup>390</sup>

According to a fairly old view of the Commission, this exclusion covers only contracts awarded by a contracting authority under these procedures, as international organisations are not contracting authorities within the meaning of the Directives.<sup>391</sup> As we explained in the previous section, this is probably too simplistic, as international organisations of which EU Member States control the decision-making process would fit within the definition of bodies governed by public law. However, this view could be correct when applied to international organisations in which non-EU Member States may block the organisation’s decisions.<sup>392</sup>

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<sup>388</sup> Directive 2004/18/EC, above, Art.15(c); see further Heuninckx, “Lurking at the Boundaries”, above, pp.106-107

<sup>389</sup> See e.g. *Srl CILFIT and Lanificio di Gavardo SpA v Italian Ministry of Health* (Case 283/81) [1982] E.C.R. 3415; *Jean-E. Humblet v Belgium* (Case 6/60) [1960] E.C.R. 559; *DIR International Film Srl and others v Commission* (Case C-164/98 P) [2000] E.C.R. I-447, [26]; *Denmark v Commission* (Case 349/85) [1988] E.C.R. 169, [9]; This is inspired by the Vienna Convention on the Law of Treaties, above, Art.31(1), but the CJEU seems to give priority to interpretation of terms in the general context (systematic method) and in the light of the object and purpose of the provisions (teleological method) over literal interpretation: see Kaczorowska, *EU Law for Today’s Lawyers*, above, p.182

<sup>390</sup> Trybus, “Procurement for the Armed Forces”, above, p.701; UK Public Contracts Regulations 2006 (S.I. 2006/5), Regulation 6(2)(d)(iii); Vienna Convention on the Law of Treaties, above, Art.2(i) defines ‘international organisations’ as intergovernmental organisations

<sup>391</sup> *Public Procurement in the European Union – Guide to the Community Rules on Public Supply Contracts other than in the Water, Energy, Transport and Telecommunications Sectors (Directive 93/36/EEC)* (European Commission: 1995), Ch.II, §2.3, p.25

<sup>392</sup> Trybus, “Procurement for the Armed Forces”, above, p.701

Some commentators consider that the text of the exemption should be interpreted as covering all international organisations, including those of which only EU Member States are members.<sup>393</sup> Support for this argument is provided by the usual meaning of the term ‘international organisation’ in everyday language. Moreover, the Commission, European Parliament and EU Member States could have been more specific in drafting the exemption if their purpose had not been to provide a blanket exemption applicable to all international organisations.

This view could also be supported by the wording of Art.351 TFEU, which – as we saw in Section 10.2.2 – states that the EU Treaties do not affect rights and obligations of the EU Member States contracted in prior international agreements with third countries (even though, as we discussed, EU Member States have the obligation to take all appropriate steps to eliminate incompatibilities with EU law in prior international agreements). An exemption similar to the international organisation exemption of the Directive could therefore already be found in the EU Treaties for procurement activities performed through organisations created by such agreements, such as NATO (but not the organisations or agencies created within NATO after 1957). The international organisations exemption of the Directive would then aim at extending it to all international organisations for the specific area of public procurement.

However, as this exemption could provide the EU Member States with an easy way to avoid their obligations under EU law, there is a contrary view that the exemption can only apply to international organisations of which non-EU Member States are members, and that other international organisations should be considered as contracting authorities within the meaning of the Directives.<sup>394</sup> The proponents of this interpretation argue that another reading would be contrary to the obligation of the EU Member States to take all appropriate measures to ensure fulfilment of the obligations arising out of the EU Treaties and to abstain from any measure that could jeopardise the attainment of the objectives of the EU Treaties.<sup>395</sup> This interpretation is also supposed to find support in the fact that Art.351 TFEU applies

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<sup>393</sup> *Contribution to the Consultation ‘Green Paper on Defence Procurement’, Answers and Comments made by the EU ISS Task Force on the establishment of a European Defence Equipment Market* (EU Institute for Security Studies, 2005), p.9; *UK Government Response to the Commission Green Paper on Defence Procurement*, above, p.7; *Groenboek Overheidsopdrachten op Defensiegebied (Reactie Nederland)*, above, p.7; Heuninckx, “Defence Procurement in the EU”, above, pp.221-223

<sup>394</sup> Trybus, “Procurement for the Armed Forces”, above, pp.709-711; Georgopoulos, *European Defence Procurement Integration*, above, p.92

<sup>395</sup> Art.4(3) TFEU (formerly Art.10(2) EC)

only to organisations created with third countries before 1958: the exemption of the Directive is assumed to have the same application.<sup>396</sup> However, there does not seem to be any evidence either to confirm or infirm this theory. Taking this restrictive interpretation one further step, one could argue that the exemption should only apply to international organisations where non-EU Member States have the power to block decisions supported by the Members of the organisation that are also EU Member States.

Even though creating international organisations specifically to avoid the application of the Public Sector Directive would certainly fall foul of the EU Member States' obligation mentioned above under the Treaties, most international organisations are created for a genuine purpose, such as to conduct collaborative defence procurement to increase interoperability of the armed forces and optimise defence budgets. Furthermore, no provision of the EU Treaties actually prevents the EU legislator from exempting all international organisations (or any other entity, for that matter) from complying with a specific directive. In that sense, it would be akin to a privilege granted to international organisations by the EU. We saw above that, even though privileges are usually granted by the founding instrument of an organisation, they may also be granted through legislation.

This issue has never been ruled on by the CJEU. The only possible indication is that the CJEU used the term 'international organisation' broadly in cases related to the free movement of workers<sup>397</sup> or competition law,<sup>398</sup> without distinction between those of which only EU Member States are members and those including other States.

Moreover, even though it did not seem to take into account the international organisation exemption in its reasoning, the CJEU held that the purpose of the Public Sector Directive was to coordinate national laws, and that it was therefore not applicable to international bodies set-up by the EU institutions, which were not, like other international organisation as we explained above, subject to the public

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<sup>396</sup> Trybus, *European Union Law and Defence Integration*, above, p.225; It is interesting to note that the same author argued that the previous Public Supplies Directive included an automatic exemption of the products covered by Art.346(1)(b) TFEU, even though the TFEU exemption itself was not automatic (see Trybus, "Procurement for the Armed Forces", above) but for the international organisation exemption argues that the purpose of Art.351 TFEU should be carried over to the Public Sector Directive

<sup>397</sup> *Echternach and Moritz*, above; *Schmid*, above; *Ferlini*, above, especially [17]

<sup>398</sup> *SAT v Eurocontrol*, above; *SELEX*, above; *SELEX II*, above

procurement law of the EU Member States.<sup>399</sup> In this ruling, the Court seems to have identified another ground on which international organisations in the EU would not have to be subject to the Public Sector Directive.

In addition, it is certainly significant that the procurement activities of the EU institutions are regulated by specific rules that do not have to comply with the Public Sector Directive, because the purpose of that Directive is the harmonisation of national law, with which the procurement rules of the EU institutions do not have to comply,<sup>400</sup> even though those rules are in fact often based on the Public Sector Directive.<sup>401</sup> If the EU institutions do not have to comply with the EU public procurement directives, it is questionable why other international organisations would have to.

It seems to us that interpreting the exemption as applying to all international organisations, even those of which only EU Member States are Members, is on the one hand more logical and on the other hand more supported by the little case law of the CJEU related to the topic. The scope of this exemption is nevertheless a point of EU public procurement law that should preferably be clarified.

Finally, another issue with that exemption is whether it could be interpreted broadly to also cover the award of a contract or the assignment of a project by a contracting authority such as an EU Member State to an international organisation. This could have been the view of the Commission when it wrote that the exclusion covered contracts awarded by a contracting authority under the procedures of the organisation.<sup>402</sup> under that reading, if the award of the contract or the assignment of the project to the organisation is made on the basis of the organisation's own procedures, the contracting authority would not have to comply with the Directive.

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<sup>399</sup> *Sogelma*, above, [115]; *Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Maritime Safety Agency (EMSA)* (Case T-70/05), judgment of 2 March 2010, not yet reported, [126]

<sup>400</sup> *Sogelma*, above, [115]-[116]; for the EU institutions: Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, [2002] OJ L248/1; Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 Laying down detailed rules for the implementation of the Financial Regulation, [2002] OJ L357/1; for the EDA: Council Decision 2007/643/CFSP of 18 September 2007 on the financial rules of the European Defence Agency and on the procurement rules and rules on financial contributions from the operational budget of the European Defence Agency, [2007] OJ L269/1

<sup>401</sup> See e.g. EDA Steering Board Decision No. 2006/29 (COR.) on Revision of EDA Financial Rules, 23 November 2006, p.1

<sup>402</sup> *Guide to the Community Rules on Public Supply Contracts*, above, Ch.II, §2.3, p.25

However, the exemption only applies to ‘public contracts’, which are contracts for pecuniary interest between contracting authorities and economic operators.<sup>403</sup> Therefore, that broad reading of the exemption would only be possible if the international organisation concerned qualifies as an ‘economic operator’, which is any natural or legal person or public entity or group of such persons and/or bodies which offers works, products and/or services on the market.<sup>404</sup> In that definition, the key criteria will be whether the organisation offers its services or products on the market.

We discuss further the assignment of a collaborative project to an international organisation in Section 11.4.

### **11.2.2. EU Defence and Security Directive**

We introduced the Defence and Security Directive in Section 8.1.3. Importantly, that Directive actually reduces the scope of the Public Sector Directive. The operational procurement activities of international organisations involved in collaborative defence procurement almost always concern military equipment that would fall within the scope of the Defence and Security Directive,<sup>405</sup> and therefore the latter Directive would be the one that could potentially apply to most of those procurement activities, not the Public Sector Directive.

The Defence and Security Directive applies to contract concluded by contracting authorities,<sup>406</sup> these terms being defined on the basis of the definitions found in the Public Sector Directive, so the discussion we conducted in the previous section on whether or not international organisations are contracting authorities also applies.

Like the Public Sector Directive, the applicability of the Defence and Security Directive is subject to a number of exemptions, some of them very relevant to international organisations.<sup>407</sup>

First, the Directive does not apply to contracts governed by specific procedural rules pursuant to an international agreement or arrangement concluded between

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<sup>403</sup> Directive 2004/18/EC, above, Art.1(2)(a); see Arrowsmith, *The Law of Public and Utilities Procurement*, above, Ch.6

<sup>404</sup> Directive 2004/18/EC, above, Art.1(8)

<sup>405</sup> Directive 2009/81/EC, above, Art.1(6)

<sup>406</sup> Directive 2009/81/EC, above, Art.1(2), 1(17), and 2

<sup>407</sup> See also the detailed discussion in Heuninckx, “Lurking at the Boundaries”, above, pp.108-114

one or more EU Member States and one or more third countries.<sup>408</sup> Even though this provision does not explicitly refer to international organisations, considering our definition of ‘international organisation’ (created by an international agreement), this exemption most likely covers contracts awarded through the procurement procedures of the organisation of which some Member States are not EU Member States, such as NATO.

Second, the Directive does not apply to contracts governed by specific procedural rules of an international organisation purchasing for its purposes, or to contracts which must be awarded by a Member State in accordance with those rules.<sup>409</sup> This exemption, even though it concerns directly international organisations, is probably aimed to cover mainly administrative procurement activities – even though it would be a rare case indeed that administrative procurement covers military equipment. On the other hand, this exemption would also apply to the few (but significant) items of military equipment that are owned and managed by international organisations, such as the NATO AWACS.<sup>410</sup>

Third, the Defence and Security Directive does not apply to contracts awarded in the framework of a cooperative programme based on R&D, conducted jointly by at least two EU Member States for the development of a new product and, where applicable, the later phases of all or part of the life-cycle of this product.<sup>411</sup> It seems clear that this exemption would apply to collaborative procurement programmes performed through international organisations.<sup>412</sup> When the cooperative programme includes separate contracts for development, production tranches, and support, this exemption would apply, not only to the initial development contract, but also to the follow-on contracts concerning the same equipment. However, if the collaborative procurement concerns only off-the shelf military equipment (without any significant R&D), or if only one EU Member State wishes to launch a procurement through the organisation, then the Directive would have to be complied with.

As for the international organisation exemption of the Public Sector Directive (discussed in Section 11.2.1.2), a broad reading of those exemptions could have

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<sup>408</sup> Directive 2009/81/EC, above, Art.12(a)

<sup>409</sup> Directive 2009/81/EC, above, Art.12(c)

<sup>410</sup> *NATO Handbook*, above, Ch.34

<sup>411</sup> Directive 2009/81/EC, above, Art.13(c)

<sup>412</sup> Directive 2009/81/EC, above, Recital 28, which expressly states that the Directive should not apply to contracts awarded by international organisations such as OCCAR, NATO, its agencies, or the EDA within the scope of cooperative programmes

them cover, not only the contracts awarded by an international organisation or an EU Member State to an economic operator, but also the assignment of the collaborative project, or the award of the management contract, by the EU Member States to the international organisation itself (an issue we discuss again in Section 11.4). However, as for the Public Sector Directive, the definition of ‘contract’ (which refers to the latter Directive)<sup>413</sup> implies that, for such a broad reading to apply, the international organisation concerned would have to offer services, products and/or works on the market.

All these exemptions imply that the Defence and Security Directive will not apply to collaborative defence procurement performed through an international organisation, unless this procurement is performed by an international organisation of which only EU Member States are Members and the procurement concerns off-the-shelf military equipment for which there is no significant R&D, or when a single EU Member State requires the organisation to procure military equipment on its behalf.

In addition, we have seen in Section 11.2.1.2 that the CJEU held that the purpose of the Public Sector Directive was to coordinate national laws, and that it was therefore not applicable to international bodies set-up by the EU institutions, which are not subject to the public procurement law of the EU Member States.<sup>414</sup> The same reasoning could be applied to the Defence and Security Directive. Therefore, the Directive would probably not apply to the procurement of international organisations, even in the cases identified in the previous paragraph.

### **11.3. The EU Treaties Procurement Principles**

We have seen in Section 11.2 that it is almost certain that the EU public procurement directives do not apply to the procurement activities of international organisations because of the exemptions found in those directives. Those exemptions are in fact forms of privileges granted to international organisations by EU law. Moreover, as the aim of the directives is to harmonise national procurement law, which does not apply to international organisations, the directives also do not apply to the latter. However, the procurement principles flowing from the EU Treaties, which we explained in Section 8.2, could still apply if the international organisation qualifies as a public authority, if the procurement

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<sup>413</sup> Directive 2009/81/EC, above, Art.1(2)

<sup>414</sup> *Sogelma*, above, [115]; *EMSA*, above, [126]



concerned has a link with intra-EU trade, and if it is not in a quasi in-house relationship with the entity to be awarded the contract.

Collaborative defence procurement, which is of high value, involves different EU Member States as well as cross-border trade, will almost always have a link with intra-EU trade. In addition, collaborative procurement contracts will only very rarely be awarded to an entity that is in a quasi in-house relationship with the organisation: those contractors are almost always major defence companies. In any case, the analysis of this condition will have to be made on a contract-by-contract basis, not as a single determination for a specific organisation.

Therefore, the decisive question to determine whether or not an international organisation has to comply with the EU Treaties procurement principles is whether or not the organisation qualifies as a public authority. For that purpose, international organisations that qualify as contracting authorities will also qualify as public authorities. Because of the specificities of each case, we will analyse for each international organisation under analysis in Chapter 5 whether or not they are public authorities. However, as a public authority must be effectively controlled by EU Member States or other public authorities, we can already state that international organisations of which EU Member States do not control the decision-making (such as when non-EU Member States constitute a blocking minority) will probably not qualify as public authorities. Indeed, non-EU Member States are probably not ‘public authorities’ in the sense of EU law. As we have seen in Section 8.2.2, to establish whether an entity is a public authority, the entity in question must be effectively controlled by the State or another public authority, and it may not compete in the market.<sup>415</sup> Even though foreign States usually do not compete on the market, they cannot be said to be controlled by EU Member States. Therefore they would not qualify as public authorities, and an international organisation in which non-EU Member States have at least a blocking minority would then not qualify as a public authority either, and would therefore not have to comply with the EU Treaties procurement principles.

In addition, we have seen in Section 11.1 that, through what is probably a customary privilege (to be confirmed by either further research or a ruling by an international court), domestic procurement law does not apply to international organisations. In addition to the express privileges granted to international

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<sup>415</sup> *Wall*, above, [47]-[52] and [60]; *Coditel Brabant*, above, [30]; *Stadt Halle*, above, [48]-[50] imply that it is possible that some public authorities are not contracting authorities; Wauters, “In-house Provision and the Case Law of the European Court of Justice”, above, agrees

organisations in the EU public procurement directives, which we discussed in Section 11.2, one could question if there would – or should – not be a similar customary privilege that would exempt the procurement rules of international organisations from complying with the EU law procurement principles.

If we first consider international organisations of which only EU Member States are Members, we can only conclude that such a privilege would not be appropriate. Privileges are only granted out of functional necessity, to avoid undue interference from domestic law on the functioning and purpose of the organisation. When all Member States of the organisation are also EU Member States, EU law applies equally on the territory of these States, and EU law cannot therefore be unduly relied on by one of them to advantage its own national interests. Moreover, we have seen in Section 10.2.2 that international agreements concluded between EU Member States have to be drafted in line with EU law, and EU Member States have the obligation to take all appropriate measures to ensure fulfilment of the obligations arising out of the EU Treaties and to abstain from any measure that could jeopardise the attainment of the objectives of the EU Treaties.<sup>416</sup> In the exceptional cases where one of the Member States of the organisation would need EU law not to apply because its essential security interests require special protection, it could still invoke an EU Treaties exemption such as Art.346 TFEU in line with CJEU case law. Therefore, international organisations of which only EU Member States are Members would most likely have to comply with the EU treaties procurement principles if they qualify as public authorities.

The case could be different for international organisations of which non-EU Member States are Members. In these cases, the EU Treaties procurement principles, such as non-discrimination and equal treatment, apply to economic operators located in EU Member States, not to those from the non-EU Member States that are Members of the organisation. This is particularly true since the EU Treaties prescribe that the most favoured nation principle of international law (by which a State grants another State the same benefits as those it grants to third States through other treaties) cannot be used by third countries to obtain the same benefits as those conferred to the EU Member States through the Treaties.<sup>417</sup>

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<sup>416</sup> Art.4(3) TFEU (formerly Art.10(2) EC)

<sup>417</sup> Art.351(3) TFEU (formerly Art.307(3) EC); Van Raepenbusch, *Droit Institutionnel de l'Union et des Communautés européennes*, above, pp.310-311; Manzini, "The Priority of Pre-Existing Treaties of EC Member States", above, p.782; American Law Institute, *The Foreign Relation Law of the United States*, above, §801, Comment a

Therefore, preserving the independent functioning of the organisation could require a customary privilege to avoid application of the EU Treaties procurement principles to the procurement rules of the organisation, in order to ensure that the interests of its non-EU Member States are not damaged by their application.

However, this reasoning would probably not be appropriate in cases where EU Member States control the decision-making process of the organisation, such as when a decision requires a majority among the Member States of the organisation and more than half of these are also EU Member States. By joining an international organisation and accepting that EU Member States may take decisions that go against its interests, a non-EU Member State cannot argue that complying with EU Treaties principles (something EU Member States are bound to do within the decision-making process of the organisation<sup>418</sup>) would hinder the proper functioning and purpose of the organisation. If the non-EU Member State had a national interest so strong that, even though the decision-making process is controlled by EU Member States, it does not want the organisation to comply with the EU Treaties procurement principles, it should have included an express privilege to that effect in the founding instrument of the organisation.

On the other hand, when EU member States do not control the decision-making process of an international organisation, such as when unanimity is required for a decision to be made (which is in fact very often the case in international organisations dealing with defence and security matters) and some of the Member States of the organisation are not Members of the EU, it would be appropriate that a customary privilege exists in order to prevent EU member States from affecting through EU law the independence and proper functioning of the organisation related to procurement. This conclusion confirms the one we reached based on the definition of public authority.

It is also worth noting that the CJEU has sometimes used the EU public procurement directives as a guide to determine the applicability of the EU Treaties procurement principles.<sup>419</sup> Therefore, it is not impossible that the Court would one day rule that, for instance, the international organisation exemption of the Public Sector Directive would, for policy reasons, also apply to the EU Treaties

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<sup>418</sup> *Kramer*, above, [44]-[45]; *Evans Medical*, above, [32]; *Centro-Com*, above, [60]; Manzini, “The Priority of Pre-Existing Treaties of EC Member States”, above, p.786

<sup>419</sup> See the discussion of this issue in A. Brown, “EU primary law requirements in practice: advertising, procedures and remedies for public contracts outside the procurement directives” (2010) 19(5) P.P.L.R. 169, pp.176-178

principles. However, it has not yet done so and, on the basis of the reasoning above, we would argue that it should not, especially when all Members of the organisation are EU Member States. Even though the EU legislator may decide to exclude specific entities such as international organisations from the coverage of a directive, this does not mean that such decision also applies to the EU Treaties.

Finally, even though this is not dispositive, it could be argued that the fact that the EU legislator included express exemptions for international organisations in the EU public procurement directives means that it did not consider that there was a generic privilege exempting all international organisations from compliance with EU public procurement law.<sup>420</sup>

#### **11.4. Assigning a Collaborative Project to an International Organisation**

A last, but important, question is whether the Member States of an international organisation that are also EU Member States have – in their national procedures – to comply with EU public procurement law when assigning the management of a collaborative defence procurement programmes to an international organisation.<sup>421</sup>

One could argue that this decision is a form of outsourcing, the international organisation being awarded a public services contract for the management of some of the procurement activities of its Member States, and would therefore have to comply with EU public procurement law.

As we have seen in Sections 8.1.2.3 and 8.2.2, neither the EU public procurement directives, nor the EU Treaties principles related to procurement apply to contracts between a public authority and an entity legally distinct from it if the public authority exercises over the entity concerned a control which is similar to that which it exercises over its own departments and, at the same time, that entity carries out the essential part of its activities with the controlling public authority.<sup>422</sup>

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<sup>420</sup> Directive 2009/81/EC, above, Recital 28, by expressly stating that the award of contracts by international organisations such as OCCAR, NATO, its agencies, or the EDA within the scope of cooperative programmes should be exempted from complying with the Directive, implies that, without the exemption, the Directive (and therefore also the procurement principles flowing from the EU Treaties) could apply to the award of contracts by these organisations

<sup>421</sup> An issue identified in more general terms in Arrowsmith, *The Law of Public and Utilities Procurement*, above, §§6.180-6.181 and 6.189

<sup>422</sup> *Teckal*, above, [50]; *Stadt Halle*, above, [49] and [52]; *Commission v Spain* (Case C-84/03), above, [38]; *Parking Brixen*, above, [62]; *Agusta Helicopters*, above, [39]-[41]; *Coditel Brabant*, above, [26]; *Sea*, above, [36]-[37]; see Arrowsmith, *The Law of Public and Utilities Procurement*, above, §§6.166-6.172; Wauters, “In-house Provision and the Case Law of the European Court of Justice”, above, pp.10-21

The Members of the international organisations under analysis in this thesis are exclusively States, and the decision-making bodies of these organisations are composed of the representatives of their Member States. Even though international organisations have a legal personality different of that of their Member States, they usually do not have a commercial character and perform tasks in the public interest, which would probably not evidence a sufficient degree of independence for the necessary level of control to be found lacking. Moreover, most international defence procurement organisations by definition carry out the essential part of their activities for the benefit of their Member States. Therefore, it is very likely that the latter will not have to comply with EU public procurement law, both the procurement principles flowing from the EU Treaties and the public procurement directives, when they assign the management of a collaborative defence procurement programme to an international organisation.

Nonetheless, even though this conclusion seems fairly clear when all the Member States of the international organisation are also EU Member States, it is not certain that it would also be valid when some of the Member States of the organisations are not EU Member States, as non-EU Member States are probably not ‘public authorities’ in the sense of EU law, as we explained in Section 11.3. If non-EU Member States hold at least a blocking minority in the decision-making of the organisation, then the EU Member States that are Members of the organisation cannot be said to exercise over it a control similar to that which they exercise over their own departments. Therefore, the membership of non-EU Member States in the international organisation will affect the fact that EU Member States would have to comply with EU public procurement law when assigning the management of a collaborative procurement programme to an international organisation. This will have to be assessed case-by case.

Nevertheless, if a broad reading of the international organisation exemption of the Public Sector Directive and of the international rules exemptions of the Defence and Security Directive is accepted (see our discussion at the end of Section 11.2.1.2 and in Section 11.2.2 respectively), which could only be the case if the international organisation concerned offers works, products and/or services on the market, the EU Member States would not have to comply with the Directives for assigning a collaborative project to an international organisation. However, in that case, the EU Member States could still have to comply with the EU Treaties procurement principles discussed in Section 11.3, depending on the applicability of the ‘quasi-in house’ exemption, which could depend on the membership of non-EU

Member States in the international organisation, as discussed in the above paragraph.

In addition, we also saw in Section 8.1.2.3 that the award of a contract of a non-commercial nature by public authorities to another public authority ('leading' authority) would not have to comply with EU public procurement law if such contract is the culmination of a process of cooperation that aims to ensure the efficient completion of a public task that all public authorities have to perform, even if the public authorities awarding the contract do not exercise any control over the 'leading' authority.<sup>423</sup> However, the aim of such cooperation may not be to avoid complying with EU procurement law.<sup>424</sup> This same reasoning could potentially apply to collaborative defence procurement performed through a lead nation, and also to international organisations that could be considered 'public authorities'. Nevertheless, the Court made clear that those cooperation contracts would not prejudice the conditions of award by the 'leading' authority for any public contract required for the execution of the cooperation.<sup>425</sup> This probably means that the 'leading' authority awarding contracts to private undertakings in order to meet its requirements and those of the other authorities would have to comply with the applicable EU procurement law.

The reasoning above is based on case law related to public contracts awarded to entities created under national law, and whose members were public authorities of a sub-national nature. Even though the issue was not discussed in the CJEU rulings, the latter do not seem to imply that the reasoning it followed could not apply to bodies created under international law and whose Members are States.

Of course, even if none of the above would apply, EU Member States could still invoke case-by-case one of the exemptions from compliance with the EU Treaties. If the conditions for applicability of the exemption are complied with, this would allow the EU Member States to avoid compliance with EU law when assigning the management of a collaborative defence procurement programme to an international organisation.

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<sup>423</sup> *Commission v Germany* (Case C-480/06), above, [36]-[45]; see Pedersen and Olsson, "*Commission v Germany* – a new approach to in-house providing?", above

<sup>424</sup> *Commission v Germany* (Case C-480/06), above, [48]; Pedersen and Olsson, "*Commission v Germany* – a new approach to in-house providing?", above, at 44

<sup>425</sup> *Commission v Germany* (Case C-480/06), above, [44]; Pedersen and Olsson, "*Commission v Germany* – a new approach to in-house providing?", above, at 42

## **12. Procurement and International Organisations' Immunities**

### **12.1. The Issue of Immunities**

We saw in Section 9.6 that the legal personality of an international organisation in the legal system of its Member States gives it justiciable rights and obligations, but that international organisations are usually granted some form of privileges and immunities that alter this generic rule.<sup>426</sup> However, these privileges and immunities are limited by the principle of functional necessity: they apply only if they are necessary for the fulfilment of the organisation's functions and purposes.<sup>427</sup> We discussed the impact of privileges on the procurement rules of international organisations though Section 11, and will now analyse the impact that immunities can have on the procurement activities of international organisations.

The immunity of international organisations from jurisdiction and execution of judgment has obviously a direct impact on the effectiveness of the remedies that aggrieved candidates, tenderers and/or contractors could claim against these organisations. Because of the immunity from jurisdiction of international organisations, a candidate, tenderer or contractor wanting to obtain some form of redress against an organisation would have to rely on alternative dispute resolution processes without recourse to the judicial system, unless the organisation waives its immunity.<sup>428</sup> As we explain in the sections dealing with the procurement rules of the international organisations under analysis, a claim against a contract award or other procurement-related decision of an international organisation is usually dealt with solely by an administrative claims procedure internal to the organisation.<sup>429</sup>

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<sup>426</sup> See generally Amerasinghe, *Principles of the Institutional Law of International Organizations*, above, Ch.10; American Law Institute, *The Foreign Relation Law of the United States*, above, §223, Comment b

<sup>427</sup> Reinisch, *International Organisations before National Courts*, above, p.206; Klabbers, *An Introduction to International Institutional Law*, above, pp.146-149; Schermer and Blokker, *International Institutional Law*, above, §324; American Law Institute, *The Foreign Relation Law of the United States*, above, §467 and Reporter's Note 4

<sup>428</sup> Wellens, *Remedies Against International Organisations*, above, p.114; Schermer and Blokker, *International Institutional Law*, above, §1612

<sup>429</sup> For instance, candidates and tenderers for OCCAR procurement activities may file complaints with the Director of OCCAR-EA and his decision following the complaint may be appealed to the OCCAR Board of Supervisors: OMP 5 *Contract Placement Procedure*, issue 2, 1 July 2006, §5.1.4 and Annex F. Even though the OCCAR Board of Supervisors "has the duty to waive immunity where reliance upon it would impede the course of justice", this is only the case "if this would not prejudice the interests of OCCAR" which strongly weakens the duty to waive immunity, as one could argue that money damages or the annulment of a procurement procedure always prejudice the interests of OCCAR: OCCAR Convention, above, Annex I, Art.3(1)(a)

This might conflict with the EU law principles of effectiveness and of effective judicial protection, which we discuss in Section 12.2.

Nevertheless, an international organisation can only claim immunity from the jurisdiction of domestic courts for its procurement activities if immunity is necessary for the fulfilment of the organisation's functions or purpose. For the collaborative procurement organisations under analysis in this thesis, it would seem fairly clear that their operational procurement activities could be covered by immunity, as those activities constitute the actual purpose of the organisation.

Strangely enough, some authors asserted that 'expenditures for operational activities are not directly related to the functioning of international organisations',<sup>430</sup> which would seem to imply that, in their view, functional immunity could not apply to operational activities. It is submitted that the latter view is probably too generic. These authors made this statement in relation to the administrative functions of the secretariat of international organisations whose main function is to support the decision-making process of the Member States in the area of responsibility of the organisations. To adequately apply the principle of functional immunity, one should first look at the organisation's functions and purpose. In the case of organisations whose function is primarily to discuss the positions of its Member States and reach agreements on a specific subject, such as for instance the Council of Europe with regards to human rights,<sup>431</sup> it could indeed be argued that operational procurement is not an inherent part of the function of the organisation. However, for an organisation whose function is to perform collaborative procurement, it would be difficult to argue that operational procurement is not directly related to its function and purpose: performing operational procurement for the benefit of its Member States is, in fact, its purpose. Therefore, operational procurement activities of such organisations could be covered by functional immunity if the latter is necessary for the achievement of their purpose, such as to ensure the independence of the procurement process free of interference of a Member State trying to gain advantages for its national industry by pressuring the organisation through its national courts.

In addition, some have argued that the internal law of international organisations, such as administrative or constitutional rules and decisions, should never be

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<sup>430</sup> Schermer and Blokker, *International Institutional Law*, above, §1208

<sup>431</sup> Statute of the Council of Europe, London, 5 May 1949, European Treaty Series - Nos 1/6/7/8/11 (Treaty of London), Art.1



adjudicated by national courts, just like the courts of a State do not have jurisdiction to adjudicate the public law of another State.<sup>432</sup> This would be a form of customary immunity that could constitute an additional ground on which public procurement rules and decisions of international organisation would escape the jurisdiction of national courts. However, there does not seem to be any evidence yet of the formation of such a custom in international law.

## **12.2. Immunities Recognition in EU Law**

As we already mentioned in Section 10.2.1, the EU must respect international law in the exercise of its powers. EU law must be interpreted, and its scope limited, in the light of the relevant rules of the international law, including customary international law.<sup>433</sup> Moreover, international law, including the law of treaties and customary international law, widely recognises the immunities of international organisations.<sup>434</sup> This would tend to show that the immunities of international organisations would be recognised in EU law. In fact, the CJEU held that the functional necessity principle applied to the EC and EAEC to provide them a relative, but not absolute, immunity.<sup>435</sup> The immunities of other international organisations would most likely likewise be recognised.

Fundamental rights form an integral part of the general principles of law whose observance must be ensured.<sup>436</sup> The right to effective judicial protection is one of the general principles of law stemming from the constitutional traditions common to the EU Member States and enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>437</sup> and now in the legally binding EU Charter of Fundamental Rights.<sup>438</sup>

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<sup>432</sup> As explained in Reinisch, *International Organisations before National Courts*, above, pp.374 et.seq.

<sup>433</sup> Poulsen, above, [9]; *Kadi and Al Barakaat*, above, [291]; *Racke*, above, [45]; Ahmed and Butler, “The European Union and Human Rights”, above, at 777

<sup>434</sup> American Law Institute, *The Foreign Relation Law of the United States*, above, §467, comments a and d, and reporter’s notes 1 and 2

<sup>435</sup> *Imm J. J. Zwartveld and others* (Case 2/88) [1990] E.C.R. I-3365 and I-4405; *Ufficio Imposte di Consumo di Ispra v Commission* (Case 2/68) [1968] E.C.R. 435; *Germany v Council* (Case C-122/95) [1998] E.C.R. I-973; See M. De Castro Meireles, *The World Bank Procurement Regulations: A Critical Analysis of the Enforcement Mechanism and of the Application of Secondary Policies in Financed Projects*, Ph.D. Thesis (University of Nottingham, 2006), p.129

<sup>436</sup> *Kadi and Al Barakaat*, above, [283]-[286]; *Eugen Schmidberger, Internationale Transporte und Planzüge v Austria* (Case C-112/00) [2003] E.C.R. I-5659, [73]; see further Ahmed and Butler, “The European Union and Human Rights”, above

<sup>437</sup> See e.g. *Unión de Pequeños Agricultores v Council* (Case C-50/00 P) [2002] E.C.R. I-6677, [39]; *Commission v Austria* (Case C-424/99) [2001] E.C.R. I-9285, [45]; *Ordre des barreaux francophones*

In the EU, individuals therefore have a fundamental right of access to court, the right to be communicated the reasons for any final administrative decision that concerns them (such as a contract award decision), and the legality of those decisions must be reviewable by means of judicial review.<sup>439</sup> Especially, the CJEU seemed to hold on a number of occasions that the fact that the review of administrative decisions was entrusted only to an administrative body, and not to a judicial body, would be in breach of fundamental rights.<sup>440</sup> Even though these rulings were based on provisions of EU Directives requiring judicial determination of the claimants' rights, the CJEU added every time that the requirement of judicial review reflected a general principle of EU law that would apply in any case. Even relying on one of the exemptions from applicability of EU law (such as Art.346 or 351 TFEU) would not authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms.<sup>441</sup>

When analysing human rights and fundamental freedoms, the CJEU referred regularly to precedents of the European Court of Human Rights (ECtHR).<sup>442</sup> Although judgments of the ECtHR are not part of the EU legal order, the CJEU has clearly established that it has to protect the fundamental rights found in the constitutional tradition of the EU Member States and enshrined in the European Convention of Human Rights.<sup>443</sup> We should therefore analyse the ECtHR

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*et germanophone and Others* (Case C-305/05) [2007] E.C.R. I-5305, [29]; *Kadi and Al Barakaat*, above, [335]; *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* (Case C-432/05) [2007] E.C.R. I-2271, [37]; European Convention for the Protection of Human Rights, above, Art.6(1) and 13; The EU institutions stated that they would apply the Convention in their rulemaking: Joint Declaration concerning the protection of fundamental rights, above

<sup>438</sup> Charter of Fundamental Rights of the EU, above, Art.47

<sup>439</sup> *Von Colson and Kamann*, above; *Johnston*, above, [18]; *Unión de Pequeños Agricultores*, above, [39]; and especially *Heylens*, above, [14]-[16]; *Coote v Granada Hospitality Ltd.* (Case C-185/97) [1998] E.C.R. I-5199; see also Dahlgaard Dingel, *A Harmonization of the National Judicial Review*, above, pp.177 *et. seq.*; Wellens, *Remedies Against International Organisations*, above, p.118

<sup>440</sup> See e.g. *Commission v Austria* (Case C-424/99), above, [39]-[45]; *Johnston*, above, [18]

<sup>441</sup> *Kadi and Al Barakaat*, above, [303]-[304]; see Art 6(1) EU; see Halberstan and Stein, "The United Nations, the European Union, and the King of Sweden", above, p.45

<sup>442</sup> See e.g. *Hüls AG v Commission* (Case C-199/92 P) [1999] E.C.R. I-4287, [150]; *Kadi and Al Barakaat*, above, [256] and [344]; Ahmed and Butler, "The European Union and Human Rights", above, at 773-774; Craig and De Búrca, *EU Law, Text, Cases and Materials*, above, pp.332-337; Gattini, "Joined Cases C-402/05 P and C-415/05 P", above, p.222; Kunoy and Dawes, "Plate Tectonics in Luxembourg", above, pp.79-80; G. Harpaz, "The European Court of Justice and its Relations with the European Court of Human Rights: The Quest for Enhanced Reliance, Coherence and Legitimacy" (2009) 46(1) C.M.L.Rev. 105

<sup>443</sup> *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission* (Case 4/73) [1974] E.C.R. 491, [13]; *Cinéthèque v Fédération Nationale des Cinémas Français* (Joined Cases 60/84 and 61/84) [1985] E.C.R. 2605, [25]; *Johnston*, above, [18]-[19]; *Demirel v Stadt Schwabisch Gmund* (Case 12/86) [1987] E.C.R. 3719, [28]; Case C-5/88 *Wachauf v Germany* [1989] E.C.R. 2609, [19]; *Heylens*, above, [14]; *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v*

jurisprudence on the issue of international organisations' immunities and their relationship with fundamental rights.

### **12.3. Immunities and the European Court of Human Rights (ECtHR)**

The ECtHR has a number of times rendered rulings concerned with the immunities of international organisations and their relationship with the fundamental rights such as the rights of effective judicial protection. The ECtHR does not have jurisdiction on those who are not Contracting Parties to the European Convention of Human Rights, such as international organisations, but it has the power to review the acts and omissions of the Contracting Parties (European States in particular) not only when the act or omission in question was a consequence of domestic law, but also when it flows from the necessity to comply with international legal obligations subsequent to the Convention,<sup>444</sup> for instance those arising from membership of an international organisation. State action taken in compliance with those legal obligations will be presumed to be justified if the organisation is considered to protect fundamental rights, both the substantive guarantees offered and the mechanisms controlling their observance, in a manner at least equivalent or comparable to that provided by the Convention, even though such a presumption is subject to review by the ECtHR.<sup>445</sup> If these conditions are not met, namely if the protection of the rights flowing from the Convention by the international organisation concerned is found by the ECtHR to be 'manifestly deficient', then the Member States of the organisation that are also Contracting Parties to the Convention may be held accountable for the acts and omissions of the organisation.<sup>446</sup>

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*Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others (ERT)* (Case C-260/89) [1991] E.C.R. I-2925, [41]; *Friedrich Kremzow v Austria* (Case C-299/95) [1997] E.C.R. I-2629, [14]; *Schmidberger*, above, [73]-[74]; Craig and De Búrca, *EU Law, Text, Cases and Materials*, above, pp.332-337; see further N. Lavranos, *Legal Interaction between Decisions of International Organisations and European Law* (Europa Law: 2004), pp.29-30; some have even argued that the European Convention of Human Rights and related jurisprudence has in fact become part of EU law, as explained in Harpaz, "The European Court of Justice and its Relations with the European Court of Human Rights", above, p.110

<sup>444</sup> Case of *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v Ireland*, Application no. 45036/98, judgment of 30 June 2005, Reports 2005-VI, [152]-[154]; *Waite and Kennedy*, above, [67]; Case of *Prince Hans-Adam II of Liechtenstein v Germany*, Application no. 42527/98, judgment of 12 July 2001, Reports 2001, [47]; Kunoy and Dawes, "Plate Tectonics in Luxembourg", above, p.79

<sup>445</sup> *Bosphorus*, above, [155]-[156]

<sup>446</sup> Harpaz, "The European Court of Justice and its Relations with the European Court of Human Rights", above, p.135, on the basis of *Bosphorus*, above, [156]

The ECtHR characterised the privileges and immunities of international organisation as an essential means of ensuring the proper functioning of the organisations free from unilateral interference by individual governments. The immunity from jurisdiction commonly accorded by States to international organisations under the organisations' constituent instruments or supplementary agreements is a long-standing practice established in the interest of the good working of these organisations.<sup>447</sup> Therefore, as a general principle, the ECtHR recognises the immunity of international organisations.

However, when States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities and attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the European Convention of Human Rights if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by this attribution. This is particularly true for the right of access to court.<sup>448</sup> Likewise, States may not avoid their obligations under the European Convention of Human Rights, for instance by restricting the right of access to court, under the guise of complying with the recommendations of an international organisation.<sup>449</sup> States signatories to the European Convention of Human Rights may not use an international organisation as a vessel to restrict the rights granted by the Convention.

The ECtHR therefore held that the immunity from jurisdiction of an international organisation was not absolute, and identified two cumulative conditions to determining whether granting immunity is permissible under the Convention.<sup>450</sup>

The first is whether the immunity from jurisdiction of the organisation, taking into account the current extension and strengthening of international cooperation in all domains of modern society, has a legitimate objective. To put it otherwise, any limitation of the right of access to court has to pursue a legitimate aim.<sup>451</sup> It seems

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<sup>447</sup> *Waite and Kennedy*, above, [63]; *Beer and Regan*, above, [53]

<sup>448</sup> Case of *Airey v Ireland*, judgment of 9 October 1979, Reports 1979 Series A no. 32, [24]; Case of *Ait-Mouhoub v France*, judgment of 28 October 1998, Reports 1998-VIII, [52]; *Beer and Regan*, above, [57]; *Waite and Kennedy*, above, [67]; *Hans-Adam II of Liechtenstein*, above, [48]

<sup>449</sup> Case of *Capital Bank AD v Bulgaria*, Application no. 49429/99, judgment of 24 November 2005, Reports 2005, [90]

<sup>450</sup> Articulated initially based on other facts in Case of *Ashingdane v United Kingdom*, judgment of 28 May 1985, Reports 1985 Series A no. 93, [57]

<sup>451</sup> *Beer and Regan*, above, [49]; *Waite and Kennedy*, above, [59]

from the rulings of the ECtHR that this requirement will be fairly easily met as long as the organisation has a legitimate purpose.<sup>452</sup> It is very likely that this would be the case with collaborative defence procurement, as long as it genuinely attempts to meet the needs of the Participating States' armed forces at reasonable conditions.

The second is that there has to be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.<sup>453</sup> Measures that reflect generally recognised rules of public international law, such as those on immunity, cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court,<sup>454</sup> but the plaintiff must be able to rely on reasonable alternative means in the organisation's legal instruments to protect effectively its rights, such as specific modes of settlement of private-law disputes.<sup>455</sup> Although there is a certain margin of appreciation in defining alternative modes of dispute settlement, the latter may not restrict or reduce the access to means of redress in such a way or to such an extent that the very essence of the right of access to court is impaired.<sup>456</sup>

The ECtHR held that provisions for arbitration of contractual disputes between the organisation and private parties and an ad-hoc dispute settlement system independent from the organisation to deal with staff matters would both meet this test.<sup>457</sup> Requiring the application of national legislation in staff matters would, in the Court's view, thwart the proper functioning of international organisations and run counter to the current trend towards extending and strengthening international cooperation,<sup>458</sup> even though it did not elaborate as to why, in its view, this was the case. The ECtHR never ruled, however, on the settlement of procurement disputes before contract signature. Especially, if appeals against decisions made during the procurement process (such as the contract award decision) are only possible to the

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<sup>452</sup> *Beer and Regan*, above, [43]; *Waite and Kennedy*, above, [53]

<sup>453</sup> *Beer and Regan*, above, [49]; Case of *Fayed v the United Kingdom*, judgment of 21 September 1994, Reports 2001 Series A no. 294-B, [65]; Case of *McElhinney v Ireland*, Application no. 31253/96, judgment of 21 November 2001, Reports 2001-XI, [34]

<sup>454</sup> *McElhinney*, above, [37] (even though this case concerned a State and not an international organisation)

<sup>455</sup> *Waite and Kennedy*, above, [68]-[69]; *Beer and Regan*, above, [58]; *Hans-Adam II of Liechtenstein*, above, [48]; See Reinisch, *International Organisations before National Courts*, above, pp.366 et seq.

<sup>456</sup> *Beer and Regan*, above, [49]; *Fayed*, above, [65]; *McElhinney*, above, [34]

<sup>457</sup> *Waite and Kennedy*, above, [69]; *Beer and Regan*, above, [59]

<sup>458</sup> *Waite and Kennedy*, above, [72]; *Beer and Regan*, above, [62]

organs of the organisation itself, this process cannot be deemed to be independent from the organisation,<sup>459</sup> and is then probably not a reasonable alternative means of dispute settlement.

The ECtHR case law on the immunity of international organisations provides useful guidance on the relationship between the immunities of international organisations and their procurement activities but it does not resolve entirely the issue. Even though it seems clear that the immunity from jurisdiction of international organisations with a legitimate purpose will not breach the right of access to court, a plaintiff must be able to rely on reasonable alternative means to protect effectively its rights. Even though, it is not entirely certain that the ECtHR would apply the same reasoning when only economic interests are at stake, such as for procurement cases, many national courts are now restricting the immunities of international organisations on the basis of similar tests.<sup>460</sup>

### **13.Summary of Answers to First Group of Research Questions**

#### **13.1.Applicability of EU and Domestic Law in General**

In answer to our first research question (identified in Section 3.1), we have seen that domestic law will, in general terms, apply to international organisations or agencies, subject to their privileges and immunities, which can be explicitly listed in their founding international agreements, in other international agreements or in domestic law, or can be customary.

Similarly, as a generic principle, the applicability of EU law to international organisations or agencies cannot be excluded, but it has to be ascertained based on the EU law provisions concerned, but also on the basis of relevant international law, such as the privileges and immunities of the organisation.

Moreover, based on the CJEU case law related to Art.351 TFEU, any international agreement concluded by EU Member States after 1957 or the date of their accession to the EU, including amendments to prior agreements, must be drafted in line with EU law. For international agreements concluded before 1958, the EU

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<sup>459</sup> See the discussion of this issue in De Castro Meireles, *The World Bank Procurement Regulations*, above, pp.141 et.seq.

<sup>460</sup> Malmendier, “The liability of international development banks in procurement proceedings”, above, at 153

Member States parties to the agreement have the obligation to take all appropriate steps to eliminate incompatibilities with EU law, and an obligation to denounce an agreement cannot be excluded if an EU Member State encounters difficulties which make adjustment of the agreement impossible. These principles would also apply to the founding agreements and rules of international organisations or agencies. For the internal rules of the organisation, the ease with which any incompatibility can be removed will depend on whether or not the Members of the organisation that are also EU Member States control its decision-making process.

In addition, considering the case law of the CJEU, it cannot be excluded that unimplemented or incorrectly implemented directives would have direct effect against an international organisation or agency in suits between individuals and that organisation, provided it is sufficiently clear, precise and unconditional, depending on the level of control exercised by EU Member States on the organisation.

Finally, it is likely that the international organisations or agencies under analysis in this thesis would not have the power to invoke exemptions from compliance with EU law, such as Art.346 TFEU. Invoking those exemptions would have to be made by the EU Member States that are also Members of the organisation.

### **13.2. Applicability of Public Procurement Law**

In answer to our second research question (identified in Section 3.1), we have seen that there is usually no explicit privilege in the founding international agreements of international organisations or agencies exempting them from compliance with domestic public procurement laws.

However, domestic public procurement law is in fact universally not applied for the administrative and operational procurement activities of international organisations or agencies. This is likely because of a customary privilege to that effect to preserve the independence of those organisations under the international law principle of functional necessity.

In addition, even though international organisations of which EU Member States control the decision-making would likely qualify as contracting authorities, the EU Public Sector and Defence and Security Directives most likely do not apply to the collaborative procurement activities of international organisations or agencies because of the exemptions contained in these Directives (the international organisations exemption of the Public Sector Directive, and the international

agreement, international organisations and collaborative procurement exemptions of the Defence and Security Directive), and because such Directives aim to harmonise domestic procurement law, which is not applicable to international organisations or agencies.

Nevertheless, it is likely that there would not be any customary privilege allowing international organisations or agencies of which EU Member States control the decision-making to avoid compliance with the EU Treaties procurement principles. Such privilege would not be appropriate, as the Member States cannot claim a privilege to avoid EU law obligations that they have all willingly accepted. Because such international organisations would often qualify as public authorities, they would have to comply with the procurement principles flowing from the EU Treaties. However, it is also likely that international organisations or agencies of which EU Member States do not control the decision-making (such as when it requires unanimity and some of the Member States of the organisation are not EU Member States) would likely not qualify as public authorities, and in addition could benefit from such a customary privilege, as EU Member States could otherwise use EU procurement law to affect the proper functioning and independence of the organisation.

Finally, it is likely that EU Member States would not need to comply with EU public procurement law when assigning the management of a collaborative programme to the organisations or agencies that fit within the quasi in-house exemption created by the CJEU. However, they would likely have to comply with EU public procurement law when assigning a collaborative programme to an organisation or agency that does not meet that test.

### **13.3. Impact of the Immunities of International Organisations**

In answer to our third research question (identified in Section 3.1), we saw that the immunities of international organisations or agencies with a legitimate purpose from the jurisdiction of domestic courts and from the execution of judgments will generally be upheld and will not breach the right of access to court. However, on the basis of ECtHR case law, we concluded that a plaintiff must be able to rely on reasonable alternative means of dispute resolution independent from the organisation to protect effectively its rights.



## Chapter 5 – Case Studies

### **14. The Joint Organisation for Armaments Cooperation (OCCAR)**

#### **14.1. Introduction to OCCAR**

##### **14.1.1. Functions and Aims of OCCAR**

On the basis of the conclusions reached in the previous sections, we now turn to the examination of the procurement rules of the international organisations under analysis in this thesis, namely OCCAR, NAMSIO and the EDA. For each of these organisations, we will attempt to answer the research questions devised in Section 3.2 of this thesis.

The Joint Organisation for Armaments Cooperation (OCCAR) was created under public international law by a treaty referred to as the OCCAR Convention.<sup>461</sup> In 2010, the OCCAR Member States were Belgium, France, Germany, Italy, Spain and the United Kingdom, and Finland, Luxemburg, the Netherlands, Poland, Sweden and Turkey were participating in at least one of the OCCAR programmes.<sup>462</sup>

The role and tasks of OCCAR consist of the management of collaborative defence procurement programmes and of the national programmes that its Member States assign to it, the preparation of common technical specifications for the development and procurement of jointly defined equipment, the coordination and planning of joint research activities and studies, the coordination of national decisions concerning the common industrial base and common technologies, and the coordination of capital investments and of the use of test facilities.<sup>463</sup> A

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<sup>461</sup> OCCAR Convention, above

<sup>462</sup> OCCAR website at [www.occar-ea.org](http://www.occar-ea.org), accessed on 7 June 2009; M. Trybus, “With or without the EU Constitutional Treaty: towards a common security and defence policy?” (2006) 31 E.L.Rev. 145,12

<sup>463</sup> OCCAR Convention, above, Art.8; see also Trybus, “The New Public Sector Directive and Beyond”, above, p.207; Van Eekelen, *The Parliamentary Dimension of Defence Procurement*, above, p.27; Schmitt, *The European Union and Armaments*, above, p.24; Georgopoulos A., “The European Armaments Policy: A *conditio sine qua non* for the European Security and Defence Policy?”, in

peculiarity of OCCAR is that non-Member States and other international organisations may participate in programmes managed by OCCAR.<sup>464</sup>

Procurement performed by OCCAR must follow the principles flowing from the objectives and role of OCCAR.<sup>465</sup> These principles include strengthening the European Defence Technological and Industrial Base to create genuine complementarity between the Member States, and guaranteeing support for the armed forces of the OCCAR Member States in the short and medium term. OCCAR also advocates transparency, and most importantly the renunciation of the *juste retour* principle.<sup>466</sup>

The yearly expenditures of OCCAR have increased dramatically since it gained legal status in January 2001, as shown in Figure 4, as the management of programme budgets was gradually transferred to the organisation.<sup>467</sup>

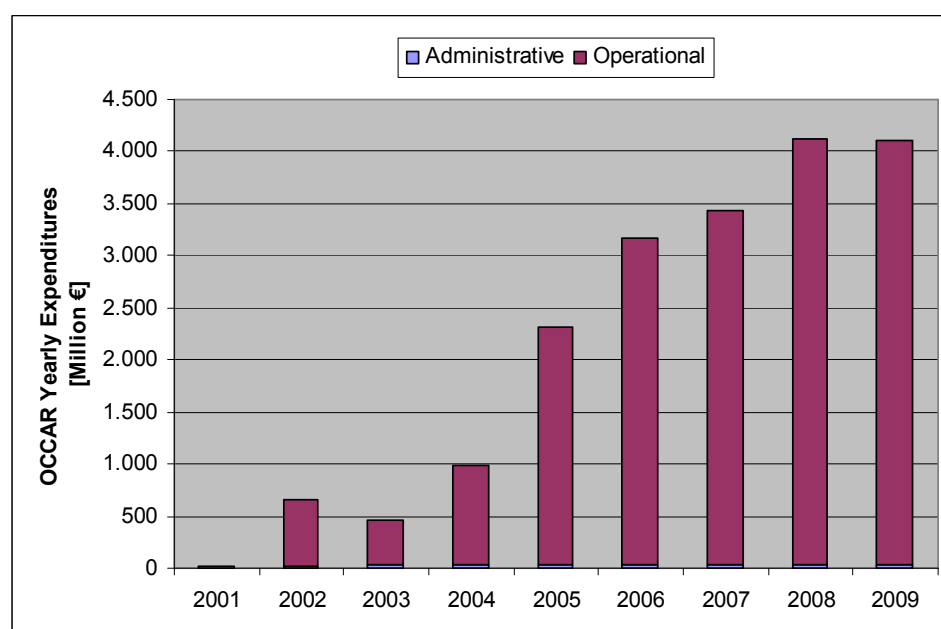


Figure 4: OCCAR Yearly Expenditures<sup>468</sup>

In 2009, the operational expenditures of OCCAR, used to finance the costs of the programmes managed by the organisation, amounted to about €4 billion and its

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Trybus M. and White N. D. (Eds.), *European Security Law* (Oxford University Press, 2007), p.198, pp.209-212

<sup>464</sup> OCCAR Convention, above, Art.38; Georgopoulos, “Defence Procurement and EU Law”, above, p.561; De Neve, *L’Agence européenne de Défense*, above, pp.48-53

<sup>465</sup> OCCAR Convention, above, Art.24(2)

<sup>466</sup> OCCAR Convention, above, Ch.II; Georgopoulos, “Defence Procurement and EU Law”, above, p.561

<sup>467</sup> Cardinali, “Collaboration in European Defence Acquisition”, above

<sup>468</sup> Information provided by Eric Huybrechts, Deputy Director of OCCAR-EA, 17 January 2011

administrative expenditures, financing internal costs such as emoluments and office rental, amounted to about €40 million (or about 1% of the total expenditures of OCCAR). The annual budget of OCCAR is in fact higher than the defence budget of most EU Member States.<sup>469</sup>

The financial weight of OCCAR in the European collaborative defence procurement expenditures is also significant. The OCCAR expenditures in 2009 amount to about 40% of the collaborative equipment procurement and R&D in the EU, which probably makes it the most important collaborative defence procurement organisation in Europe.

#### **14.1.2. Organisation of OCCAR**

The two primary organs of OCCAR are the *Board of Supervisors* and the *Executive Administration*.<sup>470</sup>

The OCCAR Board of Supervisors (BoS) is the organ where its Member States are represented. It comprises the ministers of defence of the OCCAR Member States or their delegates, and is the highest decision-making level within OCCAR,<sup>471</sup> even though it may delegate some of its authority to subsidiary organs.<sup>472</sup> The BoS is in particular responsible for the approval of the assignment of a collaborative programme to OCCAR,<sup>473</sup> the approval of the working procedures of OCCAR (including its procurement rules),<sup>474</sup> and for decisions concerning the award of contracts when such decisions have not been delegated to competent committees created for this purpose,<sup>475</sup> often referred to as Programme Committees.<sup>476</sup>

Decisions of the BoS have to be approved by unanimity, but a system of reinforced qualified majority voting also exists. However, the OCCAR system of reinforced

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<sup>469</sup> European Defence Agency, “Defence Data of EDA participating Member States in 2008”, January 2009: If it were an EU Member State, OCCAR would rank 9<sup>th</sup> in terms of total defence expenditures, and 4<sup>th</sup> in terms of equipment procurement and R&D (after the UK, France and Germany)

<sup>470</sup> Mezzadri, *L’ouverture des Marchés de la Défense*, above, p.22

<sup>471</sup> OCCAR Convention, above, Ch.IV; OMP 3, *Corporate Management*, Issue 3, 9 December 2008, §4

<sup>472</sup> Schmitt, *The European Union and Armaments*, above, p.24; P. Castellani, “OCCAR: un Exemple Pratique de la Coopération Européenne en Matière de Défense”, conference paper, IRSD, Brussels, 24 February 2004, p.6

<sup>473</sup> OCCAR Convention, above, Art.12(b)

<sup>474</sup> OCCAR Convention, above, Art.23

<sup>475</sup> OCCAR Convention, above, Art.12(f) and 17(1); Trybus, “The New Public Sector Directive and Beyond”, above, p.208

<sup>476</sup> OMP 1, *Principal Programme Management Procedure*, issue 2, 01 July 2006, §4.2.2

qualified majority in fact gives each of the four founding Member State of OCCAR (France, Germany, Italy and the United Kingdom) a veto right on any decision.<sup>477</sup> Decisions affecting only one programme are made only by the OCCAR Member States participating in that programme, plus the other participating States.<sup>478</sup>

The membership pattern of OCCAR and its decision-making process clearly make it an international organisation ‘controlled’ by EU Member States, as all its Member States are also EU Member States.

The Executive Administration of OCCAR (OCCAR-EA) is the standing executive body of independent international civil servants responsible for the implementation of the decisions of the BoS.<sup>479</sup> OCCAR-EA is headed by a Director to whom the BoS delegates a number of responsibilities, including for the purpose of this thesis some decision-making power related to procurement (which we will detail in Section 14.4 dealing with the OCCAR procurement rules) and the authority to sign contracts in the name of OCCAR, even when he is not the one to decide on the contract award.<sup>480</sup> However, compared with the authority of the executive agencies of other organisations such as NAMS (see Section 15), the Director of OCCAR-EA only has a limited delegated power. One of the ways the decision-making process of OCCAR could be made more efficient could be to delegate more responsibilities related to contract award to the Director of OCCAR-EA. Nevertheless, even though this would probably streamline the decision-making process of the organisation, this would lend less weight to the essential national interests of the OCCAR Member States.

### ***14.1.3. Legal Personality of OCCAR***

The OCCAR Convention states that OCCAR has full legal personality and, in particular, the capacity to contract, acquire and dispose of immovable and movable property, and institute legal proceedings.<sup>481</sup> OCCAR may also cooperate with other international organisations and with non-Member States, and conclude agreements

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<sup>477</sup> OCCAR Convention, above, Art.18 and An.IV; PP 14-3, *OCCAR Membership Policy*, Issue 1, 6 July 2006, §3.2.2; see the discussion in Van Eekelen, *The Parliamentary Dimension of Defence Procurement*, above, p.28; Schmitt, *The European Union and Armaments*, above, p.25

<sup>478</sup> OCCAR Convention, above, Art.17(1) and An.IV, §2; Castellani, “OCCAR: un Exemple Pratique de la Coopération Européenne”, above, p.5

<sup>479</sup> OCCAR Convention, above, Ch.II and V

<sup>480</sup> OCCAR Convention, above, Art.19 and 21; OMP 3, above, An.F; OMP 1, above, §4.2.4

<sup>481</sup> OCCAR Convention, above, Art.39

with them.<sup>482</sup> These provisions fairly clearly grant OCCAR both international legal personality and legal personality in the legal system of its Member States.

#### **14.1.4. Rulemaking within OCCAR**

In order to complete the provisions of the OCCAR Convention, OCCAR has put in place a set of Management Documentation,<sup>483</sup> of which the highest level consists of those that are approved by the BoS under the reinforced qualified majority procedure: the OCCAR Management Procedures (OMP).

#### **14.1.5. OCCAR Financing**

The funds required for OCCAR programmes are the subject of an annual budget that specifies the funding keys among the Member States and other participating States, as only the States participating in a collaborative programme contribute to its funding.<sup>484</sup> The costs and liabilities for all OCCAR activities, administrative and operational, are borne by its Member States based on cost sharing keys agreed by the Member States and other participating States, and that can vary from programme to programme and from issue to issue.<sup>485</sup>

#### **14.1.6. Privileges and Immunities of OCCAR**

OCCAR enjoys a number of privileges and immunities, but the explicit privileges of OCCAR as listed in the OCCAR Convention do not include any privilege related to the application of domestic or EU public procurement law.<sup>486</sup> However, the OCCAR Convention states that the detailed OCCAR rules and procedures for procurement shall be the subject of a regulation adopted by the BoS.<sup>487</sup> Even though this provision is not located in the part of the Convention dealing with privileges and immunities, it could be interpreted as a privilege exempting OCCAR

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<sup>482</sup> OCCAR Convention, above, Art.37

<sup>483</sup> On the basis of the OCCAR Convention Art.12(f), 12(h), 13, 23 and 34; OCCAR website at <http://www.occar-ea.org> accessed on 18 August 2005; IP 10, *OCCAR-EA Quality Plan*, issue 6, 8 April 2008, §5.2.1; N. Cardinali, “Is Europe a Help or a Hindrance in National Defence Acquisition Strategies?” (2007) 10(3) *Rusi Defence Systems* 38, p.40; Castellani, “OCCAR: un Exemple Pratique de la Coopération Européenne”, above, p.17

<sup>484</sup> OCCAR Convention, above, Art.35(1)

<sup>485</sup> OCCAR Convention, above, Art.34(a); OMP 4, *Legal Issues*, issue 3, 1 July 2006, §§3.2.3, 3.3.4 and 3.4.2

<sup>486</sup> OCCAR Convention, above, Art.40

<sup>487</sup> OCCAR Convention, above, Art.23

from compliance with national public procurement law or could be a reflection of the customary privilege we have identified in Section 11.1.

In addition, the immunities of OCCAR that are relevant to this thesis include immunity from jurisdiction and execution of judgment, except in cases when such immunity has been waived by the BoS and in respect of the enforcement of an arbitration award made under the terms of any contract made by OCCAR, and immunity from any form of requisition, confiscation, expropriation, or sequestration, as well as administrative or provisional judicial constraint.<sup>488</sup> However, the BoS has the duty to waive these immunities in all cases where reliance upon it would impede the course of justice, and when such immunity can be waived without prejudicing the interests of OCCAR.<sup>489</sup> If immunity is not waived, the BoS has to take all appropriate steps to deal with the claim and, if the claim is justified, to settle it.<sup>490</sup>

These provisions are somewhat confusing. The balance between fair judicial protection and the prejudice to the interests of OCCAR will often be difficult to assess. Moreover, it is unclear what the ‘interests of OCCAR’ actually are, and what type or amount of prejudice to OCCAR would be required for the interests of OCCAR to be threatened. Such interests could be monetary, or could flow from the military or strategic interests of its Member States linked to the programmes managed by OCCAR. It is suggested that this restriction should only concern the fundamental interests of OCCAR, such as its continuing existence, or cases where waiving immunity would threaten the essential security interests of its Member States, such as when a waiver could lead to the cancellation of a critical programme or to operationally unacceptable delays in the deliveries of a weapon system required by troops in the field.

## **14.2. Applicability of EU Procurement Law to OCCAR**

### ***14.2.1. Applicability of EU Substantive Law in General***

The position of OCCAR is that, for its rulemaking, ‘in addition to complying with applicable law, it is OCCAR’s policy to respect the spirit of EU Regulations and

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<sup>488</sup> OCCAR Convention, above, Art.40

<sup>489</sup> OCCAR Convention, above, An.I, Art.3(1)(a); OMP 4, above, §3.4.1.1.3

<sup>490</sup> OCCAR Convention, above, Art.50; OMP 4, above, §3.4.1.1.4

Directives, which are not binding upon it'.<sup>491</sup> It is not entirely clear what is actually meant by this sentence.

First, one could question the intended meaning of 'applicable law'. As the sentence refers to OCCAR rulemaking, this seems to mean that – according to OCCAR – there is a body of law that applies to their rulemaking and another that does not. It is likely that the OCCAR Convention and the other OCCAR rules in force are to be considered as 'applicable law' with which OCCAR must comply, but it is unclear what other rules OCCAR considers would apply to its decision-making process.

Second, the last part of the sentence could mean either that OCCAR considers that no EU regulations and directives apply to OCCAR but that it would respect their spirit nonetheless, or that it will respect the spirit of those EU regulations and directives that do not apply to OCCAR, and will comply with those that do apply.<sup>492</sup> It also does not clarify the view of OCCAR on the applicability of EU law provisions that are not regulations or directives, such as the EU Treaties.

We saw in Section 10.2.1 that EU law will in general terms apply to an international organisation in the EU, but that this must be analysed case-by-case based on the contents and scope of the EU substantive law related to the case at hand and on relevant rules of international law, such as the privileges of the international organisation. EU law would, as a general principle, therefore apply to OCCAR.

In addition, as the OCCAR Convention came into effect after 1957 and the OCCAR Member States are all EU Member States, the OCCAR Member States had the obligation to draft the OCCAR Convention in accordance with EU law, and would have to amend it if it were found not to comply with EU law, even though the privileges of OCCAR may exempt it from compliance with certain provisions of EU law. As exemptions from compliance with EU law only apply to clearly defined and exceptional cases and do not create general or automatic exemptions,<sup>493</sup> it is very unlikely that the CJEU would accept their use to justify provisions of the OCCAR Convention, which is a framework treaty under which its

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<sup>491</sup> OMP 4, above, §5.2

<sup>492</sup> The Director of OCCAR-EA, in J-M. Capuano, "OCCAR: A Pragmatic View on European Defence Cooperation", Eurofuture, Spring 2006, p.110, seems to consider evident that EU directives or the interpretation of Art.296 EC cannot directly affect OCCAR

<sup>493</sup> *Commission v Spain* (Case C-414/97), above, [21]; *Johnston*, above, [26]; *Sirdar*, above, [16]; *Kreil*, above, [16]

Member States may launch many collaborative programmes and place many contracts.

#### **14.2.2. *Applicability of the EU Public Procurement Directives***

Even if EU substantive law, in general terms, applies to OCCAR, this is to be confirmed case-by-case based on the provision of the EU legislation under consideration.

OCCAR would most likely qualify as a body governed by public law as discussed in Section 11.2.1.1.<sup>494</sup> Its task is to perform defence procurement activities for the benefit of its Member States, which is almost certainly meeting a need in the general interest not having an industrial or commercial character. In addition, OCCAR has a legal personality, is solely financed by its Member States, and is controlled by the representatives of its Member States, which are all EU Member States.

However, the Public Sector Directive does not apply to contracts awarded pursuant to the particular procedure of an international organisation.<sup>495</sup> As we explained in Section 11.2.1.2, the most likely view is that this exemption applies to all international organisations in the EU, even those of which only EU Member States are Members, such as OCCAR, and that the EU Public Sector Directive would therefore not apply to OCCAR. This is clearly the position of OCCAR itself.<sup>496</sup>

In addition, we have also seen in Section 11.2.2 that the EU Defence and Security Directive did not apply to contracts awarded in the framework of a cooperative programme based on R&D, conducted jointly by at least two EU Member States for the development of a new product and, where applicable, the later phases of all or part of the life-cycle of this product.<sup>497</sup> This clearly applies to most contracts concluded by OCCAR, unless these contracts are for off-the-shelf military equipment without any significant R&D or when a single OCCAR Member State requires OCCAR to procure military equipment or services for its own behalf.

Finally, as explained at the end of Section 11.2.1.2, as the purpose of the Public Sector Directive is to coordinate national laws, it is not applicable to international

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<sup>494</sup> Defined in Directive 2004/18/EC, above, Art.1(9), para 2; see further Arrowsmith, *The Law of Public and Utilities Procurement*, above, §§5.4-5.19

<sup>495</sup> Directive 2004/18/EC, above, Art.15(c)

<sup>496</sup> Capuano, "OCCAR: A Pragmatic View", above, p.110

<sup>497</sup> Directive 2009/81/EC, above, Art.13(c)



bodies set-up by the EU institutions.<sup>498</sup> As we concluded that the same reasoning could be applied to the Defence and Security Directive and to other international organisations, it is likely that the EU public procurement directives would not apply to OCCAR on this ground also.

Nevertheless, we have seen that OCCAR, in its rules, attempts to respect the spirit of EU directives, even when they do not apply. Even though the OCCAR procurement rules were not drafted to implement the EU public procurement directives, we will analyse how these rules, in fact, respect their spirit.

### ***14.2.3. Applicability of the EU Treaties Procurement Principles***

We saw in Section 14.2.1 that OCCAR, like other international organisation, would have in principle to comply with EU law, but the EU Treaties procurement principles only have to be complied with by entities that qualify as public authorities. As that concept also covers the concept of contracting authority, OCCAR would be bound to comply with those principles if it is a contracting authority which, as we explained above, is likely. Even if OCCAR would not be found to be a contracting authority, it would almost certainly qualify as a public authority: as we have seen in Section 11.3, to qualify as a public authority, the entity in question must be effectively controlled by the State or another public authority, and it may not compete in the market.<sup>499</sup> Control can be found if the State or another public authority owns a controlling majority in the entity, which is the case of OCCAR, as all its Member States are also EU Member States. In addition, it does not provide goods or services through normal commercial relations, and is therefore not operating on the market. OCCAR would therefore most likely have to comply with the EU Treaties procurement principles.

In addition, we have seen in Section 8.2.4 that, unless EU Member States delegate to an international organisation the power to decide which measures are necessary for the protection of the essential interests of the security, the most likely proposition is that only EU Member States may invoke the public security exemptions from the EU Treaties, such as Art.346 TFEU. As OCCAR has not been given any power over the essential security interests of its Member States, it cannot therefore itself invoke this exemption. As the BoS is manned by the representatives

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<sup>498</sup> *Sogelma*, above, [115]; *EMSA*, above, [126]

<sup>499</sup> See e.g. *Wall*, above, [47]-[52] and [60]

of the OCCAR Member States,<sup>500</sup> this distinction should not be significant in practice, but the use of this exemption would have to be on a case-by-case basis, namely for each procurement process initiated within OCCAR.<sup>501</sup> Nevertheless, the rules of OCCAR, both those for programme integration and those for procurement, do not mention the use of EU Treaties exemptions.

#### ***14.2.4. Applicability of the EDA Intergovernmental Regime***

As explained in Section 8.4.1, the EDA intergovernmental defence procurement regime applies to defence procurement above one million Euros, with a few exceptions, most notably collaborative procurement.<sup>502</sup> Therefore, the regime will not apply to most procurement made by OCCAR.

However, its application could have to be envisioned would one single OCCAR Member State decide to initiate a procurement process through OCCAR,<sup>503</sup> as this would not be strictly speaking collaborative procurement. The OCCAR procurement rules do not seem to consider the possibility of having to comply with the EDA regime in these cases, but as the regime is voluntary and non-binding, the OCCAR Member State for which the procurement would be performed could very well decide that OCCAR would not have to comply with it.

### **14.3. Integration of a Collaborative Programme into OCCAR**

#### ***14.3.1. OCCAR Rules on Programme Integration***

Discussions between States on the launch of a collaborative defence procurement programme usually start outside the OCCAR framework. Such discussions can flow from the EDA Capability Development Plan<sup>504</sup> or from any other forum. There is up to now no structured approach among European States to decide whether or not to allocate a collaborative programme to OCCAR.<sup>505</sup>

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<sup>500</sup> OCCAR Convention, above, Ch.IV

<sup>501</sup> *Johnston*, above, [26]; *Sirdar*, above, [16]; *Kreil*, above, [16]; *Commission v Spain* (Case C-414/97), above, [21]

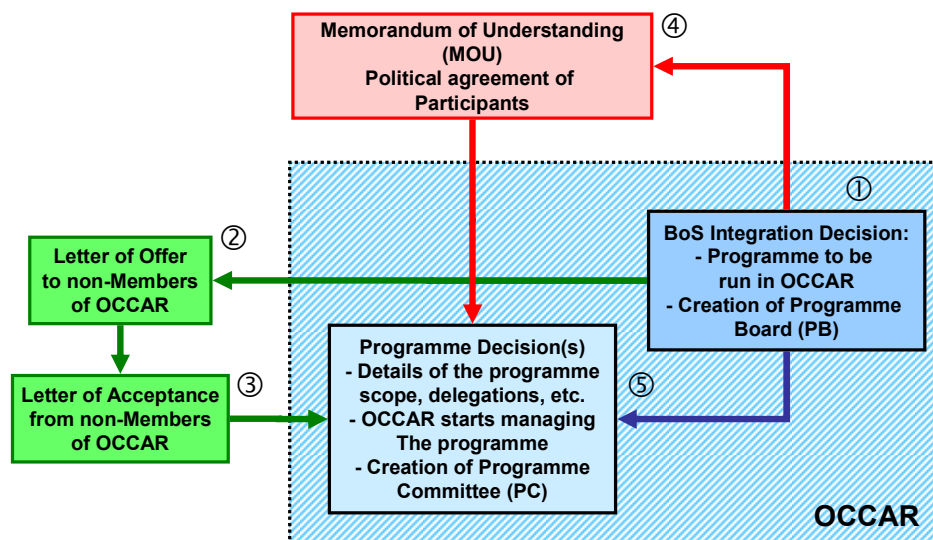
<sup>502</sup> Code of Conduct on Defence Procurement, above; Heuninckx, “Towards a Coherent European Defence Procurement Regime?”, above, p.6

<sup>503</sup> This possibility is clearly allowed by the OCCAR Convention, above, Art.8(b); Mezzadri, *L’ouverture des Marchés de la Défense*, above, p.22

<sup>504</sup> See Heuninckx, “The European Defence Agency Capability Development Plan and the European Armaments Cooperation Strategy”, above

<sup>505</sup> Schmitt, *The European Union and Armaments*, above, pp.25 and 40; Kuechle, *The Cost of non-Europe in the Area of Security and Defence*, above, §3.3; Heuninckx, “A Primer to Collaborative Defence Procurement”, above, p.130

The process of programme integration is shown schematically on Figure 5. It shows the various steps and documents to be signed before OCCAR is actually given the mandate to manage a collaborative programme. The most relevant steps for the purpose of this thesis are discussed in the following paragraphs.



*Figure 5: Programme Integration Process within OCCAR*

The integration process starts when the States intending to participate in a collaborative procurement programme (not all of them necessarily OCCAR Member States) informally agree that the programme will be managed by OCCAR. This will be accepted by OCCAR through a generic ‘Integration Decision’ adopted unanimously by the BoS,<sup>506</sup> which leads to the creation of a Programme Board, the members of which are the BoS representatives of the OCCAR Member States participating to the programme and the representatives at an equivalent level of any non-Member State participating in the programme. For the programme under its supervision, the Programme Board is responsible for making any decisions that relate only to the programme.<sup>507</sup>

The States intending to participate in the collaborative programme will in the meantime negotiate an MOU to define their respective commitments to the programme,<sup>508</sup> and the Programme Board will then sign a ‘Programme Decision’, which sets out the commitments of the participating States to allow OCCAR to effectively manage the programme, details the way the programme will be

<sup>506</sup> OCCAR Convention, above, Art.12(b) and 31; OMP 2, *Programme Integration Procedures*, Issue 5, 12 November 2007, §2.3.1; Castellani, “OCCAR: un Exemple Pratique de la Coopération Européenne”, above, p.16

<sup>507</sup> OMP 3, above, §4.2; OMP 1, above, §4.2.1

<sup>508</sup> OMP 2, above, §2.1.2

managed, and, if appropriate, has to list explicitly any exceptions to the OCCAR rules and principles to be applied to the programme. The other provisions of the Programme Decisions may not be inconsistent with OCCAR principles, rules and procedures.<sup>509</sup> A Programme Decision is a legally binding instrument.<sup>510</sup> In practice, the MOU and Programme Decision are usually negotiated in parallel with the support of OCCAR-EA and signed sequentially,<sup>511</sup> sometimes on the same day. This renders the usefulness of two separate documents dubious.

The Programme Decision also creates a Programme Committee to oversee the running of the programme for the Member States and non-Member States participating in the programme. The Programme Committee acts under delegation of the Programme Board as defined in the Programme Decision.<sup>512</sup>

#### ***14.3.2. Relationship with the EU Law Obligations of OCCAR Member States***

We have explained in Section 11.4 that neither the EU public procurement directives nor the procurement principles of the EU Treaties apply to contracts between a contracting authority and an entity legally distinct from it if the contracting authority exercises over the entity concerned, possibly jointly with other contracting authorities, a control which is similar to that which it exercises over its own departments and, at the same time, that entity carries out the essential part of its activities with the controlling contracting authority.<sup>513</sup>

The Members of OCCAR are exclusively EU Member States, and the BoS is composed solely of their representatives. Even though OCCAR has a separate legal personality, it does not have a commercial character and performs tasks in the public interest, which would not evidence a sufficient degree of independence for the necessary level of control to be found lacking. Moreover, OCCAR carries out most of its activities for the benefit of its Member States, and only incidentally for other participating States. It is therefore almost certain that neither the directives

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<sup>509</sup> OMP 2, above, §§2.3.3 and 4; OMP 1, above, §4; Castellani, “OCCAR: un Exemple Pratique de la Coopération Européenne”, above, p.16 ; De Neve, *L'Agence européenne de Défense*, above, p.49

<sup>510</sup> OMP 2, above, §2.1.3

<sup>511</sup> OMP 2, above, An.C Issue 3

<sup>512</sup> OMP 3, above, §4.5; OMP 1, above, §4.2.2; Castellani, “OCCAR: un Exemple Pratique de la Coopération Européenne”, above, p.13

<sup>513</sup> *Teckal*, above, [50]; *Stadt Halle*, above, [49] and [52]; *Commission v Spain* (Case C-84/03), above, [38]; *Parking Brixen*, above, [62]; *Agusta Helicopters*, above, [39]-[41]; *Coditel Brabant*, above, [26]; *Sea*, above, [36]-[37]

nor EU Treaties procurement principles would apply to the assignment of collaborative procurement programmes to OCCAR.

However, as we explained in Section 10.2.2, international agreements concluded by EU Member States after 1957 have to be drafted in accordance with EU law. This means that all the international agreements signed within the integration process of a programme would have to be drafted in line with EU law, unless an exemption from compliance with EU law, such as Art.346 TFEU, could be invoked. It is likely that, if the collaborative programme would require placing many different contracts for various goods and services, the use of the exemption at the level of the international agreement would be considered inappropriate and would probably breach the principle of proportionality: an exemption would have to be invoked for each individual contract.

The OCCAR Convention stipulates that, when an OCCAR Member State is considering whether or not requesting OCCAR to procure a weapon system to meet the requirements of its armed forces, it has to give preference to equipment in whose development it has previously participated within OCCAR.<sup>514</sup> This ‘buy OCCAR’ provision is in breach of the EU law principle of non-discrimination on the grounds of nationality: because of the global balance principle, discussed in Section 14.4.1, this provision implies that the contractor would be a specific company from the participating States. Even though, for the procurement of major weapon systems, exemptions from compliance with EU law could often be invoked, this has to be done on a case-by-case basis and it is highly questionable if such a blanket provision complies with the conditions set-out by the CJEU to invoke such exemption.<sup>515</sup>

Lastly, it should be noted that none of the international agreements signed within the integration process of a programme are in fact published. This lack of transparency is regrettable, as the principles under which procurement will be performed by OCCAR within the scope of the programme, especially any deviation from the OCCAR principles and rules, are to be found in the Programme Decision. It is questionable if this lack of publication would comply with the EU law principles of non-discrimination on the grounds of nationality and equal treatment, which imply a positive obligation of transparency.

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<sup>514</sup> OCCAR Convention, above, Art.6

<sup>515</sup> Trybus, “The New Public Sector Directive and Beyond”, above, p.208

## 14.4. The OCCAR Procurement Rules

### 14.4.1. The Global Balance Principle

One of the main characteristic of procurement through OCCAR is the renunciation of the *juste retour* principle usually applied to military collaborative programmes,<sup>516</sup> which is to be replaced by an overall multi-programme/multi-year balance<sup>517</sup> ('global balance' principle). This revised version of the *juste retour* principle could bear increased procurement efficiency and be an important improvement, even though it does not do away with the principle of industrial return: it is simply a potentially more flexible way of applying *juste retour*.<sup>518</sup> Nevertheless, for a State participating in only one OCCAR programme, such flexibility would not be available.

The OCCAR Convention includes rules, to be applied during an interim period, to define when a 'global imbalance' would be found. If this would be the case, the BoS is to take 'appropriate action' to restore the balance. The efficiency of those rules was to be reviewed regularly, and there should have been an examination of whether this interim procedure could be repealed by 2004.<sup>519</sup> Those interim provisions apply only to OCCAR Member States, which means that there could not be a global imbalance related to the work share of States participating in an OCCAR programme without being Members of OCCAR. In addition, these provisions retain the possibility of applying global balance independently for each phase or sub-system, which allows the continuation of one of the most economically inefficient uses of *juste retour*.

Some management rules for the 'global balance' have been agreed by the BoS but are only publicly available as a policy statement. OCCAR-EA is responsible for recording global balance data and it is on the basis of this data that the BoS would

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<sup>516</sup> OCCAR Convention, above, Ch.II – Interestingly, the OCCAR Convention states that the Member States renounce the *juste retour* principle 'in their cooperation' without mentioning explicitly OCCAR (OCCAR Convention, above, Art.5), so that an argument could be raised that OCCAR Member States have taken on an obligation under international law to renounce applying the principle of *juste retour* not only for programmes managed by OCCAR, but for all programmes in which they cooperate, even outside OCCAR

<sup>517</sup> OCCAR Convention, above, Art.5; F. Heisbourg et al., *European Defence: Making it Work*, Chaillot Paper No 42 (Institute for Security Studies: 2000), p.104; Darnis, *Lessons Learned from European Defence Equipment Programmes*, above, p.25; Arrowsmith, *The Law of Public and Utilities Procurement*, above, §6.108

<sup>518</sup> Georgopoulos, *European Defence Procurement Integration*, above, p.72

<sup>519</sup> OCCAR Convention, above, An.III; Darnis, *Lessons Learned from European Defence Equipment Programmes*, above, p.25; Georgopoulos, *European Defence Procurement Integration*, above, p.73; Keohane, *The EU and Armaments Co-operation*, above, p.41

consider what action, if any, might be taken to rectify an imbalance.<sup>520</sup> However, this policy statement makes clear the difficulty of calculating global balance and of correcting imbalances. It is unclear if the interim provisions on global balance still apply or have been repealed.<sup>521</sup>

Despite its increased flexibility and efficiency, global balance implies that, should there be a global imbalance, the latter, following a decision of the BoS, would be rectified by awarding contracts to undertakings located in the States suffering from the imbalance, provide ‘guidance’ on work allocation to a prime contractor or tenderer, or requesting a prime contractor to award sub-contracts to a specific company.<sup>522</sup> Therefore, if systematically applied, it is doubtful that the global balance principle could be found to abide with the principles of equal treatment and non-discrimination on the grounds of nationality, as it would require the award of contracts to companies located in a specific State. However, the case-by-case decision to correct a global imbalance would allow the OCCAR Member States to invoke in each case an EU Treaties exemption such as Art.346 TFEU, and this ad-hoc application of the principle of global balance could comply with the CJEU jurisprudence on the exemption if the other conditions to invoke the exemption are also satisfied.

#### **14.4.2. Contract Award Principles**

Contracts and sub-contracts are to be awarded by OCCAR after competitive tendering, except in some exceptional cases.<sup>523</sup> This is in line with the principles flowing from the EU Treaties, which forbid the award of contracts without any form of competition, and with the spirit of the EU public procurement directives. However, this principle is subject to two limitations:

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<sup>520</sup> PP 14-2, *Global Balance Policy*, Issue 1, 12 December 2006, but this document is not publicly available: only a short summary has been made public in Annex A to PP 14-2, *Global Balance Policy Statement*, Issue 1, 12 December 2006

<sup>521</sup> J-M. Capuano, “OCCAR is Going On – A Talk with Nazzareno Cardinali, Executive Director of OCCAR-EA” *EuroFuture*, Spring 2005, p.52: at that time, about 48% of the OCCAR long-term operational budget of €42.9 billion was dedicated to the A400M transport aircraft programme, 26% to the FREMM frigates, and another 17% to the Tiger combat helicopter, despite the fact that OCCAR also managed four other programmes. Belgium participates in only one programme and Italy in two. These figures are still similar today; Schmitt, *The European Union and Armaments*, above, p.25; Mezzadri, *L’ouverture des Marchés de la Défense*, above, p.25; Darnis, *Lessons Learned from European Defence Equipment Programmes*, above, p.25

<sup>522</sup> OMP 5, above, §4.3.1.2.2 and An.D, §D2.4; Trybus, “The New Public Sector Directive and Beyond”, above, p.207

<sup>523</sup> OCCAR Convention, above, Art.24(1); OMP 5, above, §§ 3.1.2 and 4.1

- The tendering has to be performed within the countries members of the Western European Armaments Group (WEAG), unless the States participating in the relevant OCCAR programme unanimously agree otherwise;<sup>524</sup>
- Competitive tendering may be restricted to the Member States participating in the relevant programme,<sup>525</sup> but this does not preclude the involvement of the industries of non-OCCAR Member States participating in the programme concerned.<sup>526</sup>

The first problem with the first limitation is that the WEAG, which was founded within the Western European Union, closed and terminated its activities on 25 May 2005.<sup>527</sup> Most of the tasks of the WEAG are gradually taken over by the EDA,<sup>528</sup> although it does not seem that the WEAG would be formally absorbed into the EDA. It is therefore unclear what the scope of the limitation actually is. It could still refer to the WEAG Participants before closure, or to the EDA participating Member States.<sup>529</sup>

If this limitation is interpreted to refer to the WEAG Participants, the restriction of contract award to tenderers from the WEAG would amount to discrimination on the ground of nationality, as the WEAG Participants did not include all the EU Member States.<sup>530</sup> Alternatively, if the limitation would be interpreted as referring to the EDA participating Member States, it would probably be in line with EU law.<sup>531</sup>

The second issue with this first limitation is that, as a blanket restriction that can be waived only by decision of the OCCAR Member States, it probably cannot be

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<sup>524</sup> OCCAR Convention, above, Art.24(3) and 24(6)

<sup>525</sup> Ibid., Art.24(4)

<sup>526</sup> OCCAR BoS Decision 61/2001 on the interpretation of Art.24(4) of the OCCAR Convention

<sup>527</sup> WEAG web site <http://www.weu.int/weag>, accessed on 16 August 2005

<sup>528</sup> Press Release: 'European Defence Agency Steering Board Agrees Transfer of WEAG/WEAO Activities to EDA', Brussels, 22 April 2005

<sup>529</sup> The EDA participating Member States (pMS) include all EU Member States, except Denmark: European Union ~Factsheet~ The European Defence Agency, February 2005

<sup>530</sup> The WEAG Participants were Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Sweden, Turkey and the United Kingdom (WEAG web site <http://www.weu.int/weag>, accessed on 16 August 2005). The EU Member States Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia and Slovenia are WEU Associate Partners, but were not WEAG Participants. Ireland is only an observer within the WEU, while Cyprus and Malta are not involved in the WEU at all

<sup>531</sup> But see the potential issue of Denmark: Protocol (No 22) on the position of Denmark [2008] OJ C115/299, Art.5



justified on the basis of the Art.346 TFEU exemption, which may only be invoked on a case-by-case basis. Therefore, this first limitation, depending on how it is interpreted, could be in breach of EU law.

The BoS should clarify the current meaning of this limitation in line with EU law and the latest developments of collaborative European defence, for instance by clarifying that it refers to the Member States of the European Economic Area, which would also cover other European States that have working relationships with the EU or were former WEAG Members, such as Norway, plus any other State participating in the programme. This would be a mere clarification of an unclear provision of the international treaty and would not require an amendment of the OCCAR Convention.

The second limitation, although more restrictive, is probably more in line with EU law.<sup>532</sup> Although it would still be in breach of the principle of non-discrimination on the grounds of nationality (as it would exclude the participation of companies located within the EU that are not from a State participating in the programme), this limitation is applied through a specific decision of the OCCAR Member States participating in the relevant programme, and therefore these Member States could invoke the Art.346 TFEU exemption in each case if the necessary conditions are met.

Contracts awarded by OCCAR through competitive tendering have generally to be awarded on the basis of the competitiveness of the offers.<sup>533</sup> What amounts to 'competitiveness' is not defined in the OCCAR Convention. Within the scope of OCCAR procurement, 'competitiveness' could be interpreted similarly as 'most economically advantageous' in EU public procurement law,<sup>534</sup> but this is not certain. However, this competitive tendering principle probably respects the spirit of the directives and the generic principles of EU law applicable to procurement.<sup>535</sup>

#### ***14.4.3. The Approving Authority***

For each contract to be awarded by OCCAR, an *Approving Authority* decides on the 'best' method of procurement through the approval of a 'Contract Route' that defines the procurement method, including the contract award procedure to be

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<sup>532</sup> Trybus, "The New Public Sector Directive and Beyond", above, at p.208

<sup>533</sup> OCCAR Convention, above, Art.25

<sup>534</sup> Directive 2004/18/EC, above, Art.53(1)(a)

<sup>535</sup> Trybus, "The New Public Sector Directive and Beyond", above, p.208

employed, in line with the programme Procurement Strategy.<sup>536</sup> The Approving Authority is also the one to approve the selection of the tenderers, the start of negotiations, and the contract award.<sup>537</sup> As we will explain in this Section, depending on which entity is the approving authority, the flexibility of the procurement process can vary greatly.

For a given programme, the Approving Authority is either the Programme Committee (for Major Contracts), or the Director of OCCAR-EA (for Minor Contracts). The difference between Minor and Major Contracts has to be defined independently for each OCCAR programme in the Programme Decision.<sup>538</sup> There does not seem to be publicly-available guidance on the criteria to be used to distinguish between Major and Minor Contracts. For some major OCCAR programmes, Minor Contracts can have a value of up to a few million Euros,<sup>539</sup> which is far from insignificant.

Even though the consequences for a contract to be classified as ‘Minor’ may appear small from the face of the OCCAR procurement rules (the contents of an ITT/RFP may be relaxed for Minor Contracts), the difference in the Approving Authority is very important. When the Approving Authority is the Programme Committee, each participating State will have to review the proposals of OCCAR-EA at each step of the procedure mentioned above. As Programme Committees usually meet two or three times a year, this makes the process very heavy and can lead to deadlocks where no contract is awarded because one participating State withholds its approval (sometimes for political reasons). For Minor Contracts, the process remains internal to OCCAR-EA, which allows for much quicker decisions.

#### ***14.4.4. Advertising Rules***

Possible future purchases, Invitations to Tender and Requests for Proposals (ITT/RFP), and contract award decisions above €750,000, are to be advertised through publication in the bulletins of all programme participating States and of OCCAR Member States, in the WEAG Bulletin and on the OCCAR website,<sup>540</sup>

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<sup>536</sup> OMP 5, above, §3.2 and An.A

<sup>537</sup> OMP 5, above, §5.3

<sup>538</sup> OMP 5, above, §5.4

<sup>539</sup> Source withheld

<sup>540</sup> OCCAR website at <http://www.occar-ea.org/view.php?nid=147&page=3>, accessed on 19 June 2009

although procurement for a lower amount may also be advertised. A decision not to advertise must be subject to specific decision of the Approving Authority.<sup>541</sup>

The OCCAR rules do not explain in which circumstances the Approving Authority may decide not to advertise. Moreover, procurement under €750,000 could still evidence some cross-border interest, and should therefore be published to comply with the positive obligation of transparency from the EU Treaties.<sup>542</sup> Therefore, even though these provisions generally follow the spirit of the EU directives,<sup>543</sup> more detailed advertisement rules compatible with the EU Treaties procurement principles would be required.

Moreover, as the WEAG Bulletin does not exist anymore following closure of the WEAG, and as the EDA refuses to publish advertisements from OCCAR contracts in its Electronic Bulletin Board (mentioned in Section 8.4)<sup>544</sup> on the ground that it is not a subscribing Member State of the EDA intergovernmental defence procurement regime,<sup>545</sup> the only EU-wide advertisement of OCCAR contracts is in fact the OCCAR website.

For contracts falling below the thresholds of the Public Sector Directive and for public services contracts not covered by that Directive, the Commission considers that publication on the website of a contracting authority is appropriate,<sup>546</sup> so advertisement on the OCCAR website is probably an appropriate method of publication.

#### **14.4.5. Contract Award Procedure**

##### **14.4.5.1. Choice of a Competitive or Non-Competitive Procedure**

As explained in Section 14.4.2, contracts and sub-contracts are to be awarded by OCCAR after competitive tendering, except in some exceptional cases.<sup>547</sup> Single

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<sup>541</sup> OCCAR Convention, above, Art.26 and OMP 5, above, §§5.1.1, 5.2.2.1, 5.3.8.1 and An.C, §§C1 and C2.2

<sup>542</sup> *Dundalk water pipes*, above, [16]; *Unitron Scandinavia*, above, [31]; *Telaustria*, above, [60]-[62]; *Coname*, above, [16]

<sup>543</sup> Directive 2004/18/EC, above, Art.35; see also Arrowsmith, *The Law of Public and Utilities Procurement*, above, Ch.13

<sup>544</sup> For more on the EBB, see Heuninckx, “The European Defence Agency Electronic Bulletin Board”, above

<sup>545</sup> Experience of the author, second semester of 2007

<sup>546</sup> Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, above, §2.1.2

<sup>547</sup> OCCAR Convention, above, Art.24(1); OMP 5, above, §§3.1.2 and 4.1

tenders may be invited exclusively when only one supplier is able to fulfil the requirement, when the Approving Authority decides that competition is inappropriate, or for an additional order.<sup>548</sup> The conditions for the latter are quite well-defined, but are to be used as guidance only.<sup>549</sup> The non-exhaustive list of circumstances under which competition may be considered inappropriate includes:<sup>550</sup>

- When the supplies or services are unobtainable from any other source;
- When the requirement is for spares which must be ordered from the original equipment manufacturer;
- When the proposed supplier has been awarded a contract for the same items in the previous twelve months; or
- When precluded by the agreed nationality field approved in the Procurement Strategy.

It should never be assumed that timing, past practice, past procurement route, complexity of the requirement, or end-user pressure are sufficient justifications for deciding to proceed non-competitively.<sup>551</sup>

A number of comments have to be made on this list. First, it is not exhaustive,<sup>552</sup> and this leaves the Approving Authority with an important degree of freedom in deciding to invite single tenders. The OCCAR process leading to the decision to request single tenders is therefore not very transparent, and the OCCAR procedures should provide more guidance on when competition could be validly deemed ‘inappropriate’.

Second, the term ‘nationality field’ is not defined, but most likely refers to the two limitations mentioned in the discussion of contract award principles in Section 14.4.2. A procurement strategy based on the procurement principles laid down in the OCCAR Convention must be approved by the Programme Committee for each OCCAR programme,<sup>553</sup> and any deviation from these principles must be approved

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<sup>548</sup> OMP 5, above, §5.1.2.5

<sup>549</sup> OMP 5, above, §5.2.2.5

<sup>550</sup> OMP 5, above, An.B

<sup>551</sup> OMP 5, above, §4.2

<sup>552</sup> OMP 5, above, An.B, §B1

<sup>553</sup> OCCAR Convention, above, Ch.VI

by the BoS.<sup>554</sup> Of course, such nationality requirement contravenes the EU law principles of equal treatment and non-discrimination on the grounds of nationality. An exemption from applicability of EU law, such as Art.346 TFEU, would have to be validly invoked by the participating States if nationality is to be a ground for selecting the award procedure, selecting the tenderers, or awarding the contract. Depending on the scope of the programme, it is not certain that the CJEU would accept that the exemption is invoked at the time of the approval of the procurement strategy (for the whole programme).

Third, whilst in the EU procurement directives the choice of the procedure relates to whether or not the procedure would include negotiations,<sup>555</sup> in the OCCAR rules the choice is whether a single tender will be requested or if a competition will be held. In addition, the grounds for awarding contracts without competition are quite different from those of the directives that relate to the negotiated procedure.<sup>556</sup> Most importantly, the list of those grounds is not exhaustive in the OCCAR rules, whilst it is so in the directives.

Fourth, as we will see below in the section on tendering and evaluation, the OCCAR rules authorise negotiations in most cases. One could argue that, if the aim of procurement rules is to encourage competitiveness and ensure fair and equal treatment,<sup>557</sup> the OCCAR rules on negotiation would probably be more respectful of the principle of proportionality than the Public Sector Directive which, as a blanket rule, bans any negotiation except in exceptional cases. The latter rules could be seen as exceeding what is appropriate and necessary to attain the objectives pursued by the legislation.<sup>558</sup> This could have been the thinking behind the adoption of the Defence and Security Directive, where the negotiated procedure with publication is to be the default procedure for the procurement of military equipment, while still requiring competition.<sup>559</sup>

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<sup>554</sup> OMP 1, above, §4.2.2.5

<sup>555</sup> See Arrowsmith, *The Law of Public and Utilities Procurement*, above, Ch.8; A. Brown, "The Impact of the New Procurement Directive on Large Public Infrastructure Projects: Competitive Dialogue or Better the Devil You Know" (2004) 13(4) PPLR 160, pp.166-169

<sup>556</sup> Directive 2004/18/EC, above, Art.30-31; Directive 2009/81/EC, above, Art.28; Arrowsmith, *The Law of Public and Utilities Procurement*, above, §§8.2-8.14 and 9.2-9.21

<sup>557</sup> Trepte, *Regulating Procurement*, above, pp.63 et.seq; C. Bovis, *The Liberalisation of Public Procurement and Its Effects on the Common Market* (Ashgate: 1998), pp.5-11

<sup>558</sup> On the principle, see Buitoni, above, [16]; Fromançais, above, [8]; *Denkavit Nederland*, above, [25]

<sup>559</sup> Directive 2009/81/EC, above, Art.25; see Heuninckx, "The EU Defence and Security Procurement Directive", above

Overall, it seems that the Approving Authority has a wide discretion in deciding whether or not the contract will be awarded through a competition. This is not very conducive of transparency, and potentially creates legal uncertainty. It is submitted that the grounds for finding that competition is inappropriate should be clarified and applied restrictively.

#### **14.4.5.2. Subcontracting**

OCCAR requires its contractors to exercise as much as possible competition at the subcontractor level. Especially, when a contract is awarded by OCCAR on a non-competitive basis, a tenderer must provide evidence of how he intends to achieve the greatest competition at sub-contractor level.<sup>560</sup> In addition, OCCAR may reserve the right to intervene case-by-case in subcontracting to restore the global balance or to ensure security of supply, even though the prime contractor retains the sole responsibility for the execution of the contract.<sup>561</sup>

Despite the fact that these interferences would sometimes be in breach of EU law, especially of the principle of non-discrimination, they require a decision of the BoS or of the respective Programme Committee, which would allow invoking case-by-case a specific exemption, such as Art.346 TFEU.

However, these provisions would provide an answer to some criticisms of the Public Sector Directive related to defence procurement voiced in the consultation run by the Commission, such as the fact that they do not ensure security of supply or secure competition throughout the supply chain.<sup>562</sup>

#### **14.4.5.3. Small Value Contracts**

When the value of the requirement is so small that the expected savings achieved through a formal competition are likely to be of a low value or outweighed by the cost, time and effort involved, an 'informal competition' may be run.<sup>563</sup> This is probably in line with the EU Treaties obligation of transparency which, despite requiring sufficient advertising to allow potential tenderers from other Member States an opportunity of expressing their interest in obtaining the contract, does not

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<sup>560</sup> OMP 5, above, §4.3.1.1

<sup>561</sup> OMP 5, above, §4.3.1.2

<sup>562</sup> Communication on the results of the consultation launched by the Green Paper on Defence Procurement, COM(2005)626, above, §II 2

<sup>563</sup> OMP 5, above, §4.1.4

require a formal tendering process in each case.<sup>564</sup> One could regret that the value under which competition may be informal is not defined. It is submitted that this should be done once for each OCCAR programme in the Programme Decision, together with the definition of the distinction between Minor and Major Contracts.

Moreover, the relationship between small value contracts and Minor Contracts, as well as their link to the €750,000 publication threshold for publication, is unclear.

In addition, the process of ‘informal competition’ is not defined either, even though some provisions exist for relaxing the contents of an ITT/RFP in the case of Minor Contracts, but it is not clear if these apply in the case of ‘informal competition’.<sup>565</sup>

#### **14.4.5.4. Contractor Selection**

The award of a contract by OCCAR is performed in a two-step process: a supplier selection and a tendering leading to contract award.<sup>566</sup> These are two distinct steps, and this principle is in line with the requirements of EU law.<sup>567</sup>

Supplier selection aims at identifying the potential contractors that meet the minimum requirements of the advertisement and/or of a pre-qualification questionnaire (PQQ) and are within the required ‘nationality field’ defined in the Procurement Strategy.<sup>568</sup> The potential contractors meeting the selection requirements will be included in a Programme suppliers' selection list and will be issued the ITT/RFP documents.<sup>569</sup>

The PQQ requires the provision of company generic information, proof of technical competence, security clearances, resources, sub-contracting, financing, and details of similar projects.<sup>570</sup> The pre-selection/qualification criteria and the minimum standards to be met are to be defined by the Programme Manager in the PQQ and/or advertisement.<sup>571</sup>

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<sup>564</sup> *Unitron Scandinavia*, above, [31]; *Telaustria*, above, [60]-[62]; *Coname*, above, [19]-[21]

<sup>565</sup> OMP 5, above, §5.2.2.4

<sup>566</sup> OMP 5, above, §5.1.2

<sup>567</sup> As articulated in *Beentjes*, above, [15]

<sup>568</sup> OMP 5, above, §5.1.2.1 and An.E (the OMP mistakenly places this the PQQ at An.D)

<sup>569</sup> OMP 5, above, §5.1.2.4

<sup>570</sup> OMP 5, above, An.E

<sup>571</sup> OMP 5, above, §5.1.5 and An.E, §E1

Potential contractors who expressed their interest in tendering, but were not invited to tender after the pre-selection process, have to be informed and debriefed.<sup>572</sup>

These provisions seem to respect at least the spirit of the EU public procurement directives dealing with the qualitative selection of candidates,<sup>573</sup> as well as the related principles flowing from the EU Treaties, with the exception of the limitations of nationality, which we discussed above. However, some of them could benefit from clarifications.

#### **14.4.5.5. Tendering and Tender Assessment**

The tendering process must preserve commercial confidentiality and equal and fair treatment of all potential or actual tenderers.<sup>574</sup>

ITT/RFP are prepared and issued based on a set of guidelines<sup>575</sup> that are more flexible than the provisions of the EU directives dealing with technical specifications,<sup>576</sup> but seem to respect the basic EU Treaties principle of mutual recognition of technical standards.<sup>577</sup> A Tender Assessment Panel is set-up to prepare the ITT/RFP, to assess the tenders, and to make recommendations to the Approving Authority for the award of the contract.<sup>578</sup>

The ITT/RFP ‘should’ provide the selection criteria (by which is meant the contract award criteria) and ‘technical marking scheme’ (including, where appropriate, the weighting), identifying relative importance of each criterion and minimum requirements below which tenders will be classified as noncompliant.<sup>579</sup> There does not seem to be guidance on what contract award criteria are to be used (e.g. if offsets could be used), or on who has to approve the ITT/RFP and relevant criteria. Moreover, it seems that publishing the award criteria and marking scheme is not mandatory.

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<sup>572</sup> OMP 5, above, §5.1.3

<sup>573</sup> Directive 2004/18/EC, above, Art.44-52; Directive 2009/81/EC, above, Art.39-46; see further Arrowsmith, *The Law of Public and Utilities Procurement*, above, Ch.12

<sup>574</sup> OMP 5, above, §5.2.1.2

<sup>575</sup> OMP 5, above, §§5.2.2 and 5.2.3

<sup>576</sup> Directive 2004/18/EC, above, Art.23-27; Directive 2009/81/EC, above, Art.18; see further Arrowsmith, *The Law of Public and Utilities Procurement*, above, Ch.17

<sup>577</sup> *Vlassopoulou*, above; *Säger*, above, [15]; *Vestergaard*, above, [21]-[24]; also implied in *Dundalk water pipes*, above

<sup>578</sup> OMP 5, above, §§ 5.2.4, 5.2.7 and 5.3, and Annex G

<sup>579</sup> OMP 5, above, An.G, §G2



Following the assessment of the tenders, the recommendation of the Tender Assessment Panel can be one of the following.<sup>580</sup>

- The immediate award of the contract if there is a fully compliant and outright winning tender;
- Initiating negotiations with one or more fully compliant tenderer when there is scope for improving the outcome;
- Seeking best and final offers when there is more than one fully compliant tender, either after tender evaluation or after negotiation;
- Recognising that the competition has been ineffective, in which case the Approving Authority may decide to re-issue the ITT/RFP, or to start negotiation with more than one of the tenderers.

The possibilities of pre-contract negotiation and of a best and final offer after assessment of the tenders differ from the open or restricted procedures of the EU directives, but are only authorised if mentioned in the advertisement.<sup>581</sup> Tenderers who are not invited to negotiations and those who are not requested to provide a best and final offer have to be informed, and debriefed if necessary.<sup>582</sup>

This process, with the addition of the possibility of post-tender negotiation and best and final offer, makes the competitive procedure of OCCAR more similar to the competitive dialogue of the EU directives<sup>583</sup> than to the open or restricted procedure, but the process allows for negotiations in most cases (providing this has been stated at publication), and not only when the procurement is ‘particularly complex’. It therefore provides the flexibility in contract award required by most practitioners of defence procurement, as identified in the Commission’s consultation.<sup>584</sup>

#### **14.4.5.6. Contract Award**

Contract award is decided by the Approving Authority based on the Tender Assessment Panel’s recommendation. There is no ‘standstill period’ foreseen between the award decision of the Approving Authority and the actual contract

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<sup>580</sup> OMP 5, above, §5.3 and An.G, §G.4

<sup>581</sup> OMP 5, above, §4.1.4, para 2

<sup>582</sup> OMP 5, above, §5.3.3.1 and 5.3.4.3

<sup>583</sup> Directive 2004/18/EC, above, Art.29; Directive 2009/81/EC, above, Art.27; see further Arrowsmith, *The Law of Public and Utilities Procurement*, above, Ch.10

<sup>584</sup> COM(2005) 626, above, §II.2

signature by the Director of OCCAR-EA.<sup>585</sup> This is not in line with the amended Remedies Directive,<sup>586</sup> but the latter does not apply to OCCAR. However, the principles set-out in the relevant CJEU judgement<sup>587</sup> should be considered as setting a standard for any revision of the OCCAR rules.

The unsuccessful tenderers have to be notified. Following notification, they also have to be provided with a debriefing on request.<sup>588</sup>

#### **14.4.6. Complaints and Settlement of Disputes**

Aggrieved potential contractors may rely on a complaint procedure<sup>589</sup> that is explicitly mentioned in the OCCAR rules as being applicable in the following cases:

- For being excluded from the tender list at the end of the selection process;<sup>590</sup>
- For not being invited to participate in the negotiations following tender assessment;<sup>591</sup>
- For not being awarded the contract.<sup>592</sup>

However, it seems that this list is not exhaustive, and complaints could be received at any stage of the procedure, such as if the ITT/RFP documents themselves are considered to be discriminatory against a potential tenderer.<sup>593</sup>

Complaints have to be made in writing to the Director of OCCAR-EA who will ‘deal with the matter promptly, fairly and objectively’.<sup>594</sup> The Director of OCCAR-EA will then make a ‘decision’ based on the complaint, but the OCCAR rules do

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<sup>585</sup> OMP 5, above, §5.3.8

<sup>586</sup> Directive 89/665/EEC, above, Art.2a

<sup>587</sup> *Alcatel Austria AG and Others, Siemens AG Österreich and Sag-Schrack Anlagentechnik AG v Bundesministerium für Wissenschaft und Verkehr* (Case C-81/98) [1999] E.C.R. I-7671, [29]-[43]; *Commission v Austria* (Case C-212/02) [2004] E.C.R. I-00, [20]-[23]

<sup>588</sup> OMP 5, above, §5.3.8.3

<sup>589</sup> OMP 5, above, An.F

<sup>590</sup> OMP 5, above, §5.1.4 and An.F, §F1

<sup>591</sup> OMP 5, above, §5.3.3.1 and An.F, §F2

<sup>592</sup> OMP 5, above, §5.3.8.3 and An.F, §F2

<sup>593</sup> OMP 5, above, §5.2.1.2 and An.F, §F2

<sup>594</sup> OMP 5, above, An.F, §F2

not specify what this decision may be. This decision may be appealed to the BoS, who may conduct their own investigation of the complaint.<sup>595</sup>

Where a complaint to the Director of OCCAR-EA is successful, the Director refers the matter to the BoS with recommendations for possible forms of redress. Complaints upheld by the BoS are notified to the Director of OCCAR-EA with guidance on what form of redress is to be offered.<sup>596</sup> This means that, even when the Director decides that the complaint is justified, the BoS has to approve the decision and the possible form of redress.

Complaints do not have automatic suspensive effect, but interim measures do not seem to be precluded as a means of redress through a decision of the Director or the BoS.<sup>597</sup> However, selection decisions will not be reviewed during the tendering process, even though such decisions may be reviewed if no recommendation for contract award can be made following tender assessment.<sup>598</sup> This provision seems to nullify the benefit of being able to file a complaint at the contractor selection stage.

The OMP does not mention the possibility of judicial review of the decisions of the BoS in answer to a complaint. In addition, we saw that OCCAR has immunity from jurisdiction and execution of judgment, except when the BoS expressly waives its immunity, or for the enforcement of an arbitration award. The BoS has the duty to waive immunity where reliance upon it would impede the course of justice.<sup>599</sup> If a third party such as a candidate or tenderer claims that damages have been caused by OCCAR and OCCAR does not waive immunity, the BoS will deal with the claim and is empowered to settle it.<sup>600</sup>

These provisions clearly do not comply with the requirements, or even the spirit, of the Remedies Directive,<sup>601</sup> which requires that, if the review body does not have a judicial character, its decisions must be subject to judicial review.<sup>602</sup> However, as

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<sup>595</sup> OMP 5, above, An.F, §F3

<sup>596</sup> OMP 5, above, An.F, §F5

<sup>597</sup> OMP 5, above, An.F, §F4

<sup>598</sup> OMP 5, above, §5.1.5

<sup>599</sup> OCCAR Convention, above, An.I, Art.3; OMP 4, above, §3.4.1.1.3

<sup>600</sup> OCCAR Convention, above, Art.50; OMP 4, above, §3.4.1.1.4

<sup>601</sup> Council Directive 89/665/EEC, above, Article 2(7) to (8); see further Arrowsmith, *The Law of Public and Utilities Procurement*, above, Ch.21

<sup>602</sup> *Josef Köllensperger GmbH & Co. KG and Atzwanger AG v Gemeindeverband Bezirkskrankenhaus Schwaz* (Case C-103/97) [1999] E.C.R. I-551, [26]-[31]; *Hospital Ingenieure*

we have seen that it is very likely that the Remedies Directive does not apply to OCCAR procurement, this is not so much of an issue.

More worrying is the compliance of the OCCAR immunities with the EU Treaties principles of effectiveness and of effective judicial protection, whereby it must be possible to review the impartiality of procurement procedures.<sup>603</sup> We have seen in Section 12.3 that the immunities of international organisations do not in principle impose a disproportionate restriction on the right of access to court,<sup>604</sup> but that the plaintiff must be able to rely on reasonable alternative means in the organisation's legal instruments to protect effectively its rights, such as specific modes of settlement of private-law disputes.<sup>605</sup>

Specifically, we saw that the ECtHR held that provisions for arbitration of contractual disputes between the organisation and private parties and an ad-hoc dispute settlement system independent from the organisation to deal with staff matters would be appropriate,<sup>606</sup> but never had the chance to rule on the settlement of procurement disputes before contract signature. However, by analogy, if appeals against decisions made during the procurement process are only possible to the organs of the organisation itself, such as is the case in OCCAR, this process cannot be deemed to be 'independent from the organisation',<sup>607</sup> and is then probably not a reasonable alternative means of dispute settlement.

## **14.5. Research Questions Answers for OCCAR**

### ***14.5.1. OCCAR Procurement Rules and EU Law***

We have seen that OCCAR probably does not have to comply with the EU public procurement directives, even though the policy of OCCAR is to attempt to respect their spirit. However, OCCAR has most likely to comply with the procurement principles flowing from the EU Treaties, unless an exemption from compliance

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*Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v Landeskrankenanstalten-Betriebsgesellschaft* (Case C-258/97) [1999] E.C.R. I-1405, [14]-[20]

<sup>603</sup> *Telaustria*, above, [62]; *Coname*, above, [21]; see also Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, above, §2.3

<sup>604</sup> *McElhinney*, above, [37]

<sup>605</sup> *Waite and Kennedy*, above, [68]-[69]; *Beer and Regan*, above, [58]; *Hans-Adam II of Liechtenstein*, above, [48]; See Reinisch, *International Organisations before National Courts*, above, pp.366 et.seq.

<sup>606</sup> *Waite and Kennedy*, above, [69]; *Beer and Regan*, above, [59]

<sup>607</sup> See the discussion of this issue in De Castro Meireles, *The World Bank Procurement Regulations*, above, pp.141 et.seq.

with EU law, such as Art.346 TFEU, can be validly invoked by the States participating in the relevant collaborative programme.

Our analysis of the OCCAR procurement principles and detailed rules has shown many differences with the EU public procurement directives. In a number of cases, OCCAR often fails to even respect their spirit or to comply with the procurement principles flowing from the EU Treaties. This is mostly because many provisions of the OCCAR rules provide for unequal treatment and discrimination on the grounds of nationality to enforce the global balance principle.

However, most of the OCCAR rules would allow a case-by-case invocation of an exemption from compliance with EU law in line with the case law of the CJEU, even though this is not always the case, as some discriminating provisions are drafted as blanket rules.

Therefore, despite the fact that the OCCAR procurement rules in many ways attempt to comply with EU public procurement law, a number of issues remains, for which OCCAR and/or its Member States could be found in breach of their EU law obligations.

#### ***14.5.2. Internal Coherence of the OCCAR Procurement Rules***

The OCCAR procurement rules, even though not perfectly drafted, constitute a generally coherent set of rules and provide for quite a large amount of flexibility. On the one hand, this allows catering for the specificities of the defence market, but on the other leaves much leeway to the organisation and does not favour legal certainty. However, despite this flexibility, OCCAR Member States retain an important role in procurement decision-making, with only limited delegation to the Director of OCCAR-EA, and this process does not guarantee efficient, and especially timely, procurement decisions.

Nevertheless, the procedures for contract award, which include a contractor selection, tenders assessment, and potentially negotiations and best and final offers, provide more flexibility and are probably well-suited to the specificities of the defence market. We could ask ourselves if the OCCAR rules are not more compliant with the EU law principle of proportionality than the EU Public Sector Directive, which forbids negotiations for most public procurements. The OCCAR procurement process could very well be applied while respecting the EU Treaties principles applicable to procurement.

Similarly, the OCCAR rules on subcontracting, when applied in a non-discriminatory manner, can be efficient to ensure security of supply and promote competition down the supply chain, especially the participation of SME.

Therefore, even though the OCCAR rules are generally coherent, they in some cases lack clarity and leave too much freedom to the organisation, thereby opening to door to arbitrary decisions. In addition, transparency could be increased in many cases.

We will make specific recommendations for improving the OCCAR procurement rules in Section 20.

## **15. The NATO Maintenance and Supply Organisation (NAMSO)**

### **15.1. Introduction to NAMSO**

#### **15.1.1. Functions and Aims of NAMSO**

In this chapter, we will attempt to answer for the NATO Maintenance and Supply Organisation (NAMSO) the research questions devised in Section 3.2 of this thesis.

NAMSO is a subsidiary body created by the North Atlantic Treaty Organization (NATO).<sup>608</sup> The mission of NAMSO is to provide logistics support to NATO or to its Member States individually or collectively, with the objective to maximize the effectiveness of logistic support to the armed forces of NATO Member States and to minimize the related costs.<sup>609</sup>

In 2009, the NAMSO operational budget was estimated at about €1.2 billion.<sup>610</sup> The administrative expenditures of NAMSO (salaries of staff, renting of premises, etc.) currently amount to about 6% of its total expenditures, as shown on Figure 6.

NAMSO manages more than 20.000 operational contracts<sup>611</sup> that amount to about 3% of the total operations and maintenance expenditures in the EU (this would be

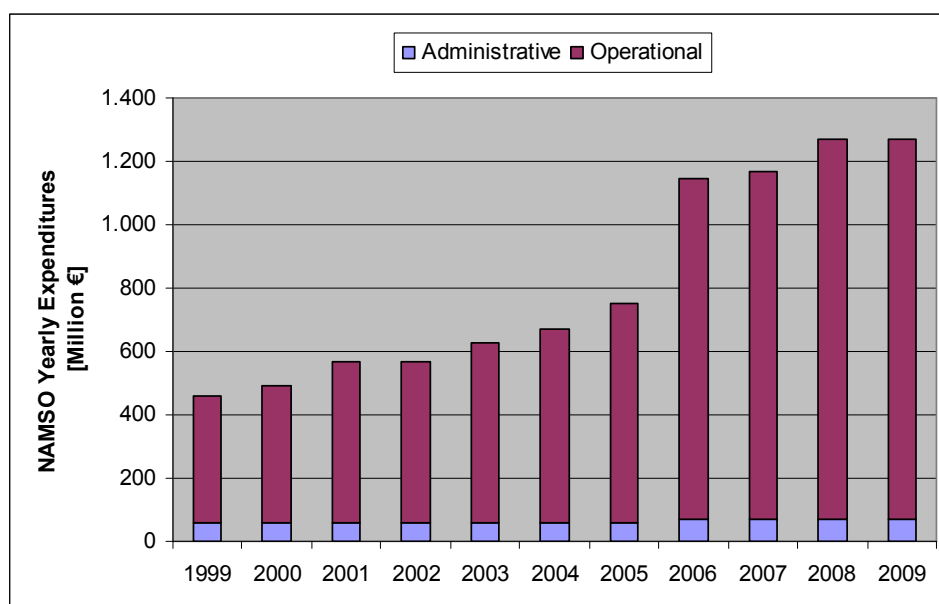
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<sup>608</sup> North Atlantic Treaty, above, Art.9 and *NATO Handbook*, above, pp.34-36; NAMSO Charter, above, Art.1

<sup>609</sup> NAMSO Charter, above, Art.3; *NATO Handbook*, above, p.323; *NATO Logistics Handbook* (NATO, 2006), p.24; see also Kirat T. and Bayon D., *Contrats d'acquisition, maintenance et coût global de possession : comparaisons dans le domaine aéronautique entre la France, le Royaume-Uni, les Etats-Unis et l'OTAN* (Institut des Sciences de l'Homme: 2004), pp.97-99

<sup>610</sup> K-H.Munzner, "NAMSA in Support of Multinational Operations", presentation at the International Defence Logistics 2009 conference, Brussels, 10 June 2009, Slide 24

equivalent to more than 12% of collaborative defence equipment procurement and R&D in the EU, but NAMS0 supports principally operations and maintenance activities, of which the collaborative portion is not publicly known).



*Figure 6: NAMS0 Yearly Expenditures*<sup>612</sup>

Some non-EU Member States (Canada, Iceland, Norway, Turkey and the United States) are members of NAMS0, while some EU Member States are not (Austria, Cyprus, Finland, Ireland, Malta and Sweden). All the NAMS0 Member States are also Members of NATO, but one NATO Member State is not (yet) Member of NAMS0 (Albania).<sup>613</sup>

NAMS0 performs a number of tasks, such as supply management, maintenance management, procurement and technical assistance,<sup>614</sup> for the benefit of any NATO Member State (individually or to a group of such States, for instance through Weapon Systems Partnerships), of any subsidiary organisation created within the

<sup>611</sup> R. Smit, “NAMS0 Procurement Policy and Implementation”, presentation for the NAMS0 Seminar 16-17 April 2008 for the Lithuanian Industry, on file with the author, Slide 6

<sup>612</sup> M. Saudrais, “General Orientation Briefing on NAMS0”, presentation to the OCCAR A400M Programme Division, 29 July 2004, on file with the author, Slide 9; T. Russel, “NAMS0 Support of Common and Nationally Funded Aviation Systems”, presentation at the Military Aviation Repair and Maintenance 2007 conference, 25 April 2007, on file with the author, Slide 6 (expenses for 2007 and 2009 estimated)

<sup>613</sup> NAMS0 website, at [http://www.namsa.nato.int/nams0/nams0\\_1\\_e.htm](http://www.namsa.nato.int/nams0/nams0_1_e.htm), accessed on 17 August 2009, even though Iceland does not have armed forces that could use NAMS0’s support: *NATO Logistics Handbook*, above, p.24

<sup>614</sup> NAMS0 Charter, above, Art.4(c) and 5; see also *NATO Logistics Handbook*, above, p.24; Russel, “NAMS0 Support of Common and Nationally Funded Aviation Systems”, above; Kirat and Bayon, *Contrats d’acquisition, maintenance et coût global de possession*, above, p.97

framework of NATO, as well as – with some conditions – of States participating in the Partnership for Peace programme.<sup>615</sup>

Weapon System Partnerships are established within NAMSOS by some or all NAMSOS Member States for the collaborative management of the logistic support of a given weapon system or family of systems. Such partnership is formally established through the conclusion of an agreement between the participating States and its approval by the NAMSOS Board of Directors.<sup>616</sup> NAMSOS currently manages about twenty Weapon System Partnerships.<sup>617</sup> Weapon System Partnerships are somewhat comparable to collaborative programmes created within OCCAR, but they focus on in-service support.

### **15.1.2. Organisation of NAMSOS**

The two primary organs of NAMSOS are the *Board of Directors* and the *NATO Maintenance and Supply Agency* (NAMSAS).<sup>618</sup>

The Board of Directors is the governing body of NAMSOS and stands in for the collective interests of the NAMSOS Member States.<sup>619</sup> It is composed of a representative of each of the Member State, with each such State having the right to one vote.<sup>620</sup>

The Board of Directors is responsible, among other things, for general policy decisions and the issue of directives to enable NAMSOS to carry out its mission, providing guidance for the operation and administration of NAMSAS, the policy to be followed for placing procurement contracts with firms located in a State which

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<sup>615</sup> *NATO Handbook*, above, pp.195-201: the Partnership for Peace (PfP) programme seeks to promote reform, increase stability, diminish threats to peace and build strengthened security relationships between individual Partner countries (former Warsaw Pact and USSR countries) and NATO, and has in practice up to now functioned de facto as preparation for NATO membership; NAMSOS Charter, above, Art.6; *NATO Logistics Handbook*, above, p.24; NAMSOS Functional Directive No. 090, *Cooperation with Partnership for Peace States Signatory to NAMSOS MOUs*, 7 December 1999

<sup>616</sup> NAMSOS Charter, above, Art.33-35; Munzner, “NAMSAS in Support of Multinational Operations”, above, Slide 5; Saudrais, “General Orientation Briefing on NAMSAS”, above, Slide 18; see also [http://www.namsa.nato.int/namsa/namsa\\_2\\_e.htm](http://www.namsa.nato.int/namsa/namsa_2_e.htm) accessed on 17 August 2009 and [http://www.namsa.nato.int/customers/customer\\_sup\\_e.htm](http://www.namsa.nato.int/customers/customer_sup_e.htm), accessed on 18 August 2009; NAMSOS Functional Directive No. 070, *Guidelines for the General Rules and Policies Governing Future Weapon Systems Partnerships*, 2<sup>nd</sup> Revision, 25 June 2003

<sup>617</sup> Saudrais, “General Orientation Briefing on NAMSAS”, above, Slide 11; Russel, “NAMSAS Support of Common and Nationally Funded Aviation Systems”, above

<sup>618</sup> NAMSOS Charter, above, Section VII; *NATO Logistics Handbook*, above, pp.24-25 and 186

<sup>619</sup> *NATO Logistics Handbook*, above, p.186

<sup>620</sup> NAMSOS Charter, above, Art.20(a)



is not a member of NATO, and the organisation of NAMSA. The Board of Directors may delegate its powers of decision to permanent committees.<sup>621</sup>

Decisions of the Board of Director are generally supposed to be made by simple majority, but decisions that have financial implications or that concern general policy, which in fact concerns most Board of Director decisions, have to be made unanimously.<sup>622</sup> In addition, some decisions of the Board of Directors are subject to the approval of the North Atlantic Council.<sup>623</sup> Specifically, any Member State which feels that a majority decision of the Board of Directors is not in keeping with its interests, or that such a decision may injure that State, may present such matters to the North Atlantic Council for resolution.<sup>624</sup> For the most important decisions, this means that EU Member States do not control the decision-making process of NAMSO.

The activities of a Weapon System Partnership are directed by a Weapon System Partnership Committee, where the participating States make collective decisions on policy issues for logistics support, configuration management and sharing of associated operational and administrative costs, based on mutually agreed cost sharing formulae.<sup>625</sup>

NAMSA is the standing executive arm of NAMSO and is composed of independent civil servants. Its task is to provide logistic services in support of weapon and equipment systems held in common by NATO member countries, improve the efficiency of logistic operations, effect savings through consolidated procurement, and provide logistics support for deployed NATO forces.<sup>626</sup>

NAMSA is headed by a General Manager nominated by the Board of Directors and appointed by the Secretary General of NATO.<sup>627</sup> The General Manager is responsible for implementing the decisions of the Board of Directors and, in particular for the procurement activities of the organisation, for exercising the contract authority delegated to him by the Board of Directors. However, the Board

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<sup>621</sup> NAMSO Charter, above, Art.31

<sup>622</sup> NAMSO Charter, above, Art.30(a)

<sup>623</sup> For instance NAMSO Charter, above, Art.25(c) concerning arrangements in peacetime for the wartime tasks of NAMSO

<sup>624</sup> NAMSO Charter, above, Art.30(b)

<sup>625</sup> See [http://www.namsa.nato.int/customers/customer\\_sup\\_e.htm](http://www.namsa.nato.int/customers/customer_sup_e.htm), accessed on 18 August 2009

<sup>626</sup> *NATO Handbook*, above, p.323; NAMSO Functional Directive No. 040, *General Organisation of NAMSA*, 2<sup>nd</sup> Revision, Amendments 1-2, 28 June 2006

<sup>627</sup> NAMSO Charter, above, Art.36

of Directors may not delegate to the General Manager the authority to conclude contracts beyond those required for routine management and business (except on a case-by-case basis after review of the Board of Directors), and may not authorise the General Manager to conclude international agreements.<sup>628</sup>

### **15.1.3. The Legal Personality of NAMSO**

NAMSO is ‘an integral part of NATO’, and ‘shares in the international personality of NATO, as well as in the juridical personality possessed by NATO’.<sup>629</sup> In carrying out and within the scope of its mission, NAMSO may conclude agreements and contracts, acquire and dispose of property in the name of NATO, and conclude administrative agreements with other NATO bodies.<sup>630</sup> In addition, subject to advance approval in principle by the North Atlantic Council, NAMSO may also conclude agreements or contracts with governments of non-NATO Members States or with other international organisations.<sup>631</sup>

Referring to our discussions on the subject in Section 9.3, these provisions clearly grant NAMSO international legal personality and legal personality in the legal system of its Member States. However, that legal personality is the one of NATO. One could therefore question if NAMSO is in fact an international organisation. In the definition we used in Section 9.3, an international organisation is to have ‘international legal personality’, but the key factor in this definition is that the international legal personality of the organisation has to be different from those of its Member States,<sup>632</sup> which is clearly the case for NATO.<sup>633</sup> NAMSO would therefore be an international organisation according to our definition, even though one could still question if it is an international organisation different from NATO. However, for the purpose of this thesis, this is not a fundamental issue.

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<sup>628</sup> NAMSO Charter, above, Art.37

<sup>629</sup> NAMSO Charter, above, Art.7; Agreement on the Status of the North Atlantic Treaty Organization, National Representatives And International Staff, Ottawa, 20 September 1951 (*Ottawa Agreement*), Art.4, No. 2992, 200 United Nations Treaty Series 3; see the discussion in Stein and Carreau, “Law and Peaceful Change in a Subsystem”, above, pp.602-603

<sup>630</sup> NAMSO Charter, above, Art.10: it is likely that the term ‘other NATO bodies’ refers to subsidiary bodies established pursuant to Art.9 of the North Atlantic Treaty, like NAMSO

<sup>631</sup> NAMSO Charter, above, Art.11: special arrangements exist for agreements involving Partnership for Peace States and, for the purpose of these provisions, a subsidiary body established pursuant to Art.9 of the North Atlantic Treaty like NAMSO is not ‘another’ international organisation

<sup>632</sup> See the discussion in International Court of Justice, *Reparations for Injuries*, above, p.179

<sup>633</sup> Stein and Carreau, “Law and Peaceful Change in a Subsystem”, above, pp.602-603

Weapon System Partnerships share the legal personality of NAMSO,<sup>634</sup> so the discussion we conducted in this section also applies to them.

#### **15.1.4. Rulemaking within NAMSO**

The NAMSO Board of Directors is responsible for the issue of ‘directives’ to enable NAMSO to carry out its mission,<sup>635</sup> which for the purpose of this thesis include in particular Functional Directive 251, ‘Policies to Govern NAMSA Procurement’, that defines the basic principles applicable to procurement executed by NAMSA.<sup>636</sup> Any deviation from the provisions of Functional Directive 251 has to be approved by the Board of Directors,<sup>637</sup> except in case of emergency.<sup>638</sup>

Because decisions regarding questions of general policy are to be made unanimously by the NAMSO Board of Directors,<sup>639</sup> and that such policy is to be laid down in the NAMSO directives,<sup>640</sup> it is highly likely that Functional Directive 251 and its amendments or deviations have to be approved unanimously.<sup>641</sup> This is also confirmed by the fact that amendments to the lower-level NAMSA Procurement Regulations have to be endorsed unanimously (see below).

On the basis of Functional Directive 251,<sup>642</sup> the NAMSA General Manager has issued the NAMSA Procurement Regulations, that include the more detailed rules to be followed within NAMSA from the time a purchase requisition is received, until the obligations of each party under the contract have been fulfilled.<sup>643</sup> Such regulations therefore cover a broader scope than procurement procedures, as they also cover contract administration.

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<sup>634</sup> NAMSO Charter, above, Art.35(a) and 16

<sup>635</sup> NAMSO Charter, above, Art.31(a)(i)

<sup>636</sup> NAMSO Functional Directive No. 251, *Policies to Govern NAMSA Procurement*, 2<sup>nd</sup> Revision, 16 September 2002; NAMSA Procurement Regulations, NAMSA Regulation Number 251-01, 1st Revision including Amendment 1, 19 October 2005, §0.1

<sup>637</sup> NAMSO Functional Directive 251, above, §2.1

<sup>638</sup> NAMSO Functional Directive 251, above, §12.1

<sup>639</sup> NAMSO Charter, above, Art.30(a); NAMSO Functional Directive No. 30, *NAMSO Board of Directors’ Rules of Procedure*, 2<sup>nd</sup> Revision including Amendments 1-8, §3.3.1.6

<sup>640</sup> NAMSO Functional Directive 30, above, §3.4.3

<sup>641</sup> This is probably confirmed by the statement of Smit, “NAMSA Procurement Policy and Implementation”, above, Slide 4, that Functional Directive 251 has been ‘approved by all NAMSO Nations’

<sup>642</sup> NAMSO Functional Directive 251, above, §11.1

<sup>643</sup> NAMSA Procurement Regulations, above, §0.2; the NAMSA Procurement Regulations are available at [http://www.namsa.nato.int/suppliers/gen-prov\\_e.htm](http://www.namsa.nato.int/suppliers/gen-prov_e.htm) accessed on 4 September 2009

Amendments to the NAMSAS Procurement Regulations have to be endorsed unanimously by the representatives of the NAMSAS Member States through a ‘silence procedure’ within the NAMSAS Finance and Administration Committee.<sup>644</sup> Even though it is not clear how the initial NAMSAS Procurement Regulations were approved, it is highly likely that they were approved through a similar procedure.

Therefore, as the NAMSAS procurement rules (both Functional Directive 251 and the NAMSAS Procurement Regulations) and their amendments have to be approved unanimously by the NAMSAS Member States, and considering that the latter include non-EU Member States, this makes NAMSAS for that purpose an international organisation ‘not controlled’ by EU Member States, as non-EU Member States could veto an attempt of EU Member States to amend the NAMSAS procurement rules, for instance to bring them in line with provisions of EU law. Moreover, we will see in Section 15.4 that, in awarding procurement contracts, NAMSAS has a wide autonomy and usually acts without the involvement of the NAMSAS Member States.

#### **15.1.5. NAMSAS Financing**

The cost of NAMSAS activities, covering both its administrative and operational activities, are borne by those using the services of NAMSAS, namely NAMSAS Member States, other NATO bodies, non-NATO Member States, an/or other international organisations as the case may be.<sup>645</sup> Such incomes are calculated to cover the operational costs (costs of the goods and services procured), plus an overhead for the administrative costs of NAMSAS.<sup>646</sup> In addition, special contributions from NAMSAS Member States are also possible to cover NAMSAS costs if other financing is insufficient.<sup>647</sup>

#### **15.1.6. Privileges and Immunities of NAMSAS**

NAMSAS enjoys the same privileges and immunities as NATO,<sup>648</sup> such as exemption from taxes and any restrictions on import and export and from any

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<sup>644</sup> NAMSAS Functional Directive 251, above, §11.2-3

<sup>645</sup> NAMSAS Charter, above, Art.42(a)-(b); *NATO Logistics Handbook*, above, p.25; Saudrais, “General Orientation Briefing on NAMSAS”, above, Slide 7

<sup>646</sup> NAMSAS Charter, above, Art.42(c)-(d)

<sup>647</sup> NAMSAS Charter, above, Art.43(d)

<sup>648</sup> NAMSAS Charter, above, Art.8

censorship, search and seizure.<sup>649</sup> In addition, NAMSO, its property and assets enjoy immunity from ‘every form of legal process’ except when the organisation expressly waives this immunity, but no waiver of immunity may extend to measures of execution or detention of property.<sup>650</sup> Therefore, even though the immunity of NAMSO from jurisdiction is subject to waiver, its immunity from execution of judgment would seem to be absolute. As we discussed in Section 9.6, it is not certain that this position would be upheld by courts.

Nevertheless, the North Atlantic Council has to make provisions for appropriate modes of settlement of private disputes of an origin other than contractual.<sup>651</sup> It is not entirely clear if it has done so.

Even though the NAMSO Charter mentions a number of times that the organisation may adopt regulations,<sup>652</sup> these provisions do not expressly exempt the organisation from compliance with domestic procurement law, nor do they specifically refer to procurement rules. As such, as discussed in Section 11.1, NATO and NAMSO seem to consider that their privilege to apply their own rules to their procurement activities is purely customary.

## **15.2. Applicability of EU Law to NAMSO**

### ***15.2.1. Applicability of EU Substantive Law in General***

We saw in Section 10.2.1 that EU law will in general terms apply to an international organisation in the EU, but that this must be analysed case-by-case based on the contents and scope of the EU substantive law related to the case at hand and on relevant rules of international law, such as the privileges of the international organisation. EU law would, as a general principle, therefore apply to NAMSO.

In addition, the initial NAMSO Charter dates from May 1958, and was entirely revised in August 2000.<sup>653</sup> The NAMSO Member States that are also EU Member States therefore had the obligation to ensure that the revised NAMSO Charter was drafted in accordance with EU law, and to amend the Charter if it were found not

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<sup>649</sup> Ottawa Agreement, above, Art. VI, VII, IX and XI

<sup>650</sup> Ottawa Agreement, above, Art. V

<sup>651</sup> NAMSO Charter, above, Art. 19 and Ottawa Agreement, above, Art. XXIV

<sup>652</sup> NAMSO Charter, above, Art. 39(b) (staff regulations), 42(e) (financial regulations), 45(b) (security regulations)

<sup>653</sup> NAMSO Charter, above, Preamble

to comply with EU law, even though the privileges of NAMSO may exempt it from compliance with certain provisions of EU law.

As exemptions from compliance with EU law only apply to clearly defined and exceptional cases and do not create general or automatic exemptions,<sup>654</sup> it is very unlikely – as for the OCCAR Convention – that the CJEU would accept their use to justify provisions of the NAMSO Charter, which is an agreement under which a number of varied procurement activities may be performed.

### ***15.2.2. Applicability of the EU Public Procurement Directives***

We saw in Section 11.2.1 that the Public Sector Directive does not apply to contracts awarded pursuant to the particular procedure of an international organisation.<sup>655</sup> As some Members of NAMSO are not EU Member States, both interpretations of this exemption presented in that Section would conclude that the Public Sector Directive does not apply to NAMSO procurement.

We also saw in Section 11.2.2 that the Defence and Security Procurement Directive does not apply to contracts governed by specific procedural rules pursuant to an international agreement or arrangement concluded between one or more EU Member States and one or more third countries.<sup>656</sup> NAMSO being created by an international agreement, and some of the signatories of the NAMSO Charter being non-EU Member States, this exemption most probably covers all contracts awarded through the procurement rules of NAMSO.

### ***15.2.3. Applicability of the EU Treaties Procurement Principles***

We have seen in Section 8.2 that even when the EU public procurement directives do not apply, or would only partially apply, to a public contract, the public procurement principles flowing from the EU Treaties could still apply, unless a specific exemption from applicability of the EU Treaties as a whole can be invoked.

However, as we explained in Section 8.2.2, only entities that qualify as public authorities have to comply with these principles. To qualify as a public authority, the factors to consider are whether the entity in question is effectively controlled by

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<sup>654</sup> *Johnston*, above, [26]; *Sirdar*, above, [16]; *Kreil*, above, [16]; *Commission v Spain* (Case C-414/97), above, [21]

<sup>655</sup> Directive 2004/18/EC, above, Art.15(c)

<sup>656</sup> Directive 2009/81/EC, above, Art.12(a)

the State or another public authority, and if it does not compete in the market. Control can be found if the State or another public authority owns a controlling majority in the entity.<sup>657</sup> In this analysis, the term ‘State’ refers to EU Member States.

We have seen in Section 15.1 that NAMSO is subject to the supervision of the Board of Directors, which is composed of representatives of its Member States. Representatives of the NAMSO Member States also approve the procurement rules of the organisation. Although the default decision-making procedure of the NAMSO Board of Directors is supposed to be majority voting, all important decisions have to be made unanimously. Therefore, as we explained, NAMSO is not an organisation of which EU Member States can control the decision-making.

In addition, as we discussed in Section 15.1.1, NAMSO provides goods or services, such as spare parts and maintenance, to its Member States, other NATO organisations, or Partnership for Peace nations, and NAMSO is mostly financed by the entities utilising its services, as explained in Section 15.1.5. Such spare parts and maintenance are related to weapon systems that are produced by private companies and are usually available from other sources than NAMSO, such as the original manufacturer of the equipment, and are therefore in most cases also available on the market. This is a very different case than the one of OCCAR, which is an organisation managing collaborative programmes whereby the weapon system required by the participating States has to be developed and is therefore not available on the market from another source than through the OCCAR programme.

Therefore, it is likely that NAMSO would not be found to be a public authority and would not have to comply with the procurement principles flowing from the EU Treaties.

Moreover, we have seen in Section 11.3 that international organisations not controlled by EU Member States could enjoy a customary privilege that would exempt them from complying with EU public procurement law in order to preserve their functional immunity. Because NAMSO is not controlled by EU Member States, NAMSO Member States that are also EU Member States would not have any obligation to ensure that the NAMSO Charter and procurement rules are in line with the EU Treaties procurement principles.

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<sup>657</sup> See e.g. *Wall*, above, [47]-[52] and [60]

Finally, we have seen in Section 8.2.4 that, unless EU Member States delegate to an international organisation the power to decide which measures are necessary for the protection of the essential interests of their security, the most likely proposition is that only EU Member States may invoke the public security exemptions from the EU Treaties, such as Art.346 TFEU. As NAMSO has not been given any power over the essential security interests of its Member States, it cannot therefore itself invoke this exemption. This would have to be done outside the NAMSO framework by each EU Member State concerned on a case-by-case basis.<sup>658</sup>

#### ***15.2.4. Applicability of the EDA Intergovernmental Regime***

As explained in Section 8.4.1, the EDA intergovernmental defence procurement regime applies to defence procurement above one million Euros, with a few exceptions, most notably collaborative procurement.<sup>659</sup> Therefore, the regime will not apply to collaborative procurement made by NAMSO.

However, the mission of NAMSO is to provide logistics support to NATO or to its member states, not only collectively, but also individually.<sup>660</sup> A single NATO Member State may (and often does) request NAMSA to perform procurement activities for its sole benefit. This would only qualify as collaborative procurement if the latter concept is understood in a broad sense, as the only collaboration in such process is for NAMSA to look for synergies and consolidation of requirements. In some cases, such consolidation would not necessarily be possible, and NAMSA would simply act as a procurement agent for the relevant State.

Nevertheless, NAMSO Member States that are not EU Member States could very well prevent NAMSO from complying with the EDA regime. In any case, as the regime is voluntary and non-binding, the NAMSO Member State for which the procurement would be performed could decide that NAMSO would not have to comply with it. Therefore, the regime would probably have little influence on NAMSO procurement.

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<sup>658</sup> *Johnston*, above, [26]; *Sirdar*, above, [16]; *Kreil*, above, [16]; *Commission v Spain* (Case C-414/97), above, [21]

<sup>659</sup> Code of Conduct on Defence Procurement, above; Heuninckx, “Towards a Coherent European Defence Procurement Regime?”, above, p.6

<sup>660</sup> NAMSO Charter, above, Art.3(a)



### **15.3. NAMSΟ Member States Contracting with NAMSΟ**

We have seen in Section 11.4 that neither the EU public procurement directives nor the generic principles of EU law related to procurement apply to contracts between a public authority and an entity legally distinct from it if the public authority exercises over the entity concerned, possibly jointly with other public authorities, a control which is similar to that which it exercises over its own departments and if that entity carries out the essential part of its activities with the controlling public authorities ('quasi in-house' situations).<sup>661</sup>

We concluded that most international organisations of which only EU Member States were members would meet these conditions. However, because non-EU Member States are most likely not public authorities within the meaning of EU procurement law, we also concluded that this conclusion would probably not be valid for international organisations of which non-EU Member States were Members. This is especially true of NAMSΟ, as we have seen in Section 15.1 that EU Member States do not 'control' the decision-making process of NAMSΟ (at least for important decisions). Moreover, even though the proportion of the NAMSΟ turnover between EU Member States and non-EU Member States is not publicly known, it could also be a factor affecting our analysis. Therefore, it is likely that EU Member States cannot award contracts to NAMSΟ without complying with EU procurement law.

Even if a broad reading of the international organisation exemption of the Public Sector Directive and of the international rules exemptions of the Defence and Security Directive is accepted (see our discussion in Sections 11.4 and 15.2.3), EU Member States would still have to comply with the EU Treaties procurement principles when contracting with NAMSΟ.

Strangely enough, in some EU Member States, the Ministry of Defence is allowed by law to contract with NAMSΟ without any formal call for competition and without seemingly needing to invoke an exemption from compliance with EU law.<sup>662</sup> Presumably, this is only possible if such EU Member States consider their relationship with NAMSΟ to be 'quasi in-house' as described above.

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<sup>661</sup> *Teckal*, above, [50]; *Stadt Halle*, above, [49] and [52]; *Commission v Spain* (Case C-84/03), above, [38]; *Parking Brixen*, above, [62]; *Agusta Helicopters*, above, [39]-[41]; *Coditel Brabant*, above, [26]; *Sea*, above, [36]-[37]

<sup>662</sup> This is the case of Belgium: Belgian Law of 13 January 2009 Containing the General Budget of Expenses for the Financial Year 2009, *Moniteur Belge* of 13 February 2009, Art.2.16.5, p.12282

NAMSO does not usually manufacture equipment or provide maintenance services itself. The object of the contract is usually purchased/subcontracted using the NAMSO procurement rules which, as we explained above, most likely do not have to comply with EU procurement law. Therefore, if NAMSO was considered to be in a ‘quasi in-house’ relationship with the contracting State, this would allow EU Member States to use NAMSO as a vessel to award procurement contracts in a manner inconsistent with EU law, even in cases when an exemption from compliance with EU law could not apply. The only way to resolve this issue would be for the CJEU to ensure coherence between its case law related to public authorities (discussed in Section 8.2.2) and the one on ‘quasi in-house’ situations (discussed in Section 8.1.2.3). We make proposals to that effect in Section 19.5.

## **15.4. The NAMSO Procurement Rules**

### ***15.4.1. General Principles***

Even though we have seen above that NAMSO most likely does not have to comply with EU public procurement law, we should nevertheless investigate how far the NAMSO procurement rules are in line with EU law, as on the one hand it is not entirely certain (even though very likely) that NAMSO does not have to follow the EU Treaties procurement principles, and on the other hand such analysis can help us identify the seriousness of the issue identified in Section 15.3: if the NAMSO procurement rules widely deviate from fundamental principles of EU law, it is all the more important that EU Member States comply with EU procurement law when contracting with NAMSO.

When answering the requisition of a customer, NAMSA has to conduct a sourcing analysis called ‘brokerage’ that can lead to one of the following sourcing solutions:<sup>663</sup>

- Redistribution of the required supplies between NAMSO Member States, either directly or through the NATO Logistic Stock Exchange;<sup>664</sup>

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<sup>663</sup> NAMSO Functional Directive No. 212, *Brokerage Operations (Supply)*, 2<sup>nd</sup> Revision, 30 June 2003

<sup>664</sup> NAMSO Functional Directive No. 222, *Redistribution of Stocks*, 2<sup>nd</sup> Revision, Amendment 1, 18 October 1972; NAMSO Functional Directive No. 221, *Mutual Emergency Support*, 2<sup>nd</sup> Revision, 6 July 1978; NAMSO Functional Directive No. 225, *NATO Logistics Stock Exchange (NLSE)*, 1<sup>st</sup> Revision, 7 December 2005; NAMSO Functional Directive No. 224, *Common Item Materiel Management System (COMMIT)*, 9 December 1998; NAMSO Agreement No. 139, *COMMIT Partnership Agreement*, 1<sup>st</sup> Revision, 7 December 2005

- Provision of the required supplies from NAMSA's own stocks, for parts for which NAMSA has been authorised to hold stocks,<sup>665</sup>
- Procurement of the required supplies on the commercial market, which will be only applied if none of the other sourcing solution is available,<sup>666</sup> but which is in practice the normal result of the brokerage operation.<sup>667</sup>

We will not analyse in this thesis the NAMSO rules on redistribution or those on brokerage, as they are not in effect procurement activities. For the latter, the principal objective of NAMSA is to obtain, through international competitive bidding, the most economical prices for materiel and services. Contracts are to be awarded to the most economic proposal meeting the technical and contractual requirements stipulated in the Requests for Proposal, except when it is necessary to balance the distribution of production.<sup>668</sup>

Indeed, NAMSA must also carry out planning, under the guidance of the NAMSO Board of Directors, for a distribution of production that is balanced among NAMSO Member States, and to ensure such distribution of production to the greatest practicable extent.<sup>669</sup> For that purpose, the industrial return position of each NAMSO Member State is determined using the ratio between the value of contracts placed by NAMSO in the State concerned and the value of sales made by NAMSO to that State.<sup>670</sup>

As a basic principle, the most economical compliant offer is awarded the contract but, under the principle of balancing of production, for contracts above €75,200, the NAMSO Member States' position in terms of industrial return has to be taken into consideration.<sup>671</sup> For that purpose, companies from countries of which the industrial return position is less favourable as that of the country of the company

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<sup>665</sup> NAMSO Functional Directive No. 216, *Direct Exchange*, 1st Revision, 28 June 1983

<sup>666</sup> Functional Directive 251, above, §3.3

<sup>667</sup> Functional Directive 212, above, §5.1

<sup>668</sup> Functional Directive 251, above, §§3.1 and 3.2

<sup>669</sup> Functional Directive 251, above, §§3.1 and 3.5

<sup>670</sup> Functional Directive 251, above, §3.5.1 and NAMSA Procurement regulations, above, §5.7.2

<sup>671</sup> Functional Directive 251, above, §3.5 and NAMSA Procurement regulations, above, §5.7.1; Request for Proposal (RFP) N°: MNE90454U /LC-CC-6000425111 of 02 Sep 2009, General Introduction, §4, accessed at <https://www.natolog.com/eProcurement/RFP/PublicRFPDetails.aspx> on 5 September 2009

having submitted the most economical compliant offer are given a chance, under some conditions, to match the best offer.<sup>672</sup>

This distribution of production is a form of *juste retour* applied over a number of unrelated purchases over a long period of time for fairly low value contract. It is clearly inconsistent with the EU law principles of non-discrimination on the basis of nationality and equal treatment of tenderers. Nevertheless, it is not a strict application of *juste retour*, first because the industrial return position ratio does not have to be made equal to one, and second because the onus is in fact on the bidders to match the lowest offer. If they can, this would not result in an unfavourable deal for NAMSO as long as the technical quality of the product or service is equivalent.

Even though measures to balance the distribution of production are only taken on a contract by contract basis, such measures are taken by NAMSA acting on its own, which would not allow invoking an exemption from compliance with EU law, as only EU Member States are competent to do so.

#### **15.4.2. Authority to Award Contracts**

The authority to conclude contracts and agreements is delegated to the General Manager of NAMSA, but this delegation does not extend beyond the purview of routine management and business intercourse, except when authorized by the Board of Directors on a case-by-case basis. The General Manager has re-delegated his authority to approve and sign contracts to different levels of NAMSA staff members on the basis of thresholds for the value of the contract.<sup>673</sup>

Despite the fact that these provisions may seem quite restrictive, as the authority of NAMSA is limited to routine procurement, we should not forget that most of NAMSA activities concern routine business intercourse, namely maintenance and supply activities. The procurement delegation to the NAMSA General Manager is therefore quite wide indeed, and the General Manager or his subordinates probably have the authority to approve the award of contracts that cover most of the budget of NAMSO. This makes sense, as requiring approval of the NAMSO Member States for an important part of the numerous NAMSO procurement activities would render the organisation useless (we saw in Section 15.1.1 that NAMSA manages

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<sup>672</sup> NAMSA Procurement Regulations, above, §5.7.3-7.5.7; RFP N° MNE90454U, above

<sup>673</sup> Functional Directive 251, above, §8; NAMSA Procurement Regulations, above, §6.3.4; NAMSO Functional Directive No. 410, *NAMSA Financial Regulations and Financial Implementing Rules and Procedures*, 2<sup>nd</sup> Revision, Amendments 1-8, Art.24, FRP XXIV.4

about 20,000 contracts). This is an entirely different case from OCCAR, where only major procurement contracts are awarded, but in a limited number.

#### **15.4.3. Source Identification**

NAMSA manages a 'source file' of past, present and potential vendors, including vendor performance data, as well as cross-references of vendor with materiel and services. The primary purpose of the source file is to facilitate an efficient and effective source selection process and to achieve an appropriate distribution of the requirements to the industry.<sup>674</sup> The qualification of a supplier to be registered in the source file is based on its residency, national eligibility status, present capability and past performance.<sup>675</sup> Some of these criteria, such as residency and national eligibility, are probably inconsistent with EU law.

NAMSA will include in its source file commercial firms, as well as military and governmental entities located in NAMSO Member States.<sup>676</sup> Firms from Partnership for Peace States which are associate States of a Weapon System Partnership may, under some conditions and for Weapon System Partnership requirements only, be included in the NAMSA source file.<sup>677</sup> In addition, the NAMSA General Manager may decide in some cases to include in the source file firms from countries that are not members of NAMSO.<sup>678</sup> The information to be provided by firms to be included in the NAMSA source file, especially to list their capabilities, is in fact quite limited.<sup>679</sup>

#### **15.4.4. Contract Award Procedure**

##### **15.4.4.1. Initiation of the Procurement Process**

The procurement process within NAMSA is initiated by a Purchase Requisition that describes what is to be procured and is sent to the NAMSA Procurement Division by the Logistics Division on the basis of the requirements expressed by one or more NAMSO Member State or other client after negotiation with the

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<sup>674</sup> Functional Directive 251, above, §4.1; NAMSA Procurement Regulations, above, §2.1.2

<sup>675</sup> NAMSA Procurement Regulations, above, §2.2.1

<sup>676</sup> Functional Directive 251, above, §4.2.1

<sup>677</sup> Functional Directive 251, above, §4.2.2; NAMSA Procurement Regulations, above, §2.2.2

<sup>678</sup> Functional Directive 251, above, §4.2.2; NAMSA Procurement Regulations, above, §2.2.2

<sup>679</sup> See in particular <https://www.natolog.com/eProcurement/Content/AllBusinessContents.aspx?r=1> and [http://www.namsa.nato.int/suppliers/apply\\_e.htm](http://www.namsa.nato.int/suppliers/apply_e.htm) accessed on 4 September 2009; see also [http://www.namsa.nato.int/suppliers/source\\_e.htm](http://www.namsa.nato.int/suppliers/source_e.htm) accessed on 4 September 2009;

Logistics Division and the consolidation of identical or similar requirements if the conclusion of the 'brokerage' operations is that procurement is the best solution to meet the need.<sup>680</sup>

#### **15.4.4.2. Choice of a Competitive or Non-Competitive Solicitation**

NAMSA has the obligation to promote and provide for full and open international competition in soliciting offers and awarding contracts. Commercial sources as well as military and other governmental sources of NAMSO Member States may be solicited in NAMSA competitions<sup>681</sup> and, with some conditions, US sources through the US government using the Foreign Military Sales procedures.<sup>682</sup>

However, in specific circumstances, solicitation procedures other than full and open international competitive bidding may be utilized:

- When there is only one known source capable of providing the materiel or service required (sole source);
- When the solicitation process has to be restricted to only one responsible source despite the fact that other potential sources may exist (single source), such as in case of urgency;
- To exercise an option on an existing contract;
- For small value purchases under a threshold of €3,760;<sup>683</sup> or
- If security requirements prohibit or limit the distribution of the Request for Proposal.<sup>684</sup>

In cases of emergency procurement and/or small value purchases, where there is no competitive solicitation, the most advantageous, appropriate and reliable source is selected, based upon best judgment and past experience.<sup>685</sup>

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<sup>680</sup> Functional Directive 212, above, §6; NAMSO Functional Directive No. 252, *General Provisions for Sales*, 1<sup>st</sup> Revision, Amendments 1-6, 11 December 1990; NAMSA Logistic Manual NR-200-00, 5<sup>th</sup> Revision, 1 January 2004; NAMSA Procurement Regulations, above, §3; [http://www.namsa.nato.int/About/business\\_e.htm](http://www.namsa.nato.int/About/business_e.htm) accessed on 4 September 2009

<sup>681</sup> NAMSA Procurement Regulations, above, §4.1

<sup>682</sup> Functional Directive 251, above, §3.6; NAMSA Procurement Regulations, above, §4.4

<sup>683</sup> By cross-referencing with provisions found in RFP N° MNE90454U, above, on the basis of which Financial Level B can be identified as €18,800, which is twice Financial Level A based on NAMSO Functional Regulation 410, above, and small value purchases apply for amounts smaller than 0.4 x Financial Level A

<sup>684</sup> Functional Directive 251, above, §3.7; NAMSA Procurement Regulations, above, §4.3

<sup>685</sup> NAMSA Procurement Regulations, above, §4.3.6

Even though some of these provisions may remind us of some of the exemptions from applicability of the EU directives, it is not entirely certain that they are all in line with EU law. Nevertheless, as the threshold for small value purchases is very small, it probably does not evidence a cross-border interest and would therefore not have to comply with the EU Treaties principles.

#### **15.4.4.3. Publication**

NAMSA publishes on its website Future Business Opportunities that list all the Requests for Proposals of an estimated value higher than €150,400 that NAMSA intends to issue in the following months.<sup>686</sup> This value is much lower than the threshold to publish a prior information notice under the EU procurement directives (€750,000).<sup>687</sup> This publication allows on the one hand economic operators to request to be included in the source file in time to answer the Request for Proposal, and on the other hand those already in the source file to prepare for answering the Requests for Proposals.

In addition, NAMSA publishes most Requests for Proposals on the NATOLOG portal, part of its website,<sup>688</sup> even though this is not explicitly required by Functional Directive 251 or the NAMSA Procurement Regulations. Requests for Proposals submitted for online bidding (the eBid system), those limited to specific purchasing groups, and those restricted to specific vendors are only published on a secured part of NATOLOG, only accessible to members of the source file, that sometimes have to meet additional conditions.<sup>689</sup> It is not entirely clear if there is a threshold under which NAMSA does not publish Requests for Proposals.

Finally, unclassified contract awards with a value above €752,000<sup>690</sup> are published on the NAMSA website.<sup>691</sup>

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<sup>686</sup> NAMSA Procurement Regulations, above, §4.5.2; The value of the threshold has been calculated based on RFP N° MNE90454U, above; See also <https://www.natolog.com/eProcurement/FBO/FutureBusinessOpportunitiesList.aspx?ni=0> accessed on 4 September 2009

<sup>687</sup> Directive 2004/18/EC, above, Art.35(1)

<sup>688</sup> Smit, “NAMSA Procurement Policy and Implementation”, above, Slides 21-46; See <https://www.natolog.com/eProcurement/RFP/PublicRFPList.aspx>, accessed on 4 September 2009

<sup>689</sup> See <https://www.natolog.com/eProcurement/Content/AllBusinessContents.aspx?r=1> accessed on 4 September 2009; <https://www.natolog.com/eProcurement/Content/AllBusinessContents.aspx?r=3> accessed on 4 September 2009

<sup>690</sup> The value of the threshold was found on [http://www.namsa.nato.int/PDF/Contract\\_Awards.pdf](http://www.namsa.nato.int/PDF/Contract_Awards.pdf)

<sup>691</sup> Functional Directive 251, above, §10

#### **15.4.4.4. Source Selection**

NAMSA normally selects from its source file the sources to which Requests for Proposals are sent. The number of sources to be solicited must be reasonable in relation to the total estimated value of the order. Competitive proposals are normally sought from at least three potential suppliers. However, this principle does not apply when NAMSA publishes its requirements on eBid or by other electronic means<sup>692</sup> such as NATOLOG, whereby access to the Request for Proposal is only limited by the conditions of access. In addition, for procurements with an estimated value above €75,200,<sup>693</sup> all known qualified sources must be solicited.<sup>694</sup>

It is important to note that this source selection process is in fact not a candidate selection process similar to that of the EU directives. NAMSA performs candidate selection through inclusion in the source file, but also after the selection of the most economical bid, as we will see in Section 15.4.4.7.

For contracts under €75,200, the selection of tenderers is entirely left to the discretion of NAMSA, and this could very well be inconsistent with the EU law principle of equal treatment. However, that is not necessarily certain, because some form of competition is anyway present, even though transparency is not necessarily ensured, as the requirements are not always published. Nevertheless, the selection by NAMSA of the tenderers for contracts under €75,200 is not necessarily promoting efficiency, as the market would be better placed to determine who should send a tender.

Procurement is normally limited to firms located within NAMSO Member States, which have equal opportunities to submit proposals.<sup>695</sup> Firms located in a Partnership for Peace State may, under certain conditions, also be invited to submit proposals.<sup>696</sup>

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<sup>692</sup> Functional Directive 251, above, §3.8

<sup>693</sup> RFP N° MNE90454U, above, allows to determine that Financial Level B is €18,800, and Financial Level C, which applies in this case, is four times Financial Level B in accordance with NAMSO Functional Directive 410, above; Smit, “NAMSA Procurement Policy and Implementation”, above, Slide 6; Russel, “NAMSA Support of Common and Nationally Funded Aviation Systems”, above, Slide 10

<sup>694</sup> NAMSA Procurement Regulations, above, §4.5.1

<sup>695</sup> Functional Directive 251, above, §3.4.1-3.4.2

<sup>696</sup> Functional Directive 251, above, §3.4.3; Functional Directive 090, above



In case a Weapon System Partnership so decides, Requests for Proposals may, subject to approval by the Board of Directors, be issued only to firms in specified geographical areas, and/or be subject to the application of certain criteria designed to give preference to firms located in such geographical areas, in which case the criteria must be clearly stated to permit standing application by NAMSA, and the NAMSO rules on the balancing of production will not apply.<sup>697</sup> This rule clearly intends to limit source selection to the States participating in the Weapon System Partnership, in a provision similar to those of OCCAR.

Considering the different membership pattern of NAMSO and the EU, these geographical limitations are clearly contrary to the EU law principle of non-discrimination. Moreover, as they are generally applicable, they would not allow invoking an exemption from applicability of EU law on a case-by-case basis. Even the specific source selection rule for Weapon System Partnership, which requires approval of the Board of Directors, is probably too broad to be covered by a single invocation of an exemption, as the aim of Weapon Systems Partnerships is to ensure the collaborative support of the military equipment concerned over its whole life-cycle, which may extend for decades.

#### **15.4.4.5. Request for Proposal (RFP)**

Requests for Proposals, to be sent or made available to the economic operators selected in accordance with the source selection process described above, must be designed in such a way to avoid the need for pre-award negotiations,<sup>698</sup> even though such negotiations are not entirely precluded (see the following section).

The NAMSA Procurement Regulations include a number of rules on the drafting of Requests for Proposal and what they should contain, but do not include specific rules on the drafting of the technical specifications.<sup>699</sup> This could allow some discrimination by relying only on national standards and rejecting comparisons of equivalency, something that is not allowed under the procurement principles flowing from the EU Treaties.

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<sup>697</sup> Functional Directive 251, above, §3.4.4

<sup>698</sup> Functional Directive 251, above, §4.3

<sup>699</sup> NAMSA Procurement Regulations, above, §4.6

#### **15.4.4.6. Evaluation of the Proposals**

Proposals received are first assessed to determine whether or not they are technically and contractually compliant with the Request for Proposal. Compliant proposals are evaluated in order to determine the ‘most economical’ one.<sup>700</sup> If a realistic comparison of the proposals cannot be made, NAMSA may ask for additional information and clarification with the objective of obtaining comparable proposals.<sup>701</sup> In addition, pre-award negotiations of contractual terms may exceptionally be held when all proposals received are considered unsatisfactory.<sup>702</sup>

The ‘most economical’ proposal is determined by giving ‘due consideration’ to prices, delivery schedules, transportation costs, technical capability, the administrative costs of NAMSA and the balance of production.<sup>703</sup>

The NAMSO procurement rules do not give precise details on how the tender evaluation process is to be carried out, except to say that ‘due consideration’ has to be given to the factors mentioned above. There is no mention of contract award criteria or of their weighting, but the criteria are in fact published in the Request for Proposals.<sup>704</sup> More guidance should be available on what criteria may or may not be used.

In addition, even though the NAMSO rules often mention ‘the lowest compliant offer’, these provisions show that criteria other than price may be used to select the contractor, which is a more efficient solution than awarding the contract to the lowest price. However, contract award to a tenderer other than the one submitting the lowest compliant offer is subject to conditions, as explained in the next section.

#### **15.4.4.7. Contract Award**

Before awarding a contract, NAMSA has to make a ‘determination’ concerning the responsibility, capability and financial stability of the prospective contractor on the basis either of information in the source file or, in case it is insufficient, of a Pre-Award Survey. Pre-award surveys will normally not be performed for contracts

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<sup>700</sup> Functional Directive 251, above, §4.8.3; NAMSA Procurement Regulations, above, §5.5.6

<sup>701</sup> RFP N° MNE90454U, above allows to determine that which Financial Level B is €18,800, and Financial Level C, which applies in this case, is four times Financial Level B in accordance with NAMSO Functional Directive 410, above; NAMSA Procurement Regulations, above, §5.5.5; Smit, “NAMSA Procurement Policy and Implementation”, above, Slide 9

<sup>702</sup> Functional Directive 251, above, §4.5; NAMSA Procurement Regulations, above, §5.5.7

<sup>703</sup> NAMSA Procurement Regulations, above, §5.6-5.7

<sup>704</sup> RFP N° MNE90454U, above, General Introduction, §5

with a value lower than €150,400.<sup>705</sup> This provision seems similar to the process for selection of candidates in the EU procurement directives, with the key differences that it is performed after the tender evaluation process only for the tenderer to be awarded the contract, and that the NAMSO procurement rules do not clarify on what detailed grounds this ‘determination’ has to be made.

Also, before the contract can be awarded, the approval of the price by the customer is required. If no response is received within 28 days, NAMSA will assume that the customer decided to cancel the requirement. Such Customer Price Approval will usually not be required for low value contracts (smaller than €9,400) or for urgent requirements.<sup>706</sup> This price approval provision acts as a safeguard against the relatively wide freedom of NAMSA to award contracts, and ensures that a contract will not be awarded at a price that the customer cannot afford.

For each NAMSO procurement above €75,200,<sup>707</sup> a contract award committee of NAMSA staff members is appointed to verify the adequacy of the evaluation of the proposals.<sup>708</sup> On the basis of their approval, a NAMSA staff member with delegated authority will accept the offer of the winning bidder on behalf of NAMSO.<sup>709</sup>

However, the award of contracts to non-NATO Governments or to firms from non-NATO Member States requires prior approval of the Board of Directors, with a few exceptions.<sup>710</sup> As these decisions have a financial impact, they most likely have to be taken unanimously. Considering the membership pattern of NATO and the EU, these provisions are inconsistent with the EU law principles of non-discrimination and equal treatment. Moreover, as these provisions are of general application, they cannot be justified case-by-case by invoking an EU Treaties exemption.

In addition, we have seen in the previous section that the evaluation of the proposals aims at selecting the ‘most economical’ one on the basis of a number of

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<sup>705</sup> Functional Directive 251, above, §4.6; NAMSA Procurement Regulations, above, §5.9

<sup>706</sup> Functional Directive 251, above, §4.7

<sup>707</sup> RFP N° MNE90454U, above, allows to determine that Financial Level B is €18,800, and Financial Level C, which applies in this case, is four times Financial Level B in accordance with NAMSO Functional Directive 410, above; Smit, “NAMSA Procurement Policy and Implementation”, above, Slide 9; Russel, “NAMSA Support of Common and Nationally Funded Aviation Systems”, above, Slide 10

<sup>708</sup> Functional Directive 251, above, §4.9; NAMSA Procurement Regulations, above, §6.2-6.5

<sup>709</sup> NAMSA Procurement Regulations, above, §6.3.3

<sup>710</sup> NAMSO Charter, above, Art.31(a)(iii); Functional Directive 251, above, §3.4.5

factors.<sup>711</sup> This means that the ‘most economical’ tender might not necessarily be the ‘lowest compliant’ one. When this is the case and the value of the contract is above €376,000,<sup>712</sup> NAMSA will inform the NAMSO Member State where the lowest compliant bidder is located, and the contract award will be withheld for a maximum of three weeks. Within that period, this NAMSO Member State may notify NAMSA of its protest against the intended award, stating his reasons. Should the matter not be resolved to the satisfaction of the Member State within three weeks of the receipt of the protest, the Member State may initiate a Protest of Award Procedure (explained in Section 15.4.5). If the Protest of Award Procedure is not initiated within five days after the expiration of the three week period, the protest is considered withdrawn.<sup>713</sup>

This is another way through which a NAMSO Member State may veto the award of a contract, even though these provisions do not apply when the contract is awarded to the lowest compliant bidder. This means that if a NAMSO Member State considers that the offer from a company located on its soil is the most economical but that NAMSA intends to award the contract to the lowest compliant bidder instead, there would be no recourse against this decision. Moreover, only NAMSO Member States are allowed this possibility of veto: if the lowest compliant bidder is from a non-NAMSO Member State, the latter cannot use this possibility. This is clearly inconsistent with the EU law principles of non-discrimination on the grounds of nationality and equal treatment.

#### **15.4.4.8. Small Value Purchase Procedure**

For contracts of a value lower than €3,760,<sup>714</sup> single source procurement is acceptable provided that the prices quoted by this single source are considered reasonable.<sup>715</sup> For purchases comprised between €3,760 and €9,400, solicitation of proposals may be requested from a maximum of three qualified sources and a simplified procedure may be applied,<sup>716</sup> except in some limited circumstances.<sup>717</sup>

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<sup>711</sup> NAMSA Procurement Regulations, above, §5.6-5.7

<sup>712</sup> RFP N° MNE90454U, above allows to determine that which Financial Level B is €18,800, the threshold in this case is and five times Financial Level C; Smit, “NAMSA Procurement Policy and Implementation”, above, Slide 9

<sup>713</sup> NAMSA Procurement Regulations, above, §6.6

<sup>714</sup> Estimated by cross-referencing with provisions found in RFP N° MNE90454U, above: small value purchases apply for amounts smaller than 0.4 x Financial Level A

<sup>715</sup> NAMSA Procurement Regulations, above, §10.1.2

<sup>716</sup> NAMSA Procurement Regulations, above, §10.1.3-10.1.5

These provisions are reasonably standard, and require some form of competition for all procurement above €3,760. However, small value procurement do not foresee any publication of the requirements, which could be inconsistent with the EU law obligation of transparency, even though the small values concerned do not necessarily evidence cross-border interest.

#### **15.4.4.9. Information of Tenderers and NAMSO Member States**

Except for purchases under the small value purchase procedure, unsuccessful tenderers must be informed through a standard letter that their proposal has not been accepted. For proposals that exceed €300,800, additional general information is provided upon request to the unsuccessful bidders.<sup>718</sup>

These provisions provide some visibility of the procurement process to the tenderers, but they do not include a standstill period.<sup>719</sup> This is not in line with the amended Remedies Directive,<sup>720</sup> but the latter does not apply to NAMSO. As for OCCAR, the principles set-out in the relevant CJEU judgement<sup>721</sup> could be taken into account as guidance. In addition, when the protest of award procedure is applied, a standstill period of at least three weeks is in fact initiated.

#### **15.4.5. Complaints and Settlement of Disputes**

We have seen in Section 15.4.4.7 that, when NAMSA intends to award the contract to another tenderer than the one having submitted the lowest compliant bid, the NAMSO Member State where the tenderer having submitted the lowest compliant bid is located may bring a complaint to NAMSA, which can lead to the initiation of a Protest of Award Procedure.<sup>722</sup>

This procedure is initiated when a NAMSO Member State addresses a Protest of Award to the Chairman of the Board of Directors and to the General Manager of NAMSA, in which it sets forth the details of the complaint. This protest will be discussed in the NAMSO Finance and Administration Committee. Following those discussions, if no agreement has been reached between the two countries

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<sup>717</sup> NAMSA Procurement Regulations, above, §10.2

<sup>718</sup> Functional Directive 251, above, §4.10.1; NAMSA Procurement Regulations, above, §6.9; RFP N° MNE90454U, above, General Introduction, §17

<sup>719</sup> NAMSA Procurement Regulations, above, §6.3.3

<sup>720</sup> Directive 89/665/EEC, above, Art.2a

<sup>721</sup> *Alcatel Austria*, above, [29]-[43]; *Commission v Austria* (Case C-212/02), above, [20]-[23]

<sup>722</sup> NAMSA Procurement Regulations, above, §6.6

concerned, the Chairman of the Board of Directors sets-up a panel of three experts to render a decision by majority on the merits of the protest of award. This decision is final and binding on the parties involved.<sup>723</sup>

This is the only dispute settlement provision of the NAMSO procurement rules. Tenderers themselves do not seem to have any possibilities to file a complaint about the procurement process. The protest of award procedure requires that the State where an aggrieved tenderer is located agrees to assume the interests of the company, and that the State of the company to whom the contract was supposed to be awarded does the same.

Moreover, the protest of award procedure applies only when the contract award is being challenged on the grounds that the contract would be awarded to another tenderer than the one having submitted the lowest compliant bid. It is not possible to challenge the contract award on other grounds. It also does not apply when contract award is influenced in order to balance production.

As mentioned in Section 15.1.6, the North Atlantic Council is supposed to have made provisions for appropriate modes of settlement of disputes of a private character of an origin other than contractual.<sup>724</sup> As it is not apparent if such provisions were ever adopted, and as they do not seem to be publicly available, it is unclear if they can in fact be used in procurement disputes.

Moreover, we saw that NAMSO has immunity from every form of legal process, even though it may waive this immunity, and the NAMSO Charter does not contain any provision obligating the organisation to waive its immunity in some cases. We have seen in Section 12.3 that the immunities of international organisations do not in principle impose a disproportionate restriction on the right of access to court,<sup>725</sup> but that the plaintiff must be able to rely on reasonable alternative means in the organisation's legal instruments to protect effectively its rights, such as specific modes of settlement of private-law disputes.<sup>726</sup> Unless the North Atlantic Council made provisions for the settlement of private non-contractual disputes, such alternative means of dispute settlement would not be available to aggrieved tenderers. Moreover, even if NAMSO does not have to comply with the EU public

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<sup>723</sup> NAMS A Procurement Regulations, above, An.III

<sup>724</sup> NAMSO Charter, above, Art.19 and Ottawa Agreement, above, Art.XXIV

<sup>725</sup> *McElhinney*, above, [37]

<sup>726</sup> *Waite and Kennedy*, above, [68]-[69]; *Beer and Regan*, above, [58]; *Hans-Adam II of Liechtenstein*, above, [48]; See Reinisch, *International Organisations before National Courts*, above, pp.366 et.seq.

procurement law, the right of access to court is also protected by the European Convention of Human Rights that has developed a case law on the immunity of international organisations, as explained in Section 12.3, that could also apply to NAMSO. Therefore, it is not unthinkable that a national court would refuse to enforce the immunity of NAMSO, as has been the case for NATO.<sup>727</sup>

## **15.5. Research Questions Answers for NAMSO**

### ***15.5.1. NAMSO Procurement Rules and EU Law***

We have seen that because not all NAMSO Member States are also EU Member States, NAMSO probably is not a public authority and may enjoy a privilege that exempts it from complying with the EU law applicable to procurement. In any case, it is almost certain that the organisation does not have to comply with the EU public procurement directives. It is fairly clear that the NAMSO procurement rules were adopted in the understanding that EU procurement law could not conceivably apply to NAMSO. In fact, the divergences between those rules and the principles and rules of EU law are many.

By contrast, but for similar reasons, it is likely that EU Member States cannot award contracts to NAMSO without complying with EU procurement law. However, the case law related to public authorities and the one on ‘quasi in-house’ situations would require clarification.

Numerous provisions of the NAMSO procurement rules discriminate in favour of the NAMSO Member States (e.g. the rules on inclusion in the source file, on geographical limitations, on balancing of production, on protest of awards). Considering the membership patterns of NAMSO and the EU, these provisions are inconsistent with the EU law principle of non-discrimination on the ground of nationality. As these provisions are standing rules, they also could not be justified on a case-by-case basis by invoking an applicable exemption from the EU Treaties.

Specific contract award rules exist to balance the distribution of production among NAMSO Member States. This provision, which is a form of *juste retour*, is inconsistent with the EU law principles of equal treatment and non-discrimination, especially because it is applied systematically by NAMSA without the involvement of the relevant States, and that this would not allow invoking an EU law

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<sup>727</sup> Reinisch, *International Organisations before National Courts*, above; American Law Institute, *The Foreign Relation Law of the United States*, above, §467, reporter’s note 4

exemption. However, it is important to note that this balancing of production is not a strict version of the *juste retour* principle and is relatively flexible.

Under the NAMSΟ rules, complaints are in fact not available to aggrieved tenderers. A complaint of the latter is only possible if the NAMSΟ Member State where they are located takes-up their case and even then only if the contract is not awarded to the tenderer having submitted the lowest compliant bid. This is clearly inconsistent with the fundamental right of access to court, especially considering the immunity of NAMSΟ from ‘every form of legal process’. Moreover, the organisation’s immunity from jurisdiction to enforce would seem to be absolute, which could be found too broad to be enforced in court.

#### ***15.5.2. Internal Coherence of the NAMSΟ Procurement Rules***

The agency of NAMSΟ, NAMSA, has been granted a lot of independence for the management of NAMSΟ procurement activities. The NAMSΟ Member States intervene only in limited cases in the procurement process: when approving the NAMSΟ procurement rules, in case of non-routine procurement, when a contract is to be awarded to a company located in a non-NATO Member State, and in the protest of award procedure. This is probably because maintenance and supply is less sensitive than major procurement, but mostly also because such activities require smaller and more frequent contracts. As NAMSA currently manages about 20,000 contracts, the approval of its Member States for the award of such contracts would make the activities of the organisation grind to a halt. We have seen in Section 7.3 that the lack of delegation by the participating States to the agencies managing procurement was a major efficiency problem of collaborative procurement, and it seems that the reality of in-service support contributed to make NAMSΟ more efficient in that regard.

The NAMSΟ procurement rules are quite flexible, for instance for source selection process, or the possibility of pre-award negotiation to clarify tenders when they are unsatisfactory. In that sense, they are more akin to commercial practice than the provisions of the EU procurement directives. Nevertheless, some provisions, even though not all, of the NAMSΟ rules are more general principles than detailed instructions, for instance the rules on technical specifications or evaluation of tenders. Many more provisions are somewhat unclear, such as the conditions to be listed in the source file, when to publish a request for proposal on NATOLOG, or the source selection process when the request for proposal is published by electronic means. Moreover, some of the procurement rules of NAMSΟ, for



instance the thresholds, are not publicly available. This does not favour legal certainty.

We will make specific recommendations for improving the NAMSO procurement rules in Section 21.

## **16. The European Defence Agency (EDA)**

### **16.1. Introduction to the EDA**

#### **16.1.1. The Nature and Role of the EDA**

In this chapter, we provide answers to the research questions of Section 3.2 of this thesis for the last of our case studies, the European Defence Agency (EDA).

The EDA was created within the scope of the CFSP.<sup>728</sup> Its mission is to support the Council of the EU and the EU Member States in their effort to improve the EU defence capabilities in the field of crisis management and to sustain the CSDP, but without prejudice of the competence of the EU Member States in defence matters.<sup>729</sup> To that end, the functions and tasks of the EDA cover the development of the defence capabilities of the EU in the field of crisis management, the enhancement of European armaments cooperation, the strengthening of the European defence technological and industrial base, and the enhancement of the effectiveness of European defence research and technology.<sup>730</sup> All EU Member States, except Denmark, participate in the EDA and are referred to as ‘participating Member States’.<sup>731</sup>

The EDA expenditures are shown on Figure 7. Like those of OCCAR and NAMSO, such expenditures have steadily increased over the last years. EDA expenditures only amount to about 0.8% of the collaborative procurement and

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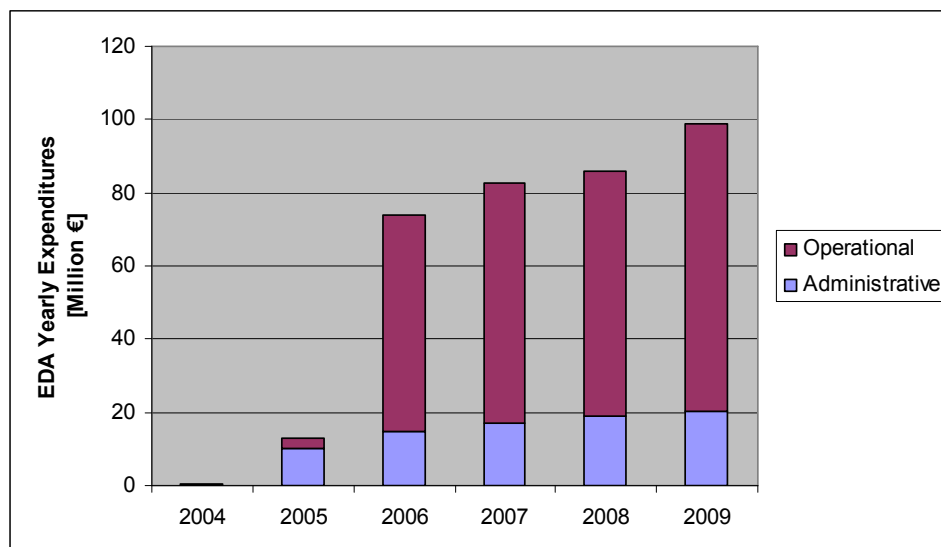
<sup>728</sup> Joint Action 2004/551/CFSP, above – the Joint Action still needs to be amended to enhance coherence with the current EU Treaties provisions

<sup>729</sup> Joint Action 2004/551/CFSP, above, Art.2

<sup>730</sup> Art.42(3) and 45(1) TEU; Joint Action 2004/551/CFSP, above, Art.5; see also Georgopoulos, “The New European Defence Agency”, above; De Neve, *L’Agence européenne de Défense*, above, pp.35-36; Trybus M., “The new European Defence Agency: a contribution to a common European security and defence policy and a challenge to the Community acquis?” (2006) 43(3) C.M.L.Rev. 667; Georgopoulos, “The European Armaments Policy”, above, pp.216-219

<sup>731</sup> Art.45(2) TEU; Joint Action 2004/551/CFSP, above, Recital 21 and Art.3

R&D expenditures of the EU Member States.<sup>732</sup> The administrative expenditures of the EDA currently amount to about 20% of its total expenditures.



*Figure 7: EDA Yearly Expenditures, including Programmes/Projects*<sup>733</sup>

Such relatively limited level of expenditures are explained by the fact that the EDA does not currently see itself as an armaments acquisition agency and does not plan to run cooperative procurement programmes in the near future. Even though the Agency's legal basis provides that the EDA may assume responsibility for managing such programmes (including through OCCAR, but also by itself),<sup>734</sup> for the time being the EDA considers that it is not structured to perform this task.<sup>735</sup>

Nevertheless, the EDA performs within its general budget the procurement activities necessary for its operational functioning, such as consulting studies. Moreover, ad-hoc projects or programmes are integrated and managed within the EDA, and the latter may be appointed to award contracts within the scope of those projects or programmes, which currently are primarily concerned with R&D (see therefore Section 16.3).

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<sup>732</sup> Compared with the figures for collaborative defence procurement and R&D found in *Defence Data 2007*, above

<sup>733</sup> European Defence Agency, 2007 and 2008 Financial Reports, June 2008 and June 2009, found at <http://www.eda.europa.eu/documents.aspx>, accessed on 22 October 2009, including the general budget and project/programme budgets, discussed in Section 16.1.5

<sup>734</sup> Joint Action 2004/551/CFSP, above, Art.5(3.2); De Neve, *L'Agence européenne de Défense*, above, pp.47-56

<sup>735</sup> EDA Bulletin Issue 12, June 2009, p.9

### **16.1.2. Organisation of the EDA**

The EDA acts under the authority of the Council of the EU within the single institutional framework of the Union, and without prejudice to the responsibilities of the EU institutions and other Council bodies.<sup>736</sup>

The Head of the Agency, who is the Secretary-General of the Council and EU High Representative for the CFSP, is responsible for the EDA overall organisation and functioning. He must ensure that the guidelines issued by the Council and the decisions of the EDA Steering Board are implemented by the EDA Chief Executive, and is also responsible for the negotiation of administrative arrangements with third countries and other organisations.<sup>737</sup>

The decision-making body of the EDA is the *Steering Board*, which is composed of one representative of each participating Member State and a representative of the Commission.<sup>738</sup> The Steering Board's tasks and powers that are relevant to the procurement activities of the EDA include: approving the establishment of projects or programmes within the EDA (and approving arrangements for the participation of third parties to such projects or programmes), deciding that the EDA may be entrusted by one or more Member States with the administrative and financial management of certain activities within its remit, and adopting the Agency's rules of procedure.<sup>739</sup>

The Steering Board makes decisions by qualified majority. The representative of a participating Member State in the Steering Board or the Steering Board itself may refer matters for advice or decision of the Council for important and stated reasons of national policy.<sup>740</sup>

The day-to-day administration of the EDA is led by the Agency's Chief Executive, who is appointed by and accountable to the Steering Board. He or she is empowered to enter into contracts and is the legal representative of the EDA.<sup>741</sup> He

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<sup>736</sup> Joint Action 2004/551/CFSP, above, Art.1(2)

<sup>737</sup> Joint Action 2004/551/CFSP, above, Art.7

<sup>738</sup> Joint Action 2004/551/CFSP, above, Art.8; see also De Neve, *L'Agence européenne de Défense*, above, pp.21-22

<sup>739</sup> Joint Action 2004/551/CFSP, above, Art.9(1)

<sup>740</sup> Joint Action 2004/551/CFSP, above, Art.9(2)-(3)

<sup>741</sup> Joint Action 2004/551/CFSP, above, Art.10

is heading an administration composed of international civil servants and seconded national experts.<sup>742</sup>

### **16.1.3. The Legal Personality of the EDA**

The EDA has ‘the legal personality necessary to perform its functions and attain its objectives’. EU Member States must ensure that it enjoys the most extensive legal capacity accorded to legal persons under their laws. The EDA may, in particular, acquire or dispose of movable and immovable property and be a party to legal proceedings, and has the capacity to conclude contracts with private or public entities or organisations.<sup>743</sup> These provisions clearly grant the EDA legal personality under the national laws of its participating Member States as explained in Section 9.3.2.

The Joint Action creating the EDA does not explicitly grant it international legal personality, but it authorises it to enter into administrative arrangements with third States, organisations and entities. In so doing, it must respect the single institutional framework and the decision-making autonomy of the EU.<sup>744</sup> It would seem that these provisions grant the EDA an existence as an independent legal person at international law, even though some could argue that an ‘administrative arrangement’ is not necessarily a treaty.<sup>745</sup> However, the EDA is said to act within the single institutional framework of the EU,<sup>746</sup> and considering the supervision role of the Council, one could argue that the EDA’s international legal personality is that of the EU,<sup>747</sup> in a similar way as the legal personality of NAMSO is that of NATO. As for NAMSO, for the purpose of this thesis, this distinction is not a fundamental issue.

### **16.1.4. Rulemaking within the EDA**

As mentioned above, the decisions of the EDA Steering Board are made by qualified majority, but when a matter is raised to the Council, the decisions of the

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<sup>742</sup> Joint Action 2004/551/CFSP, above, Art.11; see also De Neve, *L’Agence européenne de Défense*, above, pp.22-35

<sup>743</sup> Joint Action 2004/551/CFSP, above, Art.6 and Recital 15; Georgopoulos, “The New European Defence Agency”, above, p.105

<sup>744</sup> Joint Action 2004/551/CFSP, above, Art.25; Georgopoulos, “The New European Defence Agency”, above, p.108

<sup>745</sup> Aust, *Modern Treaty Law and Practice*, above, pp.19-23

<sup>746</sup> Joint Action 2004/551/CFSP, above, Art.1(2)

<sup>747</sup> Art.47 TEU (legal personality in general), 37 (international legal personality in the CFSP area) and 8 (international legal personality in relations with neighbouring countries)

latter are made unanimously. As all EDA participating Member States are EU Member States, this clearly makes the EDA an organisation or agency ‘controlled’ by EU Member States in the sense of our discussions on the topic in Section 10.2.

The financial rules and the procurement rules of the EDA have been adopted by the Council.<sup>748</sup> Technical amendments to such rules, such as those necessary to ensure consistency with rules of EU law, may be made by the Steering Board, but substantial amendments must be approved by the Council.<sup>749</sup> It is not entirely clear what is meant by ‘substantial amendments’.

The EDA procurement rules are drafted to respect the Public Sector Directive, on which they are ‘mainly’ based, to the same extent as those of the other European institutions.<sup>750</sup> As we explain in Section 16.3, those procurement rules apply to all type of procurement performed by the EDA, but projects or programmes can in addition be subject to specific rules that may deviate from the EDA procurement rules. The EDA procurement rules do not yet refer to the Defence and Security Directive, and it remains to be seen if the EDA will amend them to follow the Defence and Security Directive as well. Considering that the operational activities of the EDA are related to defence procurement, this would seem to be a logical way ahead.

#### **16.1.5. EDA Financing**

The first part of the EDA budget is the ‘general budget’ that covers the Agency’s running, staffing and meeting costs, and the costs of procuring external advice essential for the Agency to discharge its tasks, and for specific research and technology activities for the common benefit of all participating Member States, notably technical case-studies and pre-feasibility studies.<sup>751</sup> The EDA general

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<sup>748</sup> Council Decision 2007/643/CFSP of 18 September 2007 on the financial rules of the European Defence Agency and on the procurement rules and rules on financial contributions from the operational budget of the European Defence Agency [2007] OJ L269/1; see Georgopoulos, “The New European Defence Agency”, above, p.107

<sup>749</sup> Decision 2007/643/CFSP, above, Art.2

<sup>750</sup> EDA Steering Board Decision of 16 December 2005 (not numbered) to amend the financial provisions (Title III on procurement) [2005] OJ C334/12, referring to Commission Regulation (EC, Euratom) N° 1261/2005 of 20 July 2005 amending Regulation (EC, Euratom) N° 2342/2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) N° 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities [2005] OJ L201/3; EDA Steering Board Decision No. 2006/29 (COR.) on revision of EDA financial rules, 13 November 2006, seemingly not published in the OJ

<sup>751</sup> Joint Action 2004/551/CFSP, above, Art.13(2); see also De Neve, *L’Agence européenne de Défense*, above, pp.36-38

budget is financed by the participating Member States and through miscellaneous revenue<sup>752</sup> of a nature left undetermined.

In addition, the EDA may, on the basis of a decision of the Steering Board, be entrusted by participating Member States, on a contractual basis, with the administrative and financial management of certain activities, for which it may be authorised to enter into contracts on behalf of certain Member States. Such contracts are financed by the Member States concerned.<sup>753</sup> This pertains principally to the budget of ad-hoc projects or programmes, discussed in Section 16.3.<sup>754</sup> Specific rules governing the financing of such budget are to be agreed on a case-by-case basis.<sup>755</sup>

#### ***16.1.6. Privileges and Immunities of the EDA***

Privileges and immunities necessary for the performance of the duties of the Agency must be provided for in an agreement between participating Member States.<sup>756</sup> It seems that such agreement has been enshrined in a Council decision,<sup>757</sup> but does not seem to be publicly available. This is certainly not a good example of transparency, and it is submitted that this decision should be published, as we have seen that one of the most sensitive issues of international organisation's procurement is their immunity from the jurisdiction of domestic courts.

### **16.2. Applicability of EU Law to the EDA**

#### ***16.2.1. Applicability of EU Substantive Law in General***

We saw in Section 10.2.1 that EU law will in general terms apply to an international organisation in the EU, but that this must be analysed case-by-case based on the contents and scope of the EU substantive law related to the case at hand and on the relevant rules of international law, such as the privileges of the international organisation. EU law would, as a general principle, therefore apply to

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<sup>752</sup> Joint Action 2004/551/CFSP, above, Art.13(8) and 16; Decision 2007/643/CFSP, above, Title I, Art.7 and 24-29

<sup>753</sup> Joint Action 2004/551/CFSP, above, Art.17; Decision 2007/643/CFSP, above, Title I, Art.6

<sup>754</sup> General Conditions Applicable to Ad Hoc Research & Technology Projects and Programmes of the European Defence Agency, 7 April 2006, §5.3

<sup>755</sup> Joint Action 2004/551/CFSP, above, Art.20-21

<sup>756</sup> Joint Action 2004/551/CFSP, above, Art.26

<sup>757</sup> Council Decision of 10 November 2004 on the privileges and immunities granted to the European Defence Agency and to its staff members, quoted in Council Decision 2007/643/CFSP, above, An.II, Art.37(3)(e)

the EDA. If the EDA were found to be an agency of the EU, it would have to comply with EU law in the same way as the other organs of the EU.

In addition, the EDA Joint Action, which was approved in 2004, had to be drafted in accordance with EU law, and would have to be amended if it were found not to comply with EU law, even though the privileges of the EDA may exempt it from compliance with certain provisions of EU law.

The Council itself seems to consider that EU law in general applies to the EDA. In the Decision adopting the EDA financial and procurement rules, it provides that ‘the Steering Board shall review and adopt technical amendments to these rules as necessary, notably in order to ensure consistency with relevant Community rules’.<sup>758</sup>

### ***16.2.2. Applicability of the EU Public Procurement Directives***

Even if EU substantive law, in general terms, applies to the EDA, this is to be confirmed case-by-case based on the provision of the EU legislation under consideration. We must therefore consider the case of the EU public procurement directives.

The EDA would most likely qualify as a body governed by public law as discussed in Section 11.2.1.1.<sup>759</sup> Its task is to facilitate the development of the European Defence and Security Policy, which is almost certainly meeting a need in the general interest not having an industrial or commercial character. Even when projects or programmes are conducted through the EDA, the latter is only managing the projects and related budgets on behalf of the participating States. In addition, the EDA has a legal personality in the legal system of its Member States, is mostly financed by the latter, and is entirely controlled by the representatives of its Member States, which are all EU Member States.

Yet, the Public Sector Directive does not apply to contracts awarded pursuant to the particular procedure of an international organisation.<sup>760</sup> As we explained in Section 11.2.1.2, the most likely view is that this exemption applies to all international organisations in the EU, even those of which only EU Member States are Members, such as the EDA, and that the latter would not have to comply with

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<sup>758</sup> Decision 2007/643/CFSP, above, Art.1(2)

<sup>759</sup> Defined in Directive 2004/18/EC, above, Art.1(9), para 2; see further Arrowsmith, *The Law of Public and Utilities Procurement*, above, §§5.4-5.19

<sup>760</sup> Directive 2004/18/EC, above, Art.15(c)

the EU Public Sector Directive,<sup>761</sup> even though under the second interpretation of the exemption one could argue that the exemption could not apply to the EDA. In addition, the fact that the EDA is said to act within the single institutional framework of the EU could mean that it would not qualify as an international organisation for the purpose of the Directive, but as an agency of the EU.

In addition, we have also seen in Section 11.2.2 that the EU Defence and Security Directive did not apply to contracts awarded in the framework of a cooperative programme based on R&D, conducted jointly by at least two EU Member States for the development of a new product and, where applicable, the later phases of all or part of the life-cycle of this product.<sup>762</sup> This clearly applies to most defence contracts currently concluded by the EDA, as these always involve more than one participating Member State, and include R&D because of the EDA upstream position in the procurement process. In addition, the Defence and Security Directive does not apply to international organisations procuring for their own purpose,<sup>763</sup> which would also exempt the EDA from complying with the Directive when it procures specific studies within its general budget. The Defence and Security Directive also does not apply to R&D contracts,<sup>764</sup> which would cover a number of contracts concluded by the EDA.

Nevertheless, this still leaves open the possibility that the directives could apply for the award of some contracts by the EDA if the latter would not qualify as an international organisation. However, as we explained in Section 11.2.2, the purpose of the public procurement directives is to coordinate national laws, and they are therefore not applicable to international bodies set-up by the EU institutions, which are not subject to the public procurement law of the EU Member States.<sup>765</sup>

This conclusion is confirmed by the definition of ‘central purchasing body’ in the Defence and Security Directive, which states that such body can be either a contracting authority bound by the Directive or a ‘European public body’ to which the Directive does not apply,<sup>766</sup> and mentions the EDA as an example of the

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<sup>761</sup> Capuano, “OCCAR: A Pragmatic View”, above, p.110

<sup>762</sup> Directive 2009/81/EC, above, Art.13(c)

<sup>763</sup> Directive 2009/81/EC, above, Art.12(c) and Recital 26

<sup>764</sup> Directive 2009/81/EC, above, Art.13(j) and Recital 34

<sup>765</sup> *Sogelma*, above, [115]

<sup>766</sup> Directive 2009/81/EC, above, Art.1(18) and Recital 23



latter.<sup>767</sup> It seems therefore that, for the EU legislator, the Directive does not apply to the EDA (and that the EDA is a European public body).

Nevertheless, the term ‘European public body’ is not defined. The definition implies that the EU legislator considers that European public bodies could in some cases not be subject to the Directive, even though it does not say that such bodies would never qualify as contracting authorities to which the Directive applies. The concept of ‘European public body’ would almost certainly cover bodies set-up by the EU institutions, such as the EDA, but could also cover independent international organisations of which only EU Member States are Members, such as OCCAR. It is not certain, on the other hand, that it would cover international organisations of which non-EU Member States are Members, such as NAMSO. A definition of ‘European public body’ would therefore be useful.

Consequently, it seems that there are many grounds under which it can be convincingly argued that the EU public procurement directives would not apply to the EDA.

### ***16.2.3. Applicability of the EU Treaties Procurement Principles***

We saw in Section 16.2.1 that the EDA would have in principle to comply with EU law, but the EU Treaties procurement principles only have to be complied with by entities that qualify as public authorities. As that concept also covers the concept of contracting authority, the EDA would be bound to comply with those principles if it is a contracting authority which, as we explained above, is a strong possibility. Even if the EDA would not be found to be a contracting authority, it would almost certainly qualify as a public authority: as we have seen in Section 11.3 (even though those criteria are only to be used as guidance), to qualify as a public authority, the entity in question must be effectively controlled by the State or another public authority, and it may not compete in the market.<sup>768</sup> Control can be found if the State or another public authority owns a controlling majority in the entity, which is the case of the EDA, as all its participating Member States are also EU Member States. In addition, the EDA does not provide goods or services through commercial relations, and is therefore not operating on the market.

In addition, as all EDA participating member States are Members of the EU, the functional necessity principle would not justify a customary privilege exempting

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<sup>767</sup> Directive 2009/81/EC, above, Recital 23

<sup>768</sup> See e.g. *Wall*, above, [47]-[52] and [60]

the EDA from complying with EU procurement law. Therefore, even though the procurement activities of the EDA are almost certainly exempted from compliance with the EU public procurement directives, they would still have to abide by the principles flowing from the EU Treaties.

Finally, we have seen in Section 8.2.4 that, unless EU Member States delegate to the entity concerned the power to decide which measures are necessary for the protection of the essential interests of the security, the most likely proposition is that only EU Member States may invoke the public security exemptions from the EU Treaties, such as Art.346 TFEU. As the EDA has not been given any power over the essential security interests of its Member States and acts without prejudice of the competence of the EU Member States in defence matters,<sup>769</sup> it most likely cannot invoke this exemption itself.

#### ***16.2.4. Applicability of the EDA Intergovernmental Regime***

As explained in Section 8.4.1, the EDA intergovernmental defence procurement regime applies to defence procurement above one million Euros, with a few exceptions, most notably collaborative procurement and research and technology.<sup>770</sup> Considering that the EDA operational procurement and the ad-hoc projects or programmes discussed below consist exclusively of activities performed for the benefit of more than one EU Member State, they almost certainly qualify as collaborative procurement. The EDA would therefore not have to comply with its own intergovernmental procurement regime if Art.346 TFEU is invoked for one of its procurement activities.

### **16.3. EDA Ad-Hoc Projects or Programmes**

#### ***16.3.1. Projects and Programmes Integration***

Within the scope of the EDA, a programme consists of a range of cooperative activities usually made up of individual projects grouped by a common theme, whilst a project is an individual cooperative activity with a clearly defined

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<sup>769</sup> Joint Action 2004/551/CFSP, above, Art.2

<sup>770</sup> Code of Conduct on Defence Procurement, above; Heuninckx, “Towards a Coherent European Defence Procurement Regime?”, above, p.6

objective, duration, cost, and expected output,<sup>771</sup> and often leading to one contract only. The EDA may manage two types of ad-hoc projects or programmes:<sup>772</sup>

- Category A, in which general participation of the EDA participating Member States is presumed;<sup>773</sup> and
- Category B, in which a limited number of participating Member States are involved.<sup>774</sup>

The agreement of the Member States contributing to a project or programme is embodied in a specific Project or Programme Arrangement that sets-out the principles applying to the project or programme and is a form of MOU.<sup>775</sup>

The process to integrate such projects or programmes in the EDA differs.

Category A projects or programmes are submitted to the Steering Board by one or more participating Member States or by the EDA Chief Executive. The Steering Board has to approve the establishment of the project or programme, together with the rules governing its management, the budget associated with it and the keys and implementing rules for financial contributions. In principle, all participating Member States contribute to a Category A project or programme, even though some of them may opt-out.<sup>776</sup>

For Category B projects or programmes, one or more participating Member States inform the Steering Board that they intend to establish a project or programme within the EDA remit. The project or programme then becomes an EDA project or programme, unless the Steering Board decides otherwise within one month. All participating Member States are informed of the existence of the project or programme,<sup>777</sup> so that any of them who wish to join may express an interest. The initiators of the project or programme decide on such participation within two

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<sup>771</sup> General Conditions Applicable to EDA Projects and Programmes, above, §I

<sup>772</sup> See further Georgopoulos, “The New European Defence Agency”, above, p.107; De Neve, *L’Agence européenne de Défense*, above, pp.63-71

<sup>773</sup> Joint Action 2004/551/CFSP, above, Art.20(1)

<sup>774</sup> Joint Action 2004/551/CFSP, above, Art.21(1)

<sup>775</sup> General Conditions Applicable to EDA Projects and Programmes, above, §§1 and 3.1-3.3; EDA Guide to the Production of Ad Hoc Category B R&T Project And Programme Arrangements Under EDA General Conditions for the Establishment of Ad Hoc R&T Projects and Programmes, 7 April 2006, Introduction

<sup>776</sup> Joint Action 2004/551/CFSP, above, Art.20

<sup>777</sup> General Conditions Applicable to EDA Projects and Programmes, above, §3.7 and Annex A

months of a request to join. The contributing Member States take amongst them the decisions necessary for the project or programme.<sup>778</sup>

Third parties, including contractors, may contribute to a particular project or programme.<sup>779</sup> For Category A projects or programmes, the contributing Member States meeting within the Steering Board approve any necessary modalities with the relevant third parties relating to their contribution, but for Category B projects, the contributing Member States make that decision outside the Steering Board.<sup>780</sup>

Since its creation, the EDA has been managing two Category A Joint Investment Programmes and thirty Category B projects, to which participating Member States as well as the European industry have contributed funding.<sup>781</sup>

### ***16.3.2. Specific Rules for Projects and Programmes***

The EDA adopted general conditions to be used for Category A or B projects or programmes, that have to be applied by every project or programme unless expressly modified in the Programme/Project Arrangement, and then only if such modification is allowed under the general conditions.<sup>782</sup>

The EDA Joint Action does not refer to any work sharing arrangement rules for projects or programmes.<sup>783</sup> However, the general conditions state that the contributing Member States and third parties will not seek to apply *juste retour* on an individual project or programme basis, but will seek ‘a global return’.<sup>784</sup> This provision looks similar to the OCCAR global balance principle, but seems even vaguer, as ‘global return’ and the way it should be calculated are not defined. In addition, these provisions clearly show that EDA projects or programmes may create some form of distortions in the defence market through the award of strategic contracts to correct the global return. It is also unclear what procedures have to be applied to implement such corrections of global return.

Moreover, because of the ‘upstream’ nature of the EDA, which currently is mostly involved in R&D projects or programmes, this global return is problematic. Only

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<sup>778</sup> Council Joint Action 2004/551/CFSP, above, Art.21

<sup>779</sup> General Conditions Applicable to EDA Projects and Programmes, above, §8.15 et.seq

<sup>780</sup> Joint Action 2004/551/CFSP, above, Art.23

<sup>781</sup> European Defence Agency, 2007, 2008 and 2009 Financial Reports, June 2008, June 2009 and April 2010, found at <http://www.eda.europa.eu/documents.aspx>, accessed on 17 January 2011

<sup>782</sup> General Conditions Applicable to EDA Projects and Programmes, above, Preamble

<sup>783</sup> Georgopoulos, “The New European Defence Agency”, above, p.111

<sup>784</sup> General Conditions Applicable to EDA Projects and Programmes, above, §2.4

six participating Member States (France, Germany, Italy, Spain, Sweden and the United Kingdom) represent 98% of defence R&D spending within the EU<sup>785</sup> and, as a consequence, most of the EU R&D industrial capacity is located in these countries. Therefore, it would be very difficult for the EDA to balance the industrial return from R&D contracts for the benefit of smaller participating Member States, even though ensuring a more balanced global return could contribute to the diversification of the EU R&D industrial base.

The Steering Board is responsible for resolving any issues on general matters that arise under the general conditions, and disputes regarding the interpretation or application of these conditions will be resolved by consultation between the EDA and the participating Member States, and will not be referred to any tribunal.<sup>786</sup> This provision will likely mainly concern disputes between contributors to the project or programme and/or the EDA. However, if a third party, for instance an aggrieved tenderer, files a claim for loss or damage in connection with a Programme/Project Arrangement, as explained below, this provision would also apply if there is a dispute about the interpretation of the general conditions.

Competition is the preferred method for letting contracts for projects or programmes, except when the contributing Members States determine otherwise in the Project/Programme Arrangement.<sup>787</sup> The contributing Members States have to decide that contracts for the project or programme will be let either by each contributing Member State individually, by one contributing Member State according to its own national laws on behalf of the others, or by the EDA or another international organisation on behalf of the contributing Member States.<sup>788</sup> If contracts are to be awarded by the EDA, this is done not in its own name, but on behalf of the contributing Member States and contributing third parties, who bear the costs of any contractual liabilities.<sup>789</sup> The contributing Member States must seek the approval of the Steering Board before the EDA is authorised to let contracts in that manner.<sup>790</sup>

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<sup>785</sup> Communication on the results of the consultation launched by the Green Paper on Defence Procurement, COM(2005)626, above, p.2

<sup>786</sup> General Conditions Applicable to EDA Projects and Programmes, above, §2.7-2.8

<sup>787</sup> General Conditions Applicable to EDA Projects and Programmes, above, §5.1

<sup>788</sup> General Conditions Applicable to EDA Projects and Programmes, above, §§5.2 and 5.4-5.6

<sup>789</sup> General Conditions Applicable to EDA Projects and Programmes, above, §§5.10-5.11; EDA Guide to Category B R&T Project And Programme Arrangements, above, Art.4.4 and 9.1

<sup>790</sup> Joint Action 2004/551/CFSP, above, Art.17(2); General Conditions Applicable to EDA Projects and Programmes, above, §§3.6.d and 5.3

As we have seen in Section 7.2 that one of the main issues of collaborative procurement is the length of the pre-contractual preparation phase, the existence of these generic conditions can be seen as positive. Whilst, for non-EDA programmes, the programme MOU has often to be negotiated from scratch, the general conditions already provide a framework of agreed terms and conditions that do not necessarily require revision.

### ***16.3.3. Relationship with the EU Law Obligations of Participating Member States***

We have explained in Section 11.4 that neither the EU public procurement directives nor the procurement principles of the EU Treaties apply to contracts between a contracting authority and an entity legally distinct from it if the contracting authority exercises over the entity concerned, possibly jointly with other contracting authorities, a control which is similar to that which it exercises over its own departments and, at the same time, that entity carries out the essential part of its activities with the controlling contracting authority.<sup>791</sup>

The participating Members States of the EDA are exclusively EU Member States, and the Steering Board is composed solely of their representatives. Moreover, even though the EDA has a separate legal personality, it does not have a commercial character and performs tasks in the public interest, which evidences an important level of control by the participating member States. In addition, the EDA carries out most of its activities for the benefit of its Member States, and only incidentally for third parties. It is therefore almost certain that neither the directives nor the EU Treaties procurement principles would apply to the assignment of projects or programmes to the EDA.

However, as we explained in Section 10.2.2, international agreements concluded by EU Member States after 1957 have to be drafted in accordance with EU law. This means that all Project/Programme Arrangements would have to be drafted in line with EU law, unless an exemption from compliance with EU law, such as Art.346 TFEU, could be invoked. For programmes, which by definition require placing many different contracts, the use of the exemption at the level of the Programme Arrangement could be considered inappropriate and would probably breach the principle of proportionality: an exemption would have to be invoked for

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<sup>791</sup> *Teckal*, above, [50]; *Stadt Halle*, above, [49] and [52]; *Commission v Spain* (Case C-84/03), above, [38]; *Parking Brixen*, above, [62]; *Agusta Helicopters*, above, [39]-[41]; *Coditel Brabant*, above, [26]; *Sea*, above, [36]-[37]

each individual contract. However, for projects, which have a much more limited scope, invoking an EU law exemption for provisions of the Project Arrangement could be more appropriate.

## **16.4. The EDA Procurement Rules**

### ***16.4.1. General Principles***

All public contracts awarded by the EDA and financed in whole or in part by the EDA general budget must comply with the principles of transparency, proportionality, equal treatment and non-discrimination.<sup>792</sup> This rule is in line with the principles flowing from the EU Treaties and with the similar principles of the Public Sector Directive.<sup>793</sup> However, it also implies that contracts awarded by the EDA and entirely financed through the budget of projects or programmes may deviate from these principles.<sup>794</sup> This is consistent with the fact that, even though *juste retour* is not applied strictly for projects or programmes, the ‘global return’ mentioned above could in some cases require the strategic awards of contracts to ensure a more balanced global return. This could only be done if an EU Treaties exemption, such as Art.346 TFEU, is invoked by the relevant contributing Member States.

In addition, all procurement contracts of the EDA have to be put out to tender on the broadest possible base, except when use is made of the negotiated procedure.<sup>795</sup> This rule seems to apply to all contracts awarded by the EDA, without distinction between those financed through the general budget and those financed through a project or programme budget. This rule is in line with the procurement principles of the EU Treaties.

The EDA procurement rules are said not to ‘affect existing measures taken by EU Member States under [Art.346 TFEU] or under Art.10 and 14 of the Public Sector Directive’.<sup>796</sup> It is unclear what this provision exactly means. It could signify, either:

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<sup>792</sup> Decision 2007/643/CFSP, above, An.II, Art.2(1)

<sup>793</sup> Directive 2004/18/EC, above, Art.2

<sup>794</sup> This had been envisioned before the publication of the EDA procurement rules by Georgopoulos, “The New European Defence Agency”, above, p.107

<sup>795</sup> Decision 2007/643/CFSP, above, An.II, Art.2(2)

<sup>796</sup> Decision 2007/643/CFSP, above, An.II, Art.55; Directive 2004/18/EC, above, Art.10 and 14

- That the EDA procurement rules do not apply when an EU Member State invokes one of the exemptions contained in these articles;
- That the rules do not affect domestic law in force at the time of their adoption and that relate to the stated exemptions; or
- That the rules do not affect activities or procurement processes already ongoing at the time of their adoption.

Within the EDA procurement rules, certain provisions do not apply to ‘contracts related to defence’, which is a term that refers to a contract to be concluded by the EDA ‘in the fields where EU Member States may invoke the exception of Art.10 of the Public Sector Directive’.<sup>797</sup> The reference to Art.10 of the Directive is confusing, as the actual exemption is found in Art.346 TFEU. Because of the use of the word ‘may’, this provision could be read to mean that any contract related to equipment on the 1958 list will be considered as a ‘contract related to defence’ exempt from compliance with certain EDA rules. This reading would be acceptable only if the EDA rules to be applied in case of derogation would still be in line with EU law. However, a more restrictive reading would interpret this provision as meaning that the exemptions for ‘contracts related to defence’ only apply when all the conditions to validly invoke Art.346 TFEU are met. This second interpretation would be more in line with the CJEU case law, which held that there is no automatic exclusion for reasons of public security.

Where the Government Procurement Agreement (GPA) of the WTO applies, the contracts of the EDA must also be open to nationals of States that have ratified the GPA, except for contracts related to defence.<sup>798</sup> Whilst this provision seems to clarify that the EDA has to comply with the GPA, it includes a provision excluding contracts related to defence, which as we explained above refers to contracts related to Art.346 TFEU. This approach is coherent with the fact that the GPA includes a similar exemption that excludes the procurement of “hard” defence equipment from its scope,<sup>799</sup> but it is not certain that that exemption and Art.346 TFEU have exactly the same scope, which is what the EDA rules seem to

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<sup>797</sup> Decision 2007/643/CFSP, above, An.II, Art.1(i)

<sup>798</sup> Decision 2007/643/CFSP, above, An.II, Art.8; See GPA 1994, above; for more information on the GPA, see the WTO website [http://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm), accessed on 21 December 2010; Arrowsmith, *Government Procurement in the WTO*, above

<sup>799</sup> See GPA 1994, above, Art.XXIII; Arrowsmith, *Government Procurement in the WTO*, above, pp.148-150



assume.<sup>800</sup> However, as the EDA is not listed among the European procurement entities to which the GPA applies,<sup>801</sup> it is likely that there is in fact no international law obligation for the EDA to comply with the GPA, or even for its participating Member States to ensure that the EDA complies with the GPA.<sup>802</sup> It seems that the EDA participating Member States simply decided of their own initiative that the EDA should comply with the GPA, just as they did for most of the provisions of the Public Sector Directive, except for contracts related to defence.

#### **16.4.2. Authority to Award Contracts**

For contracts awarded by the EDA, an ‘Authorising Officer’ (often the Chief Executive) decides to who the contract is to be awarded, in compliance with the selection and award criteria laid down in the documents relating to the call for tenders and the procurement rules.<sup>803</sup> As for NAMS0, this has the potential to make decision-making for EDA procurement more efficient, as the agreement of the participating Member States is not required before a contract may be awarded.

#### **16.4.3. Contract Award Procedure**

##### **16.4.3.1. Thresholds**

Except for contracts related to defence, the EDA procurement rules apply the thresholds of the Public Sector Directive to determine the publication arrangements, the choice of procedures and the corresponding time limits. However, the EDA rules include additional thresholds for contracts of a value under the thresholds of the Public Sector Directive.<sup>804</sup>

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<sup>800</sup> This point is acknowledged by the EU legislator in Directive 2009/81/EC, above, Recital 18: “[Art.296 EC] and Art.XXIII(1) of the GPA have a different scope and are subject to different standards of judicial review. [EU] Member States may still rely on Art.XXIII(1) of the GPA in situations where [Art.296 EC] cannot be invoked. The two provisions have therefore to meet different conditions for application.”

<sup>801</sup> GPA 1994, above, European Union Appendix I

<sup>802</sup> Dispute DS163, *Korea – Measures Affecting Government Procurement*, Panel Report adopted by the WTO Dispute Settlement Body on 19 June 2000, held that entities not listed in a signatory’s Appendix I were not covered by the signatory’s obligations under the GPA; Arrowsmith, *Government Procurement in the WTO*, above, pp.119-122

<sup>803</sup> Decision 2007/643/CFSP, above, An.II, Art.16(1); Joint Action 2004/551/CFSP, above, Art.10(4) and 17(2)

<sup>804</sup> Decision 2007/643/CFSP, above, An.II, Art.5 and 35-36

#### **16.4.3.2. Choice of Procurement Procedure**

The procurement procedures of the EDA mirror those of the Public Sector Directive and take one of the following forms: the open procedure, the restricted procedure, the competitive dialogue, and the negotiated procedure.<sup>805</sup> The EDA may also conclude framework agreements,<sup>806</sup> organise contests,<sup>807</sup> and use dynamic purchasing systems,<sup>808</sup> which are similar to those of the Public Sector Directive.<sup>809</sup> Likewise, the competitive dialogue procedure is the same as that of the Directive.<sup>810</sup>

All the grounds for use of the negotiated procedure without publication of a contract notice listed in the Public Sector Directive<sup>811</sup> are also found in the EDA rules, but the latter include a number of additional grounds for using that procedure that are not simply exemptions from applicability of the Public Sector Directive.<sup>812</sup>

- Where the contract can be awarded only to a particular economic operator, for reasons connected with major preliminary investments related to defence equipment or technology, to unique specific defence facilities, or in order to ensure the security of supply in defence equipment or technology or in view of the need to further develop an innovative defence technology developed by such operator;
- Where the Commission or another European or international organisation or entity has entered into an agreement with a particular economic operator in the field of security research and it is appropriate to award a research contract related to defence to the same economic operator;
- For contracts related to defence to be let in the framework of a programme or project managed in cooperation with another international organisation;

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<sup>805</sup> Decision 2007/643/CFSP, above, An.II, Art.4 and 25

<sup>806</sup> Decision 2007/643/CFSP, above, An.II, Art.20

<sup>807</sup> Decision 2007/643/CFSP, above, An.II, Art.28

<sup>808</sup> Decision 2007/643/CFSP, above, An.II, Art.29

<sup>809</sup> Directive 2004/18/EC, above, Art.32-33

<sup>810</sup> Decision 2007/643/CFSP, above, An.II, Art.30; Directive 2004/18/EC, above, Art.29

<sup>811</sup> Directive 2004/18/EC, above, Art.31

<sup>812</sup> Decision 2007/643/CFSP, above, An.II, Art.31

- For contracts not covered by the Public Sector Directive, where a call for expressions of interest has been published (see Section 16.4.3.5).

The grounds connected to major preliminary investments, defence facilities, security of supply or innovative development does not mention explicitly ‘contracts related to defence’, but could often fall within the Art.346 TFEU exemption. However, it is not certain that this would always be the case, and one could argue that these grounds for awarding the contract to a particular economic operator are too broad. This exemption should be made subject to EU Treaties exemptions, such as Art.346 TFEU. Still, from a cost-effectiveness and efficiency point of view, this rule makes sense, as it is often nugatory work to perform a competitive procurement process for a follow-up phase when major investments have already been made.

The grounds that allow looking for synergies with Commission’s or an international organisation’s research initiatives could be seen as redundant with another exemption allowing the use of the negotiated procedure for R&D contracts. However, this is not the case, as the EDA should invite at least three candidates to negotiate in the latter case, and can award the contracts in a single tender procedure here.<sup>813</sup> Even though, again, this exemption could sometimes fit within an EU Treaties exemption, it is not certain that this would always be the case, and it could therefore be in breach of the procurement principles of the EU Treaties. However, as this provision is said to apply to contracts related to defence, the narrow interpretation of the latter term would ensure that it would be used only when Art.346 TFEU has been validly invoked.

The grounds for using the negotiated procedure without publication for programmes or projects managed with another international organisation clearly relate to the cases whereby the EDA would rely on the services of an organisation such as OCCAR to manage the procurement side of the programme, which the EDA currently sees as its normal way of working.<sup>814</sup> First, it should be noted that, in this case, at least three candidates should be invited to negotiate.<sup>815</sup> Second, it is not entirely clear to what type of contract this provision applies. It could apply to the contracts concluded by the EDA within the scope of that project or programme, including the contract or arrangement between the EDA and the other organisation,

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<sup>813</sup> Decision 2007/643/CFSP, above, An.II, Art.26(2)(d)

<sup>814</sup> EDA Bulletin Issue 12, above, p.9

<sup>815</sup> Decision 2007/643/CFSP, above, An.II, Art.26(2)(d)

but in that case the exemption could potentially have a very broad scope if the EDA awards a number of contracts under the programme or project. One could also argue that it would apply to the contracts to be awarded by the other international organisation within the scope of the programme. However, in that case, the interaction between this provision and the procurement rules of the other organisation is unclear. As the exemption applies to contracts related to defence, this would only cover contracts for which Art.346 TFEU has been invoked as long as the narrow interpretation of ‘contracts related to defence’ is chosen.

For contracts related to defence other than those for which the negotiated procedure without publication may be applied, the negotiated procedure with publication of a contract notice is the default procedure when neither a call for expressions of interest nor any prior information notice has been published (if one of these has been published, the negotiated procedure without publication may be applied).<sup>816</sup> This would be in line with the principles flowing from the EU Treaties, as it would provide for advertising and some form of competition (by default, a minimum of three tenderers has to be invited). In addition, the same principle is applied in the Defence and Security Directive.

The other grounds for applying the negotiated procedure with publication are the same as those of the Public Sector Directive.<sup>817</sup>

#### **16.4.3.3. Publication**

All contracts exceeding the thresholds provided for in the Public Sector Directive are subject to the same publication requirements as those to be concluded in accordance with that Directive, except secret contracts, non-priority service contracts, and contracts related to defence.<sup>818</sup> Contracts not covered by these provisions, except secret contracts, that have a value above €60,000, have to be advertised through the publication of an ‘expression of interest’ (see Section 16.4.3.5) and, for contracts above €25,000, by the annual publication of a list of contractors specifying the subject and the value of the contract awarded, with a few exceptions such as contracts related to defence. For contracts below €60,000, the advertisement is done on the website of the EDA.<sup>819</sup>

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<sup>816</sup> Decision 2007/643/CFSP, above, An.II, Art.32(1)(f)

<sup>817</sup> Decision 2007/643/CFSP, above, An.II, Art.32 and Directive 2004/18/EC, above, Art.30 respectively

<sup>818</sup> Decision 2007/643/CFSP, above, An.II, Art.3 and 21

<sup>819</sup> Decision 2007/643/CFSP, above, An.II, Art.3, 22 and 33

These provisions seem to be in line with EU law and follow the procedure and thresholds of the Public Sector Directive, except potentially for the contracts related to defence if the less restrictive reading of the definition of such contracts would be applied: it would mean that, even when the Art.346 TFEU exemption could not apply, the EDA would not publish contract notices in the EU OJ for the contracts related to products on the 1958 list. However, even if that was the case, an expression of interest would still be published, which could still be in line with the transparency requirement flowing from the EU Treaties.

#### **16.4.3.4. Conditions for Participation**

Participation in tendering procedures is open on equal terms to all natural and legal persons coming within the scope of the EU Treaties as well as to those from a third country that has an agreement on public procurement with the EU (such as GPA signatories). However, for contracts related to defence, participation is only open to those having a technological and/or industrial base appropriate for the related contract on the territory of an EU Member States or of a third country having entered into an administrative arrangement to that effect with the EDA.<sup>820</sup>

For contracts related to defence, those provisions could discriminate against tenderers from GPA countries, but this is coherent with the fact that the GPA would not have to be complied with by the EDA, as we explained above. Depending on the subject matter of the contract, geographical limitations for the award of contracts related to defence could be justified on the grounds of long-term security of supply by invoking the relevant exemption of the GPA.<sup>821</sup>

In addition, candidates or tenderers are excluded if they fit within the exclusion criteria identified in the EDA rules, such as bankruptcy, not having fulfilled social security payment obligations, having been convicted of certain offences, having made misrepresentations, being subject of a conflict of interests, or having been declared in serious breach of contract following another procurement procedure financed by the EU or the EDA general budget.<sup>822</sup> Except for the latter two, these exclusion criteria fit within those of the Public Sector Directive,<sup>823</sup> but the Directive does not preclude a Member State from providing for further

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<sup>820</sup> Decision 2007/643/CFSP, above, An.II, Art.7

<sup>821</sup> GPA 1994, above, Art.XXIII

<sup>822</sup> Decision 2007/643/CFSP, above, An.II, Art.9-10 and 41

<sup>823</sup> Directive 2004/18/EC, above, Art.45

exclusionary measures designed to ensure observance of the principles of equal treatment of tenderers and of transparency, as long as the principle of proportionality is complied with.<sup>824</sup>

#### **16.4.3.5. Calls for Expressions of Interest**

For contracts with a value of more than €60,000 but less than the thresholds for applicability of the Public Sector Directive, as well as for contracts related to defence, a call for expressions of interest is used as a means of pre-selecting candidates who will be invited to submit tenders in response to future invitations to tender. Such calls for expression of interest are published in the OJ or on the EDA website.<sup>825</sup>

On the basis of the answers to a call for expressions of interest, a list of potential tenderers is established, which is valid for three years. Any interested person may submit an application to be included in the list. Such list may be divided into sub-categories according to the type of contract for which the list is valid.<sup>826</sup> Where a specific contract is to be awarded, the EDA will invite either all candidates entered on the list or only some of them, on the basis of selection criteria specific to that contract, to submit a tender.<sup>827</sup>

This method of pre-selection is similar to the source file compiled by NAMSAs for its procurement contracts (see Section 15.4.3). Like with the NAMSAs source file, it is unclear what the criteria to be included on the list are, even though they could be defined case-by-case for each of such lists in the call for expression of interest. Such criteria most likely do not cover selection criteria, as those seem to be related to each specific contract (see Section 16.4.3.6), so they probably include the conditions for participation mentioned above, but could be tailored in function of the type of contract. In addition, it is unclear what the level of details of such list is. This is probably a wilful decision in order to leave the EDA the freedom to manage many or few of such lists. However, the fact that it is unclear on what grounds an economic operator could be excluded from the list is probably not in line with the principle of transparency of the EU Treaties, unless the criteria are systematically published in the call for expression of interest.

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<sup>824</sup> *Michaniki AE v Ethniko Simvoulío Radiotileorasis and Ipourgós Epikratías* (Case C-213/07) [2008] E.C.R. I-9999, [49]

<sup>825</sup> Decision 2007/643/CFSP, above, An.II, Art.22(1)(a) and 33(1)

<sup>826</sup> Decision 2007/643/CFSP, above, An.II, Art.33(2)

<sup>827</sup> Decision 2007/643/CFSP, above, An.II, Art.33(3)

#### **16.4.3.6. Selection of the Candidates**

The selection criteria for evaluating the capability of candidates or tenderers must be defined in advance and set out in the call for tender,<sup>828</sup> and their use is mandatory for every procurement procedure. Such criteria must be objective and non-discriminatory.<sup>829</sup> The EDA may lay down minimum capacity levels below which candidates may not be selected.<sup>830</sup>

The EDA rules on selection criteria are similar to those found in the Public Sector Directive,<sup>831</sup> with the exception that the EDA may, in view of the specific requirements for the proper performance of a contract, request the following additional information in relation to the candidates or tenderers and their subcontractors, if any:<sup>832</sup>

- A valid facility security clearance of the appropriate level;
- Security clearances for those persons who will participate in the performance of the contract;
- Information about their technological or industrial base within the territory of the participating Member States.

In addition, for contracts related to defence, the EDA may encourage, on a transparent and non-discriminatory basis, the creation of consortia and the promotion of principles similar to those of the EDA code of best practices in the supply chain<sup>833</sup> in order to encourage increased competition and fair opportunities for all suppliers, including for SME down the supply chain.<sup>834</sup> This reflects a continuing concern of smaller EU Member States who want to ensure the participation of their national industry in major procurement programmes, as well as the view of many EU Member States that SME are not involved enough in defence procurement.<sup>835</sup>

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<sup>828</sup> Decision 2007/643/CFSP, above, An.II, Art.13(1)

<sup>829</sup> Decision 2007/643/CFSP, above, An.II, Art.33(3)

<sup>830</sup> Decision 2007/643/CFSP, above, An.II, Art.42(2)

<sup>831</sup> Directive 2004/18/EC, above, Art.46-51

<sup>832</sup> Decision 2007/643/CFSP, above, An.II, Art.42(7)

<sup>833</sup> EDA Steering Board Decision Approving the Code of Best Practice in the Supply Chain, 15 May 2006; for a discussion of the Code of Best Practices, see Georgopoulos, "The New Code of Best Practice in the Supply Chain", above

<sup>834</sup> Decision 2007/643/CFSP, above, An.II, Art.42(8)

<sup>835</sup> Communication from the Commission: A strategy for a stronger and more competitive European defence industry, COM(2007)764, above, §3.2.3

#### **16.4.3.7. Calls for Tenders and Technical Specifications**

A full, clear and precise description of the subject of the contract must be given in the documents relating to the call for tenders.<sup>836</sup> Like the selection criteria, the award criteria for evaluating the contents of the tenders and, if possible, their weighting must be defined in advance and set out in the call for tender.<sup>837</sup> This is in line with the equivalent provisions of EU law.<sup>838</sup>

Specific rules exist for the contents of the tender documents and technical specifications.<sup>839</sup> These provisions are similar to those of the Public Sector Directive.<sup>840</sup> Likewise, the EDA rules on time limits<sup>841</sup> are the same as those of the Public Sector Directive.<sup>842</sup>

#### **16.4.3.8. Evaluation of the Tenders**

All applications or tenders that satisfy the conditions laid down will be evaluated on the basis of the selection and award criteria by a committee appointed for this purpose.<sup>843</sup> All contacts between the EDA and candidates or tenderers must ensure transparency and equal treatment, and may not lead to amendment of the conditions of the contract or the terms of the original tender. Before tender submission, such contacts may be made to provide clarification or to correct mistakes in the tender documents, and after tender submission to clarify or correct obvious clerical errors in the latter. However, for contracts for legal services and for contracts related to defence, the EDA may enter into the necessary contacts with tenderers ‘to check the selection and/or award criteria’.<sup>844</sup>

These provisions, except the latter, are in line with usual practice. However, the fact that the EDA may contact tenderers to check the criteria for two types of contract is interesting, albeit vague. It does not say if such contacts may be held before or after the tenders are submitted (or both), and it does not clarify what ‘to check the criteria’ means. This probably also allows the EDA to amend those

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<sup>836</sup> Decision 2007/643/CFSP, above, An.II, Art.6

<sup>837</sup> Decision 2007/643/CFSP, above, An.II, Art.13(1) and Art.45(3)

<sup>838</sup> Directive 2004/18/EC, above, Art.53(2)

<sup>839</sup> Decision 2007/643/CFSP, above, An.II, Art.37-38

<sup>840</sup> Directive 2004/18/EC, above, Art.23

<sup>841</sup> Decision 2007/643/CFSP, above, An.II, Art.48-50

<sup>842</sup> Directive 2004/18/EC, above, Art.38

<sup>843</sup> Decision 2007/643/CFSP, above, An.II, Art.14 and 52-53

<sup>844</sup> Decision 2007/643/CFSP, above, An.II, Art.15 and 51



criteria in function of the information received. These provisions can be beneficial to avoid the procurement process to be declared ineffective, but would have to be applied carefully if unequal treatment is to be avoided.

Contracts may be awarded by the automatic award procedure or by the best-value-for-money procedure.<sup>845</sup> Under the automatic award procedure, the contract is awarded to the tender that while being in order and satisfying the conditions laid down, quotes the lowest price.<sup>846</sup> It is probable that ‘being in order and satisfying the conditions laid down’ simply means ‘compliant’, so that the contract will be awarded to the lowest compliant tender. The tender offering the best value for money is the one with the best price-quality ratio, taking into account criteria justified by the subject of the contract such as price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, profitability, completion or delivery times, after-sales service and technical assistance.<sup>847</sup> Under these provisions, it seems that the best value for money procedure is equivalent to the selection of the most economically advantageous tender in the Public Sector Directive.<sup>848</sup>

For contracts related to defence, the fundamental criterion for the award of the contract will be the most economically advantageous solution, taking into account *inter alia* considerations of costs, technical compliance, quality assurance and delivery schedule as well as, where relevant, security of supply and the approach proposed by the tenderer for the selection of sources of supply.<sup>849</sup> Contrary to the EDA intergovernmental regime, these provisions do not mention offsets, even though the EDA seems to assume that contracts related to defence would be excluded from the scope of the EU Treaties. From a practical point of view, it is unclear how the EDA would in fact give marks to the approach of the selection of sources of supply, and how different such approaches are to be compared.

The EDA rules on electronic auctions<sup>850</sup> and on abnormally low tenders<sup>851</sup> are similar to those of the Public Sector Directive.<sup>852</sup>

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<sup>845</sup> Decision 2007/643/CFSP, above, An.II, Art.13(2)

<sup>846</sup> Decision 2007/643/CFSP, above, An.II, Art.45(1)

<sup>847</sup> Decision 2007/643/CFSP, above, An.II, Art.45(2)

<sup>848</sup> Directive 2004/18/EC, above, Art.53(1)

<sup>849</sup> Decision 2007/643/CFSP, above, An.II, Art.45(4)

<sup>850</sup> Decision 2007/643/CFSP, above, An.II, Art.46

<sup>851</sup> Decision 2007/643/CFSP, above, An.II, Art.47

#### **16.4.3.9. Information of Tenderers and EDA Member States**

The EDA notifies all candidates or tenderers whose applications or tenders are rejected of the grounds on which the decision was taken. If a tenderer whose tender was admissible makes a request in writing, the EDA informs it of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract is awarded, even though certain details may remain undisclosed in some cases. At the same time, the EDA informs the successful tenderer of the award decision, specifying that the decision notified does not constitute a commitment on the part of the EDA.<sup>853</sup>

These provisions are similar to those found in the Public Sector Directive,<sup>854</sup> but they do not seem to include a standstill period. This is not in line with the amended Remedies Directive.<sup>855</sup>

#### **16.4.4. Complaints and Settlement of Disputes**

The EDA may, before the contract is signed, either abandon the procurement or cancel the award procedure without the candidates or tenderers being entitled to claim any compensation. The decision must be substantiated and be brought to the attention of the candidates or tenderers.<sup>856</sup> However, these provisions do not explain on what grounds the procedure may be abandoned or cancelled, so it is unclear what ‘substantiation’ elements the EDA would have to provide.

The EDA procurement rules do not contain any provision on remedies or on a complaint procedure, but the EU General Court is competent to review the legality of acts of all bodies, offices or agencies of the EU intended to produce legal effects vis-à-vis third parties. Such proceedings may be instituted by any natural or legal person against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.<sup>857</sup> These provisions also cover decisions made during a procurement process.<sup>858</sup> A procedural defect will lead to

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<sup>852</sup> Directive 2004/18/EC, above, Art.54 and 55 respectively

<sup>853</sup> Decision 2007/643/CFSP, above, An.II, Art.16(2)-(3)

<sup>854</sup> Directive 2004/18/EC, above, Art.41

<sup>855</sup> Directive 89/665/EEC, above, Art.2a

<sup>856</sup> Decision 2007/643/CFSP, above, An.II, Art.17

<sup>857</sup> Art.263 TFEU (formerly Art.230 EC); *EMSA*, above, [75]

<sup>858</sup> *Les Verts v Parliament* (Case 294/83) [1986] E.C.R. 1339, [23]-[25]; *Sogelma*, above, [36]-[37]; *EMSA*, above, [61]-[75] and especially [67]

the annulment in whole or in part of a decision if it is shown that, but for that defect, the contested decision might have been different.<sup>859</sup>

However, the CJEU does not have jurisdiction with respect to the CFSP provisions of the TEU and decisions made in application of these, such as those that founded and regulate the working the EDA. Nevertheless, implementation of the CFSP may not affect ‘the application of the procedures and the extent of the powers of the institutions for the exercise of the Union competences’, and the CJEU has jurisdiction to monitor compliance with this principle.<sup>860</sup> Those provisions are not entirely clear, but a possible reading could be that, even though the CJEU could not review the compliance of an EDA procurement decision with the procurement rules of the agency or with its founding instrument, which are approved within the scope of the CFSP, it could review the compliance of such decision with the applicable procurement principles of EU law.

In addition, the issue of the EDA immunities, and especially the fact that they are not published, was discussed in Section 16.1.6.

## **16.5. Research Questions Answers for the EDA**

### ***16.5.1. EDA Procurement Rules and EU Law***

EU law most likely applies to the EDA, even though it is almost certain that the public procurement directives would not apply to its procurement activities. Nevertheless, the EDA procurement rules were voluntarily drafted on the basis of the Public Sector Directive. It remains to be seen if the EDA will amend its procurement rules to take into account the adoption of the Defence and Security Directive. In any case, the EDA would still have to comply with the procurement principles flowing from the EU Treaties, unless an exemption such as Art.346 TFEU is validly invoked by one or more of its participating Members States.

Contracts awarded by the EDA and financed in whole or in part by the EDA general budget must comply with the principles of transparency, proportionality, equal treatment and non-discrimination, but those awarded by the EDA and entirely financed through the budget of projects or programmes may deviate from

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<sup>859</sup> *Evropaiki Dynamiki v Commission* (Case T-345/03) [2008] E.C.R. II-341, [147]; *European Service Network (ESN) SA v Commission* (Case T-332/03) [2008] E.C.R. II-32, [130]; *EMSA*, above, [103]

<sup>860</sup> Art.24(1) and 40 TEU (ex-Art.11 and 47 EU); Art.275 TFEU (ex-Art.225a EC)

these principles. However, even though this is not explicitly mentioned in the EDA rules, this should only be done when an EU Treaties exemption has been invoked.

Certain provisions of the EDA rules do not apply to ‘contracts related to defence’, which is a term that refers to a contract in the fields where EU Member States may invoke the Art.346 TFEU exemption. This definition could be broadly or narrowly interpreted, but it is submitted that only a narrow interpretation, whereby a contract would be ‘related to defence’ only if all the conditions to invoke the Art.346 TFEU exemption are satisfied, would be in line with EU law.

The EDA procurement rules are clearly based on the EU Public Sector Directive and are in line with the EU Treaties principles applicable to procurement, with a number of differences related to the management of projects and programmes (such as global return) and to contracts related to defence. These differences are often worded in potentially broad terms that would have to be interpreted narrowly to remain within the scope of the EU Treaties exemptions.

#### ***16.5.2. Internal Coherence of the EDA Procurement Rules***

For projects or programmes conducted through the EDA, the contributing Member States do not seek to apply *juste retour* on an individual project or programme basis, but will seek ‘a global return’. However, the latter term is not defined, and it is unclear how such global return has to be calculated or corrected.

The privileges and immunities of the EDA have been agreed in a Council decision that does not seem to be publicly available. This is clearly not transparent, and a candidate or tenderer aggrieved by a procurement process of the EDA would not even know if it could sue the EDA in a national court. In addition, the EDA rules do not include any standstill period or provisions on claims or remedies. However, the EU General Court is probably competent to review the compliance of acts of the EDA with the EU Treaties, including procurement decisions.

In addition, the conditions to be included in the list kept by the EDA following a call for expressions of interest are unclear. Such lists could therefore potentially be used in a discriminatory manner.

Likewise, the EDA rules allow contacts with candidates or tenderers for contracts related to defence in order ‘to check the selection and/or award criteria’. It is not entirely clear what this provision means.

We will make specific recommendations for improving the EDA procurement rules in Section 22.

## **Chapter 6 – Recommendations**

### ***17.Introduction***

In the present chapter, we will attempt to identify lessons from our analysis and to draw common trends between our three cases studies, and will make recommendations to improve the legal aspects of collaborative defence procurement in Europe. Such recommendations will extend beyond the scope of the three international organisations or agencies under analysis, and will also cover recommendations to improve existing EU procurement law.

The issues identified in the previous chapters of this thesis can be grouped in three categories:

- General issues, not specific to one of the international organisations or agencies under analysis, but of a broader scope than EU public procurement law;
- Issues specific to EU public procurement law, for which this thesis identified that the improvement of EU law was required to increase its clarity, coherence or efficiency;
- Issues specific to one of the international organisation or agency under analysis, that are directly related to the nature and/or membership of the organisation or to its procurement rules.

Even though our research questions have been answered in Section 13 (for the research questions related to the procurement rules of international organisations in general, defined in Section 3.1), and Sections 14.5, 15.5 and 16.5 (for the research questions related to the three international organisations or agencies under analysis, defined in Section 3.2), this Chapter will propose the recommendations that necessarily flow from those answers.

### ***18.General Issues***

#### **18.1.Compliance with Domestic Procurement Law**

A first general issue that we have identified in Section 11.1 is that it seems that most international organisations in fact do not comply with domestic public

procurement law, even though, as a general principle of international law, most rules of national law, especially the law of the State in which organisations have their headquarters or conduct other activities, are applicable to international organisations.<sup>861</sup> However, despite the fact that having to comply with domestic administrative law and with the rulings of the relevant administrative tribunals could undermine the functional independence of international organisations,<sup>862</sup> we have not found any mention of such privilege in the founding instruments of international organisations. Therefore, we have concluded, because of the seemingly global acceptance of this practice, that it was likely to be a customary privilege (subject to recognition by an international court and possible further research).

Within the EU, the General Court confirmed that public contracts awarded by organisations or agencies set-up by the Council were not subject to the legislation of EU Member States.<sup>863</sup> It is likely that the Court would apply the same reasoning to any international organisation in the EU. Even though the CJEU does not have jurisdiction to rule on the applicability of domestic law or to authoritatively declare the existence of international law custom, it can acknowledge such a custom in the context of the application of EU law.

In order to set-out clearly that domestic public procurement law does not apply to international organisations, it would be beneficial, for the sake of legal certainty, to expressly include such privilege in the founding instrument of international organisations or in the instrument defining their privileges and immunities. As this would represent quite a burden, this should be considered only for new international organisations, or when the relevant instrument has anyway to be amended for other reasons.

## **18.2. Compliance with EU Law**

The next general issue, discussed in Section 10.2, is whether or not international organisations have to comply with EU law. Our conclusion was that international

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<sup>861</sup> Combacau and Sur, *Droit International Public*, above, p.715; Schermer and Blokker, *International Institutional Law*, above, §1610; Reinisch, *International Organisations before National Courts*, above, p.14; American Law Institute, *The Foreign Relation Law of the United States*, above, §467, Comment c

<sup>862</sup> Combacau and Sur, *Droit International Public*, above, p.715; Schermer and Blokker, *International Institutional Law*, above, §1601-1602

<sup>863</sup> *Sogelma*, above, [115] – however, in that case the procurement rule of the agency concerned were secondary EU law instruments, and one could maybe argue that the Court would hold differently if such procurement rules were not based on EU law, but this is only a remote possibility

organisations not only have in principle to comply with domestic law, but also with EU law in general. However, as ruled by the CJEU, this generic rule must be analysed case-by-case based on the contents and scope of the EU substantive law related to the case at hand, the privileges of the international organisation, and relevant international law. It is even not unthinkable that some international organisations could be found to be ‘emanations of the State’ against which even EU directives can have direct effect (the latter issue is also discussed in Section 19.5).

However, these conclusions should preferably be confirmed, and such confirmation can obviously only come from within the EU legal system. It is unlikely that this could come from a legislative instrument: it has to be resolved by a ruling of the CJEU. The latter has up to now avoided answering explicitly the question of whether or not EU law applied to international organisations, even when the issue was raised as a defence by the organisation during the proceedings, but it always acted as if EU law could apply to the organisation before it.<sup>864</sup>

### **18.3. Power to Invoke EU Law Exemptions**

Another general issue raised by this thesis concerns the power to invoke exemptions from compliance with EU law, such as Art.346 TFEU. The CJEU never explicitly decided if the exemption could be invoked by third parties to justify their conduct. Art.346 TFEU does not seem to allow such a possibility, as it only gives the EU Member States the right to invoke an exemption from compliance with the EU Treaties. Moreover, from an international law point of view, our conclusion was that an international organisation could only invoke an EU Treaties exemption if it would have been granted the power to do so by its Member States, which is not the case for any international organisation in Europe. This means that international organisations most likely cannot invoke exemptions from compliance with EU law. This could be confirmed by a ruling of the CJEU on the subject, but in the meantime the Commission should amend its interpretative communication on Art.346 TFEU<sup>865</sup> to clarify its view on the issue.

For the purpose of collaborative defence procurement, such exemptions should only be invoked by the participating EU Member States if measures such as the use

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<sup>864</sup> *SAT v Eurocontrol*, above, [11]

<sup>865</sup> Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement, COM(2006)779, above

of the *juste retour* principle or other national preference scheme are to be justified on the grounds of the protection of the essential security interests of the States concerned. The internal rules of procedures of each international organisation should therefore clarify that, when EU Member States that are also Members of the organisation wish to invoke the exemption, they would have, for the purpose of transparency, to notify the organisation that they have done so. This proposal would allow the States participating in the collaborative defence procurement concerned to discuss the issue if some of them want to invoke the exemption and some others not.

Even though this proposal would not give the organisation any authority to review the use of the exemption, it would increase the legal certainty of the procurement procedures of the organisation. The only measure required to do this would be an amendment of the procurement rules of each organisation, something that could be done internally within the organisation.

#### **18.4. Immunities of International Organisations**

The last two general issues raised by this thesis concern the immunities of international organisations from jurisdiction and execution of judgment. We have seen in Section 12 that these immunities are one of the main barriers to the provision of effective remedies to economic operators aggrieved by a procurement process run by an international organisation.

As the EU must respect international law,<sup>866</sup> and as international law widely recognises the immunities of international organisations,<sup>867</sup> it seems very likely that the immunities of international organisations would be recognised in EU law. However, the CJEU never provided a test to grant or deny immunity under EU law. In cases related to fundamental rights, we have seen that the CJEU has often referred to the rulings of the ECtHR, and we explained that inspiration could be gleaned from that source, even though it is not entirely certain that the Courts would apply this reasoning when only economic interests are at stake, such as for procurement. The ECtHR held that, in order to protect the right of access to court when the immunity of an international organisation is invoked, the organisation had to provide ‘reasonable alternative means of dispute resolution in the organisation’s

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<sup>866</sup> *Poulsen*, above, [9]; *Kadi and Al Barakat*, above, [291]; *Racke*, above, [45]; Ahmed and Butler, “The European Union and Human Rights”, above, at 777

<sup>867</sup> American Law Institute, *The Foreign Relation Law of the United States*, above, §467, comments a and d, and reporter’s notes 1 and 2



legal instruments'. Provisions for arbitration of contractual disputes between the organisation and private parties and an ad-hoc dispute settlement system independent from the organisation to deal with staff matters met this requirement,<sup>868</sup> but the ECtHR never ruled on the issue in procurement cases.

The most certain measure to resolve this issue within the EU would be a CJEU ruling clarifying, first the applicability of the ECtHR rule mentioned above within the EU legal system, and second applying it to a procurement case. Alternatively, a procurement-related ruling by the ECtHR would also be valuable, but would not confirm that the rule would be applicable within the EU legal system. Yet, those two measures would only be available if a relevant case is brought before these courts.

Then, of course, comes the issue of compliance of individual international organisations with the resulting rule, but this will be addressed for each international organisation under analyses in the following sections of this chapter.

Alternatively, a rule could be adopted whereby an international organisation would waive its immunity from jurisdiction and execution in all procurement cases, and that the national courts of the country where the organisation has its headquarters would have jurisdiction over formal procurement complaints against the organisation. Such measure would probably provide the best solution for individual complainants, but could raise the issue of the undue influence that the court could exercise on international organisations – conflicting with the very reason why such organisations are granted functional immunity. In order to mitigate that risk, the rule could specify that, instead of granting jurisdiction to national courts, all procurement cases concerning the organisation should be resolved by binding arbitration in a neutral forum, and that the organisation would only waive its immunity for the enforcement of the arbitration award. As we explained in Section 14.1.6, OCCAR has adopted a basic version of such rule, even though its formulation is unclear.<sup>869</sup>

The clearest way to adopt such rule would be to amend the instrument defining the privileges and immunities of each international organisation concerned. This measure would, however, require many concerted actions and could prove quite a heavy burden if international agreements subject to ratification have to be adopted.

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<sup>868</sup> *Waite and Kennedy*, above, [69]; *Beer and Regan*, above, [59]

<sup>869</sup> OCCAR Convention, above, An.I, Art.3(1)(a); OMP 4, above, §3.4.1.1.3

Alternatively, such rule could be adopted by a decision of the competent organ of the organisation choosing voluntarily to limit its reliance on immunity.

As we have seen, most general issues discussed in this section relate to the interaction between EU law and the law of international organisations. Even though this would not provide a high amount of legal certainty, the Commission could consider publishing an interpretative communication discussing these issues in a single document. Considering the sensitivity of the issue, the adoption of an EU legislative instrument or of an international agreement on the subject seems very unlikely.

## **19. Issue Specific to EU Public Procurement Law**

### **19.1. Definition of ‘International Organisation’**

A first issue that could improve the clarity, coherence and/or efficiency of EU public procurement law concerns the definition of ‘international organisation’ in the public procurement directives. We have seen in Section 11.2.1.2 that the Public Sector Directive does not apply to contracts awarded pursuant to the particular procedure of an international organisation,<sup>870</sup> and in Section 11.2.2 that the Defence and Security Directive does not apply to contracts governed by specific procedural rules of an international organisation purchasing for its purposes.<sup>871</sup> However, the term ‘international organisation’ is left undefined, which has led us to argue that it had to be interpreted as covering any international organisation, whilst some other commentators argue that these exemptions should only cover international organisations of which non-EU Member States are Members (see our discussion in Section 11.2.1.2). In addition, it is not entirely certain that agencies created within the scope of an international organisation (such as NAMSO or the EDA) would always qualify as international organisations. This issue is made more complex by the fact that there is no single definition of ‘international organisation’ in international law (see our discussion in Section 9.1).

As this EU law uncertainty is found in two directives, the best measure to resolve it would be to adopt another directive amending the two public procurement directives to include a definition of ‘international organisation’. Such definition

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<sup>870</sup> Directive 2004/18/EC, above, Art.15(c)

<sup>871</sup> Directive 2009/81/EC, above, Art.12(c)

could be based on the definition used in this thesis, amended to clarify the status of agencies:

*‘International organisation’ means an organisation established by an international agreement, having international legal personality, whose membership consists only or principally of [EU] Member States, of third countries, or both, and having a permanent institutional element with a will independent of its individual members; or an organisation, agency or institution created within such organisation in order to further its purpose.*

To avoid entering into the international law debate of whether or not international organisations can have a will independent from their Member States,<sup>872</sup> the words ‘with a will independent of its individual Member States’ could even be omitted. This definition should not extend to bodies created ‘by’ an international organisation, as this could very well include undertakings, which should not be able to rely on the international organisation exemptions when they fall within the definition of contracting authorities.

Alternatively, such definition could be provided by a CJEU ruling on the applicability of the Directives to an international organisation, but this would have the disadvantage that the definition would probably be limited to the case at hand, and would not provide for an integrated approach to the resolution of this issue.

## **19.2. Clarification of the International Rules Exemptions**

We have seen in Section 11.2.1.2 that the Public Sector Directive does not apply to contracts awarded pursuant to the particular procedure of an international organisation,<sup>873</sup> and in Section 11.2.2 that the Defence and Security Directive does not apply to contracts governed by specific procedural rules of an international organisation purchasing for its purposes,<sup>874</sup> to contracts governed by specific procedural rules pursuant to an international agreement or arrangement concluded between EU Member States and third countries (which would also cover international organisations of which non-EU Member States are Member),<sup>875</sup> and to contracts awarded in the framework of a cooperative programme based on R&D

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<sup>872</sup> See e.g. White, *The Law of International Organisations*, above, pp.30-32

<sup>873</sup> Directive 2004/18/EC, above, Art.15(c)

<sup>874</sup> Directive 2009/81/EC, above, Art.12(c)

<sup>875</sup> Directive 2009/81/EC, above, Art.12(a)

(which are often managed by international organisations).<sup>876</sup> However, as we explained in these sections, it is not entirely clear to which contracts these exemptions apply. They could refer to:

- The contracts awarded by the international organisation concerned to economic operators on the basis of its specific public procurement rules (if the international organisation is a contracting authority);
- The contracts awarded by an EU Member State or other contracting authority to economic operators on the basis of the organisation's specific rules; and/or
- The contracts awarded by one or more EU Member States or other contracting authority to the international organisation concerned on the basis of its specific rules, and entrusting it with a mission, such as the procurement of a piece of equipment or the management of a collaborative programme (in this case, the international organisation would have to qualify as an economic operator, which means that it would have to be operating in the market).

The term 'contract' has to be read in accordance with the definition of 'public contracts' within the Public Sector Directive.<sup>877</sup>

It is submitted that the first two possibilities (which constitute the narrow reading of the exemptions) should always be covered by the exemptions mentioned. This is specifically provided for in the international organisation exemption of the Defence and Security Directive,<sup>878</sup> and has been accepted by the Commission for the international organisation exemption of the Public Sector Directive.<sup>879</sup> This reading should become generally accepted for all the exemptions mentioned. This could be done through a judgement of the CJEU when an appropriate case comes before it, or by a clarification inserted in the Directives through an amendment.

It is more questionable if the third possibility (the broad reading of the exemptions) should be included in the interpretation of the Directives. It would amount to say that, when purchasing from an international organisation with which they are not in

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<sup>876</sup> Directive 2009/81/EC, above, Art.13(c)

<sup>877</sup> Directive 2004/18/EC, above, Art.1(2)(a)

<sup>878</sup> Directive 2009/81/EC, above, Art.12(c), which reads in full "This Directive shall not apply to contracts governed by [...] specific procedural rules of an international organisation purchasing for its purposes, or to contracts which must be awarded by a Member State in accordance with those rules."

<sup>879</sup> *Guide to the Community Rules on Public Supply Contracts*, above, Ch.II, §2.3, p.25

a quasi-in house relationship and that operates on the market (such as NAMSO), EU Member States would not have to comply with the Directives, but only with the EU Treaties procurement principles. This could be clarified by a CJEU ruling in an appropriate case,<sup>880</sup> or again by an amendment of the Directives.

### **19.3. Definition of ‘Contracting Authority’**

The next EU procurement law issue, which we discussed in detail in Section 11.2.1.1, is whether or not international organisations can be contracting authorities within the meaning of the Directives. We have seen that international organisations will in most cases fit within the definition of bodies governed by public law. However, some doubts remain, as it is not certain if the EU legislator intended the concept to cover entities created under international law, and if the requirement of having legal personality requires international legal personality and/or personality in the legal system of the EU Member States concerned (we have argued that only the latter is required). Also, a clarification of the meaning of ‘the State’ within the definition of contracting authorities would be helpful: as the aim of the Public Sector Directive is the harmonisation of the laws of the EU Member States,<sup>881</sup> the term ‘the State’ can only refer to the latter. Moreover, we have seen that the third alternative condition to be a body governed by public law (an administrative, managerial or supervisory board, more than half of whose members are appointed by the State) was most likely drafted to cover cases where voting within that board was by simple majority. This should be amended to cover cases where the decision-making process requires more than a simple majority (such as qualified majority or unanimity).<sup>882</sup>

Clarifying this definition would only require amending the Public Sector Directive, as the Defence and Security Directive refers to it for the definition of contracting authority.<sup>883</sup> This could be done by adopting a directive amending the Public Sector Directive (it is of course advisable to regroup all clarifications of the directives into a single directive). The following definition of contracting authority, which in addition includes clarifications flowing from the case law of the CJEU, could be used, with changes from the current definition highlighted in *italic*:

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<sup>880</sup> That would have to be coherent with the ruling in *Commission v Germany* (Case C-480/06), above

<sup>881</sup> *Sogelma*, above, [115]

<sup>882</sup> As the CJEU has done for public authorities in *Wall*, above

<sup>883</sup> Directive 2009/81/EC, above, Art.1(17)

*A ‘contracting authority’ means a [EU] Member State (including all bodies exercising legislative, executive and judicial powers at national, federal or local level), a regional or local authority of a [EU] Member State, a body governed by public law, or an association formed by one or several of such authorities or one or several of such bodies governed by public law.*

*A ‘body governed by public law’ means any body created in the national legal system of one or more [EU] Member State or in international law:*

*(a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;*

*(b) having legal personality in the legal system of one or more [EU] Member States; and*

*(c) Meeting at least one of the following conditions:*

*– financed, for the most part, by one or more [EU] Member States, regional or local authorities of one or more [EU] Member States, or other bodies governed by public law; or*

*– subject to management supervision by those bodies that renders the body dependent on those bodies in such a way that the latter are able to influence its decisions in relation to public contracts; or*

*– having an administrative, managerial or supervisory board, of which the members appointed by one or more [EU] Member States, by regional or local authorities of one or more [EU] Member States, or by other bodies governed by public law have sufficient voting power to make decisions against which all the other board members would vote.*

Such definition would make clear that international organisations ‘controlled’ by EU Member States could be contracting authorities, but that international organisations ‘not controlled’ by EU Member States would probably not. In addition, it makes clear that third countries and their regional or local authorities are not contracting authorities (something that should have been evident), and that the legal personality referred to is domestic legal personality.

#### **19.4. Definition of ‘European Public Body’**

Another related issue has been created by the Defence and Security Directive, which introduced the concept of ‘European public body’ without defining it. According to the Directive, a central purchasing body may be either a contracting

authority to which the Directive applies, or a body to which it does not apply if such body is a ‘European public body’.<sup>884</sup> This is confusing, on the one hand because of the undefined nature of European public bodies, and on the other hand because it does not make clear if it assumes that such bodies would never be contracting authorities.

The most appropriate measure to resolve this issue would again be a directive amending the Defence and Security Directive, of course combined with the other amendments discussed above, that would introduce a definition of European public body. The following amendments to Art.1 of the Defence and Security Directive could achieve that aim (proposed changes in italic), bearing in mind that a definition of international organisation would have been inserted in the Directives:

‘Central purchasing body’ means a contracting authority/entity as referred to in Article 1(9) of Directive 2004/18/EC and Article 2(1)(a) of Directive 2004/17/EC *to which this Directive applies, or a body to which this Directive does not apply, if such body is a European public body, which:*  
[...]

*‘European public body’ means an international organisation whose membership consists solely of [EU] Member States; or an organisation, agency or institution created within such organisation.*

Such definitions, even though they would leave open the question of whether or not European public bodies can qualify as contracting authorities, which is a decision that has to be made case-by-case anyway,<sup>885</sup> would provide a definition of European public body that would include agencies created within the scope of the EU, such as the EDA (which is mentioned as an example of European public body<sup>886</sup>), but also international organisations of which only EU Member States are Members, such as OCCAR.

In the case of an organisation such as OCCAR, this would clarify that, if its procurement rules comply with the Directive, EU Member States would not have to follow the Directive in order to procure from it (thereby avoiding the complex discussion of the quasi in-house exemption).<sup>887</sup> This would also avoid lengthy

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<sup>884</sup> Directive 2009/81/EC, above, Art.1(18)

<sup>885</sup> *SIEPSA*, above, [77]; *Truley*, above, [44]

<sup>886</sup> Directive 2009/81/EC, above, Recital 23

<sup>887</sup> Directive 2009/81/EC, above, Art.10

discussions of whether or not such organisation is a contracting authority: for EU Member States to be able to procure directly from such organisation without complying with EU public procurement law, the organisation would have to comply with the Defence and Security Directive, whether or not it qualifies as a contracting authority. In addition, it would help resolve the general issue of effective remedies and the immunities of international organisations by requiring international organisations acting as central purchasing bodies to provide remedies comparable to those of the Directive. Therefore, it would be a simple measure resolving many issues together.

Of course, one could argue that the actual impact of this change would be quite limited, as the Directive does not apply to contracts concluded within a cooperative programme based on R&D,<sup>888</sup> and that most collaborative defence procurement involved some of R&D. This comment is correct, but defining the terms ‘European Public Body’ would at least clarify the cases when EU Member States procure off-the-shelf military equipment collaboratively.

In addition, this change would clarify that an organisation or agency such as NAMSO is not a European public body, as its Member States are not all EU Member States. Moreover, our amended definition of contracting authority could reduce the probability of NAMSO being found a contracting authority. This would clarify that NAMSO would probably not have to comply with the EU public procurement directives, a conclusion we reached already in Section 15.2.2. However, this would weaken the case for EU Member States to procure directly from NAMSO without complying with the Directives, as the quasi in-house exemption would then be the only grounds to do this (unless the broad reading of the international rules exemptions discussed in Section 19.2 is accepted), an issue we discuss below.

The concept of European public body could also be introduced in the Public Sector Directive, in order to promote European collaboration in the procurement of civil goods or services. As the proposed definition of European public body fits within the proposed definition of international organisation, this would mean that contracting authorities would not have to comply with the Public Sector Directive when they procure from a European public body of which the procedures comply with the Directive, but that, if they rely on the international organisations exemption because the European public body (or other international organisation)

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<sup>888</sup> Directive 2009/81/EC, above, Art.13(c) and Recital 28



applies procurement procedures differing from those of the Directive, they would have to comply with the Directive when they assign to it the task of procuring in their name, unless of course the quasi in-house exemption can be invoked, as discussed below.

### **19.5. Compliance with the EU Treaties Procurement Principles**

The next EU procurement law issue identified by this thesis is who has to comply with the procurement principles flowing from the EU Treaties. In its rulings on the subject, the CJEU held that not only contracting authorities within the meaning of the EU procurement directives, but also entities that it called ‘public authorities’ have to abide by the procurement principles flowing from the EU Treaties.<sup>889</sup>

To establish whether an entity is a public authority, some aspects of the definition of ‘contracting authority’ should be taken as guidance: the entity in question must be effectively controlled by the State or another public authority, and it may not compete in the market, an issue we discussed in Section 8.2.2.<sup>890</sup> The term ‘public authority’ therefore covers a wider concept than ‘contracting authority’ within the meaning of the Public Sector Directive.<sup>891</sup> In order to be coherent, the concept of public authorities must cover in any case the concepts of contracting authorities and of European public bodies as defined above.

We have seen that international organisations ‘controlled’ by EU Member States would likely qualify as public authorities, but that the definition of public authority would seem to exclude international organisations not ‘controlled’ by EU Member States.

Not only should international organisations amend their procurement rules in line with our reasoning, but the Commission should also amend its interpretative communication on the law applicable to contract awards not or not fully subject to the provisions of the public procurement directives<sup>892</sup> to take the newest case law into account. In addition, more rulings from the CJEU would be required in order to further clarify the definition of public authority and ensure it is clear that

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<sup>889</sup> See *Parking Brixen*, above, [49]-[50]; *Telaustria*, above, [60]; *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia*, above, [71] and [75]

<sup>890</sup> See *Wall*, above, [47]-[52] and [60]

<sup>891</sup> *Stadt Halle*, above, [48]-[50] implies that it is possible that some public authorities are not contracting authorities

<sup>892</sup> Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, above

contracting authorities and European public bodies are also included within that definition.

### **19.6. Direct Effect, Contracting Authority and Quasi In-house**

Another issue identified in this thesis is a potential incoherence between the CJEU rulings related to the direct effect of directives, the definition of contracting authorities and public authorities, and the quasi in-house exemption of EU public procurement.

In the first case, discussed in Section 10.2.3, the CJEU held that directives had direct effect against a wide variety of ‘emanations of the State’,<sup>893</sup> in particular those, whatever their legal form, subject to the authority or control of the State, or with special powers beyond those which result from the normal rules applicable to relations between individuals, such as to provide public services under State control,<sup>894</sup> as long as the directives create rights for individuals and are sufficiently clear, precise and unconditional.<sup>895</sup> As we discussed, international organisations could fit that profile, even though this has not yet been ruled on by the CJEU.

In the second case, which we discussed above and in Section 8.1.2.1, the public procurement directives apply to bodies governed by public law that are subject to management supervision by EU Member States or that have an administrative, managerial or supervisory board controlled by EU Member States.<sup>896</sup> Moreover, we have seen in Section 8.2.2 that public authorities effectively controlled by the State or other public authorities and that do not compete on the market have to comply with the EU Treaties procurement principles when performing their procurement.<sup>897</sup>

In the third case, discussed in Sections 8.1.2.3 and 8.2.2, the CJEU held that a contracting authority did not have to comply with the public procurement directives or with the procurement principles flowing from the EU Treaties when it awards a contract to an entity legally distinct from it over which it exercises a control similar to that which it exercises over its own departments, and if that entity carries out the essential part of its activities with the controlling contracting

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<sup>893</sup> Vincenzi and Fairhurst, *Law of the European Community*, above, p.190

<sup>894</sup> *Foster v British Gas*, above, [20]

<sup>895</sup> *van Gend en Loos*, above; *Francovich*, above

<sup>896</sup> Directive 2004/18/EC, above, Art.1(9)

<sup>897</sup> *Wall*, above, [47]-[52] and [60]; *Stadt Halle*, above, [48]-[50]

authority.<sup>898</sup> Within the scope of this thesis, this issue is especially relevant to the decision of EU Member States to assign a collaborative procurement project to an international organisation.

All these rulings are based on the level of control exercised by EU Member States (or other authorities) over the entity concerned. The only coherent way to read these rulings would be that:

- The level of control required to find an entity to be in a quasi in-house relationship with public authorities ('a control similar to that which the public authorities exercise over their own departments'), must be sufficient to also find that entity to be a public authority ('effective control by public authorities');
- The level of control required to find an entity to be a body governed by public law ('subject to the management supervision of, or having an supervisory board controlled by, contracting authorities'), must be sufficient to also find that provisions of directives can be invoked in suits against that entity ('subject to the authority or control of the State'); and
- The concept of public authority must include, without being limited to, contracting authorities and European public bodies (as explained in Section 19.4).

Any other reading would be entirely incoherent, for instance finding an entity to be in a quasi in-house relationship with a contracting authority (in which case the contracting authority would not have to comply with EU procurement law to award a contract to it), but finding the entity not to be a public authority (in which case the entity would also not have to comply with EU public procurement law when awarding subcontracts), or finding that an entity qualifies as a contracting authority having to apply the public procurement directives, but that it is not an emanation of the State against which those directives could have direct effect.

As this issue concerns a clarification of EU law, a measure that would definitely clarify it is a judgment by the CJEU. However, such ruling could only be made if

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<sup>898</sup> *Teckal*, above, [50]; *Stadt Halle*, above, [49] and [52]; *Commission v Spain* (Case C-84/03), above, [38]; *Parking Brixen*, above, [62]; *Agusta Helicopters*, above, [39]-[41]; *Coditel Brabant*, above, [26]; *Sea*, above, [36]-[37]; see Arrowsmith, *The Law of Public and Utilities Procurement*, above, §§6.166-6.172; Wauters, "In-house Provision and the Case Law of the European Court of Justice", above, pp.10-21

the three issues mentioned were raised to the Court, which has not yet been the case, and the Court would have to be willing to tackle these three issues clearly.

Another alternative and complementary measure, but one that would only clarify the applicability of the EU Directives, would be to amend the latter to include the quasi in-house exemption, which has been judicially created. This could be done through the same amending directive we discussed above, by modifying the definition of body governed by public law in the following manner (bold italic indicates the new change):

– subject to management supervision by those bodies *that renders the body dependent on those bodies in such a way that the latter are able to influence its decisions in relation to public contracts, **such as, for instance, when those bodies exercise over the body a control similar to that which they exercise over their own departments;***

In addition, a new exemption could be introduced in both the Public Sector and the Defence and Security Directive, worded for instance:

*This Directive shall not apply to contracts awarded by a contracting authority to a body governed by public law over which the contracting authority exercises, possibly jointly with other contracting authorities, a control similar to that which it exercises over its own departments and if, at the same time, that body carries out the essential part of its activities with the controlling contracting authority.*

This would clarify that when the directive would not apply to the relationship between the controlling contracting authorities and the body concerned because of the quasi in-house exemption (assuming the condition of the second part of the exemption is met), the body concerned would automatically qualify as a contracting authority that has to comply with the Directives (assuming the other parts of the definition are met). One should note that these amendments would, in addition to the proposals identified previously, imply that, when the controlling public authorities are contracting authorities, the controlled entity would be found to be, not only a public authority that has to comply with the EU Treaty principles, but also a contracting authority that has to comply with the Directives.

## **19.7. Default Public Procurement Procedures**

The last EU law issue that we identified in this thesis concerns the procurement procedures to be used by contracting authorities under the public procurement

directives. Under the Public Sector Directive, the default procedures are the open and the restricted procedures.<sup>899</sup> However, under the Defence and Security Directive, because the contracts covered are characterised by specific requirements in terms of complexity, security of information or security of supply, the default procedures are the restricted procedure or the negotiated procedure with publication of a contract notice.<sup>900</sup> For utilities operating in the water, energy, transport and postal services sectors, the open procedure, the restricted procedure and the negotiated procedure with publication are the default procedures.<sup>901</sup> Nevertheless, the common aim of each of those Directives is to harmonise the procurement law of the EU Member States to ensure the effects of the principles flowing from the EU Treaties and to guarantee the opening-up of public procurement to competition.<sup>902</sup>

First, one could question if the specificities of the defence market and of the utilities market are not shared with other markets in the EU, for instance major construction projects. It does not seem that this possibility has been analysed by the Commission or the EU legislator.

Second, it is entirely possible to open-up procurement and to comply with the procurement principles flowing from the EU Treaties without applying the open or restricted procedure in every case, especially since the CJEU held that sufficient advertising and some form of competition were required for any procurement to which the principles apply, as we explained in Section 8.2.3.

Therefore, one could question if the Public Sector Directive should not be amended to include more flexible provisions on the use of the negotiated procedure with publication. However, we will not discuss these changes in detail here, as they go beyond the scope of this thesis.

As an interim conclusion, we can see that most EU law issues identified in this thesis can be resolved by the adoption of a directive amending the Public Sector Directive and the Defence and Security Directive. Additional measures could cover amending existing interpretative communications of the Commission and judicial

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<sup>899</sup> Directive 2004/18/EC, above, Art.28

<sup>900</sup> Directive 2009/81/EC, above, Art.25 and Recital 47

<sup>901</sup> Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L134/1, as amended, Art.40 and 1(9)

<sup>902</sup> Directive 2004/18/EC, above, Recital 2; Directive 2009/81/EC, above, Recital 4; Directive 2004/17/EC, above, Recital 9

decisions of the CJEU, but the latter would only provide clarification as cases come-up before it.

## **20. Issues Identified within OCCAR**

### **20.1. General Considerations**

In Section 14, we identified a number of issues that are specific to OCCAR, including issues of compliance with EU law and issues that reduce the internal coherence of the rules. Before discussing individual issues, we will address in general terms the compliance of the OCCAR procurement rules with EU law.

OCCAR would most probably qualify as a contracting authority, and therefore has an obligation to comply with the procurement principles flowing from the EU Treaties, unless an exemption is validly invoked. However, OCCAR most likely does not have to comply with the EU public procurement Directives because of the international organisation exemption and collaborative procurement exemption contained there.

Nevertheless, because OCCAR is an organisation ‘controlled’ by EU Member States (all OCCAR Member States are also EU Member States), the latter have the obligation to bring its procurement rules in line with applicable EU procurement law, and OCCAR most likely cannot rely on a customary privilege to be exempted from compliance with EU procurement law. Quite a number of OCCAR rules actually deviate from the EU Treaties principles.

The position of OCCAR on this issue is that, ‘in addition to complying with applicable law, its policy is to respect the spirit of EU Regulations and Directives, which are not binding upon it’.<sup>903</sup> As we discussed in Section 14.2.1, it is not entirely clear what is actually meant by this sentence.

OCCAR should clarify its position on the applicability of EU law in general terms, in particular regarding the procurement principles flowing from the EU Treaties. Once clear, this position could be discussed or challenged. Technically, this could be easily done by an amendment of the relevant OCCAR Management Procedure, but it is likely that this would lead to tense debates within the Board of Supervisors.

As we mentioned among the general issues, there is no guidance whatsoever within OCCAR on the use of EU primary law exemptions during the procurement process

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<sup>903</sup> OMP 4, above, §5.2

(there is even no reference to such exemptions). Despite the fact that invoking those exemptions, such as Art.346 TFEU, is the prerogative of the participating States, some coordinating measures should be foreseen at the level of OCCAR. This could again be achieved by an amendment of the relevant Management Procedures in line with our discussion of that issue in the previous paragraph.

Nevertheless, as exemptions from compliance with EU law only apply to clearly defined and exceptional cases and do not create general or automatic exemptions,<sup>904</sup> it is very unlikely that the CJEU would accept their use to justify provisions of the OCCAR Convention, which is a framework treaty under which its Member States may launch many collaborative programmes and many contracts can be awarded. Therefore, when analysing below the issues identified in Section 14 that find their source in the OCCAR Convention, it is likely that the only measure that could remedy deviations from applicable EU law would be an amendment of the OCCAR Convention,<sup>905</sup> which would require ratification by the parliaments of the OCCAR Member States. This would be a burdensome process, but probably the only solution for OCCAR Member States to avoid being found in breach of their EU law obligations.

In addition, we have seen that the EDA code of conduct does not apply to collaborative procurement,<sup>906</sup> but application could have to be envisioned would one single OCCAR Member State decide to initiate a procurement process through OCCAR.<sup>907</sup> This should be taken into consideration in any review of the OCCAR procurement rules, even though this would not be mandatory, as the regime is voluntary and non-binding.

We will now move on to an individual discussion of the issues identified during our analysis of the OCCAR procurement rules.

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<sup>904</sup> *Commission v Spain* (Case C-414/97), above, [21]; *Johnston*, above, [26]; *Sirdar*, above, [16]; *Kreil*, above, [16]

<sup>905</sup> The OCCAR Convention, being agreed after the entry into force of the original EC treaty had to be drafted in compliance with EU law from the start: See e.g. *Commission v United Kingdom* (Case C-466/98), above; *Commission v Belgium and Luxemburg* (Joined Cases C-176/97 and C-177/97), above

<sup>906</sup> Code of Conduct on Defence Procurement, above; Capuano, “OCCAR: A Pragmatic View”, above, p.110

<sup>907</sup> This possibility is clearly allowed by the OCCAR Convention, above, Art.8(b); Mezzadri, *L'ouverture des Marchés de la Défense*, above, p.22

## **20.2. Simplification of OCCAR Decision-making**

A first important issue to increase the efficiency of OCCAR procurement is to introduce a simplification of the decision-making process of OCCAR. Most decisions of the OCCAR Board of Supervisors and other committees are currently made by unanimity, and in some cases by qualified majority, but even qualified majority gives the four founding Members States of OCCAR a veto power.<sup>908</sup> This is on the one hand unfair towards new Member States, and most importantly makes the decision-making process slow and subject to blockage because of the national interests of a single Member State.

For procurement, this issue could be resolved by delegating all procurement decisions to the Director of OCCAR-EA within the limits of the non-committed (available) programme budget within a year. This is currently only the case for ‘minor contracts’, a concept that is defined case-by-case for each programme,<sup>909</sup> and this concept could remain applicable, but ‘major contracts’ should become the exception. This level of delegation would be similar to the one applied by NAMSO for its routine procurement<sup>910</sup> and to the EDA.<sup>911</sup> More delegation to the Director of OCCAR-EA would improve the efficiency of the decision-making process, but provisions should be made to require the Director to report yearly to the BoS and Programme Boards the award decisions he has made, to ensure he remains accountable to the Participating States. The disadvantage of this solution is that the essential security interests of the Member States could be less forcefully defended.

This change would only require an amendment of the relevant Management Procedures and would therefore not be necessarily difficult to implement, even though it would probably be opposed by many Member States, who often care more about their right to block a procurement process or to demand industrial return than about efficiency. However, it is submitted that the numerous clarifications of the OCCAR procurement rules that we propose below would channel the freedom of the Director of OCCAR-EA.

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<sup>908</sup> OCCAR Convention, above, Art.18 and An.IV; PP 14-3, above, §3.2.2; Van Eekelen, *The Parliamentary Dimension of Defence Procurement*, above, p.28; Schmitt, *The European Union and Armaments*, above, p.25

<sup>909</sup> OMP 5, above, §5.4

<sup>910</sup> Functional Directive 251, above, §8; NAMSA Procurement Regulations, above, §6.3.4

<sup>911</sup> Decision 2007/643/CFSP, above, An.II, Art.16(1); Joint Action 2004/551/CFSP, above, Art.10(4) and 17(2)



### **20.3. The ‘Buy OCCAR’ Principle**

The OCCAR Convention prescribes that, when an OCCAR Member State is considering whether or not requesting OCCAR to procure a weapon system to meet the requirements of its armed forces, it has to give preference to equipment in whose development it has previously participated within OCCAR.<sup>912</sup>

This principle, especially because it is a ‘blanket’ rule the execution of which is not subject to a case-by-case decision that would allow for invoking an EU treaties exemption, is not in line with EU law. Even though this ‘buy OCCAR’ principle is in practice blissfully ignored by the OCCAR Member States,<sup>913</sup> it would need to be removed from the OCCAR Convention, or at least said to apply only when an exemption from EU law can be invoked.

### **20.4. Actual Compliance with OCCAR Procurement Rules**

Probably one of the critical issues related to OCCAR is that, in fact, for many of the most important contracts concluded by OCCAR, its procurement rules were in fact not applied at all.<sup>914</sup> The participating Member States simply decided to award the contract to a particular company based on undisclosed rules and principles and negotiated with that company a contract that was afterwards handed over to OCCAR for signature. It would be difficult to resolve this issue by a regulatory action, as it specifically demonstrates disregard for existing legal provisions by the participating Member States. It is submitted that this issue can only be resolved if the Commission would bring proceedings against those States for breach of their EU law obligations in a few well-selected cases.

### **20.5. The Global Balance Principle**

The global balance principle aims to be a more efficient version of *juste retour*. Despite this aspiration, it is doubtful that the global balance principle could be found to be in line with the principles of equal treatment and non-discrimination on the grounds of nationality.<sup>915</sup> However, the global balance principle is supposed to be applied only through corrections of global imbalances, which are only

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<sup>912</sup> OCCAR Convention, above, Art.6

<sup>913</sup> Mezzadri, *L’ouverture des Marchés de la Défense*, above, p.26

<sup>914</sup> Schmitt, *The European Union and Armaments*, above, at62; Arrowsmith, *The Law of Public and Utilities Procurement*, above, §6.107

<sup>915</sup> See Trybus, “The New Public Sector Directive and Beyond”, above, p.207

implemented on a case-by-case basis. This would allow invoking an EU Treaties exemption in line with the CJEU case law.

However, we have seen that despite the fact that some management rules for the global balance have been agreed by the BoS (even though only publicly available as a policy statement),<sup>916</sup> it seems clear that OCCAR is experiencing difficulties in calculating global balance and defining how to correct imbalances. Even though global balance is indeed more economically efficient and flexible than *juste retour*, the rules for calculating and managing global balance are neither clear nor transparent. They should be clarified and made publicly available in the appropriate Management Procedure.

## **20.6. OCCAR Contract Award Principles**

The first contract award principle found in the OCCAR Convention states that contracts are to be awarded only to companies from WEAG countries. On the one hand, this principle is unclear since the dissolution of the WEAG, but more worryingly is a blanket rule discriminating against EU Member States that were not WEAG Participants, which would not permit the case-by-case invocation of an EU law exemption. This restriction, if interpreted literally, would amount to discrimination on the ground of nationality.

The BoS should clarify the current meaning of this limitation in line with EU law, as it has already clarified a few issues with the OCCAR Convention. It is submitted that this could be most effectively done by a Board of Supervisors decision stating that contracts are to be awarded by OCCAR only to companies from European Economic Area countries, plus other States participating in the relevant programme. This would render the principle compliant with EU law (as all EU Member States would be covered), and would also cover other European States that have working relationships with the EU or were former WEAG Members, such as Norway.

The second OCCAR contract award principle, which limits competitive tendering to the Member States participating in the relevant programme,<sup>917</sup> is not in line with EU law, but is only applied if a specific decision to that effect is made, which

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<sup>916</sup> PP 14-2, *Global Balance Policy*, above, but this document is not publicly available: only a short summary has been made public in Annex A to PP 14-2, *Global Balance Policy Statement*, above

<sup>917</sup> OCCAR Convention, above, Art24(4)

would allow invoking an EU law exemption.<sup>918</sup> Therefore, any issue with this procurement principle would be resolved by clarifying the process for invoking an EU law exemption for OCCAR procurement.

## **20.7. Use of Competitive Tendering**

Contracts awarded by OCCAR through competitive tendering have generally to be awarded on the basis of the competitiveness of the offers,<sup>919</sup> but what amounts to ‘competitiveness’ is not defined.<sup>920</sup> Within the scope of OCCAR procurement, ‘competitiveness’ can possibly be interpreted similarly as ‘most economically advantageous’ in EU public procurement law,<sup>921</sup> even though this is not certain, and the relevant case law of the CJEU would not apply to help such interpretation. It has been argued that this competitive tendering principle would probably respect the spirit of the EU Directives and the generic principles of EU law applicable to procurement.<sup>922</sup>

However, the circumstances where competition would be found inappropriate, and where therefore a non-competitive procedure is used, are not defined at the level of the OCCAR Convention and are not exhaustive, which leaves much discretion to the approving authority.<sup>923</sup>

The relevant Management Procedure should be amended to, on the one hand, clarify what is meant by ‘the competitiveness of the offers’ (this does not have to be done in the OCCAR Convention), and on the other hand include a more restrictive or more detailed list of circumstances when competition would be found to be inappropriate. The current non exhaustive list, even though its clarity should be improved, would constitute a good basis.

## **20.8. OCCAR Advertising Rules**

Possible future purchases, Invitations to Tender and Requests for Proposals, as well as contract award decisions, are to be advertised if above €750,000, although procurement for a lower amount may also be advertised. A decision not to

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<sup>918</sup> Trybus, “The New Public Sector Directive and Beyond”, above, p.208

<sup>919</sup> OCCAR Convention, above, Art.25

<sup>920</sup> OCCAR Convention, above, Art.5 and 24(4)

<sup>921</sup> Directive 2004/18/EC, above, Art.53(1)(a)

<sup>922</sup> Trybus, “The New Public Sector Directive and Beyond”, above, p.208

<sup>923</sup> OMP 5, above, §§5.1.2.5, 5.2.2.5, and An.B

advertise must be subject to a specific decision of the Approving Authority.<sup>924</sup> However, the OCCAR rules do not explain in which circumstances the Approving Authority may decide not to advertise. Therefore, unless an exemption from applicability of EU law as a whole can be invoked by the participating States, a decision not to advertise would probably be in breach of the EU law obligation of transparency.

Moreover, even the existing advertising provisions probably do not provide for sufficient advertising at the European level to open the market to competition: contracts falling below the Directive's threshold have to be somehow published to satisfy the EU Treaties principle of transparency,<sup>925</sup> which means that the OCCAR rules, which do not provide for mandatory advertising below €750,000, are most likely in breach of the CJEU rulings on the subject.

These sub-issues can be resolved in two different ways.

First, the relevant Management Procedures have to be amended to lower the threshold above which contract opportunities have to be advertised. The thresholds of the Public Sector Directive (for non-defence contracts) and of the Defence and Security Directive (for defence contracts) could be used as guidelines for that purpose. Above these thresholds, OCCAR procurement would have to be advertised EU-wide, but even procurement under these thresholds would have to be advertised on the OCCAR website (a method approved by the Commission for contracts below the Directives' thresholds), unless an exemption is invoked. In addition the amendment has to include a clear and limited list of cases where the Approving Authority may decide not to advertise the procurement. Again, inspiration for such list could be gleaned from the EU Directives.

Second, OCCAR should investigate how contracts above the advertising thresholds could be efficiently advertised. An agreement should be sought with the Commission to allow advertising contracts on TED when Art.346 TFEU has not been invoked, and with the EDA to advertise contracts on the Electronic Bulletin Board when the exemption has been invoked, even if the EDA intergovernmental regime does not apply. The resulting agreement should be embedded in the relevant Management Procedure.

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<sup>924</sup> OMP 5, above, §§5.1.1 and 5.3.8.1 and An.C

<sup>925</sup> Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, above, §2.1

## **20.9. Improving Transparency**

Another issue related to the transparency of the OCCAR procurement rules is that programme decisions and related intergovernmental agreements, which define the specific procurement rules to be applied for a programme managed by OCCAR and the agreed deviations from the Management Procedures, are not publicly available.

It is submitted that this could be easily resolved by publishing them on the OCCAR website, perhaps in a ‘sanitised’ version removing sensitive information such as programme budgets, in a similar way as the Management Procedures themselves are published.

## **20.10. Small Value Contracts**

The OCCAR procurement rules contain different provisions depending on the value of the contract. The types of contracts mentioned in the OCCAR rules include:

- Major Contracts, for which the Approving Authority is the Programme Committee of the particular programme;<sup>926</sup>
- Minor Contracts, for which the Approving Authority is the Director of OCCAR-EA;<sup>927</sup>
- Contracts of a value lower than €750,000, for which publication is not required (as discussed in Section 20.8);<sup>928</sup> and
- Contract of which the value is ‘so small that the expected savings achieved through a formal competition are likely to be of a low value or outweighed by the cost, time and effort involved,’ for which only an ‘informal competition’ has to be run.<sup>929</sup>

The difference between Minor and Major Contracts has to be defined independently for each OCCAR programme in the programme decision.<sup>930</sup> These distinctions are not necessarily clear.

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<sup>926</sup> OMP 5, above, §5.4

<sup>927</sup> Ibid

<sup>928</sup> OMP 5, above, §§5.1.1 and 5.3.8.1 and An.C

<sup>929</sup> OMP 5, above, §4.1.4

<sup>930</sup> OMP 5, above, §5.4

The appropriate measure to resolve these uncertainties in line with EU law would be to amend the relevant Management Procedure to lower the €750,000 threshold as proposed in Section 20.8 and to make this the threshold for small value contracts for which an informal competition may be run, but for which advertisement would nevertheless be performed on the OCCAR website.

In addition, the publication of the Programme Decisions should clarify publicly for each programme the threshold between Minor and Major Contracts. The definition of the latter threshold should be sufficiently high to be in line with our discussion of the simplified decision-making process of OCCAR in Section 20.2.

### **20.11. Selection of Tenderers**

The OCCAR rules for tenderers selection require them to meet the required ‘nationality field’ defined in the procurement strategy of the programme.<sup>931</sup> This term is not clearly defined, but is probably a reflection of the principle that contract awards may be limited to companies from the States participating in a specific programme. The procurement strategy of each programme has to be approved by the Programme Committee,<sup>932</sup> but any deviation from the procurement principles of the OCCAR Convention contained in a procurement strategy must be approved by the BoS.<sup>933</sup>

Moreover, the non-exhaustive list of circumstances under which competition may be considered inappropriate includes ‘when precluded by the agreed nationality field approved in the procurement strategy’.<sup>934</sup> This means that, not only can the nationality of a tenderer be a ground for exclusion at the selection (PQQ) stage, but it can also allow OCCAR to award a contract without competition.

Of course, such nationality requirement contravenes the EU law principles of equal treatment and non-discrimination on the grounds of nationality, whereby direct, indirect or covert discrimination,<sup>935</sup> such as reserving some public contracts to undertakings established in particular regions,<sup>936</sup> or imposing to maximise the use

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<sup>931</sup> OMP 5, above, §5.1.2.1 and An.E

<sup>932</sup> OCCAR Convention, above, Ch.VI

<sup>933</sup> OMP 1, above, §4.2.2.5

<sup>934</sup> OMP 5, above, An.B

<sup>935</sup> *Data Processing*, above, [8]

<sup>936</sup> *Du Pont de Nemours*, above, [18]

of national materials or labour,<sup>937</sup> is prohibited. An exemption from applicability of EU law, such as Art.346 TFEU, would have to be validly invoked by the participating States if nationality is to be a ground for selecting the award procedure, selecting the tenderers, or awarding the contract. Depending on the scope of the programme, it is not certain that the CJEU would accept invoking the exemption at the time of the approval of the procurement strategy (for the whole programme), especially if the programme would require the award of many contracts for varying types of goods or services, to which an exemption may or may not potentially apply, as the use of the exemption could then be considered as being in breach of the principle of proportionality.

An appropriate measure would therefore be to include in the relevant Management Procedure more details about the use of the nationality field. First, the term should be defined. Second, the Management Procedure should state that, when deciding the nationality field in the procurement strategy, OCCAR has to limit the use of the nationality field on a contract by contract basis and then only for contract for which the Participating States have invoked an exemption of EU law such as Art.346 TFEU. Moreover, in the specific case of the choice of the contract award procedure, awarding a contract without competition because of the nationality of a tenderer should remain limited to the restoration of global balance, which would in any case require a specific approval.

## **20.12. Contract Award Criteria**

According to the OCCAR procurement rules, the ITT/RFP should include the selection criteria and ‘technical marking scheme’ (including, where appropriate, the weighting), identifying the relative importance of each criterion and the minimum requirements below which tenders will be classified as noncompliant.<sup>938</sup> First, this sentence seems to imply that publication of the award criteria is not mandatory, and second no guidance exists on which types of contract award criteria are allowed. It is unclear, for instance, if offsets would be allowed as a contract award criteria. Even though publication of the contract award criteria is only required by the EU Directives, and not by the EU Treaties principles (up to now), these provisions do not favour transparency and legal certainty.

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<sup>937</sup> *Storebaelt Bridge*, above, [45]

<sup>938</sup> OMP 5, above, An.G, §G2

The relevant Management Procedure should therefore be amended to require publication of the contract award criteria and technical marking scheme in all cases, and should also include guidance on the definition of the contract award criteria. Such guidance could be inspired by the EDA Code of Conduct, which allows award criteria covering costs (both acquisition and life cycle), compliance with the technical specifications, quality, security of supply and offsets. Inspiration could also be found in the EU Directives. However, such guidance should also make clear that offsets or similar criteria would only be allowed when an exemption from compliance with EU law has been invoked by the participating States.

### **20.13. Inadequate Complaints Procedure**

Probably the most critical issue relates to the complaints procedure of OCCAR. Specifically, the complaint procedure suffers from the following fundamental flaws:

- The process itself contains a number of inefficiencies that limit its effectiveness, including the following: it does not foresee a ‘standstill period’ between the contract award decision and the contract signature, the remedies available to the complainant are not defined, and tenderers selection decisions are not reviewed before the tendering process is completed;
- It is purely internal to the organisation, with the principal role held by the Director of OCCAR-EA, under supervision of the BoS,<sup>939</sup> without mention of any judicial review of the decisions of the latter;
- OCCAR has immunity from jurisdiction and execution of judgment, even though the BoS may expressly waive this immunity.<sup>940</sup>

The first issue can only be resolved by a complete redrafting of the OCCAR complaints procedure to remove the identified inefficiencies, as we discussed in detail in Section 14.4.6.

For what concerns the other issues, we have seen in Section 12.3 that generally recognised rules of public international law such as the immunity of international organisations, do not in principle impose a disproportionate restriction on the right

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<sup>939</sup> OMP 5, above, An.F

<sup>940</sup> OCCAR Convention, above, An.I; OMP 4, above, §3.4.1.1.3



of access to court,<sup>941</sup> but the plaintiff must be able to rely on reasonable alternative means in the organisation's legal instruments to protect effectively its rights, such as specific modes of settlement of private-law disputes.<sup>942</sup> If appeals against decisions made during the procurement process are only possible to the organs of the organisation itself, such as is the case in OCCAR, this process cannot be deemed to be 'independent from the organisation',<sup>943</sup> and is then probably not a reasonable alternative means of dispute settlement.

The relevant Management Procedures would therefore have to be amended to allow for the possibility of the decisions of the BoS at the end of the complaint procedure to be referred to an independent arbitration tribunal (a standard provision for disputes related to contracts concluded by OCCAR,<sup>944</sup> but not during the procurement process) that would render a decision binding on the parties.<sup>945</sup> In the course of such proceedings, the provisions of the Management Procedures would have to be considered as binding on OCCAR. As the immunity of OCCAR does not apply for the enforcement of an arbitration award,<sup>946</sup> this process would provide an effective remedy to aggrieved candidates or tenderers. The standard contractual provisions of OCCAR could be used as a source of inspiration for amending the Management Procedures.

In addition, it would be useful to clarify in the relevant Management Procedures the condition under which the BoS must waive immunity. The BoS has the duty to waive immunity 'in all cases where reliance upon it would impede the course of justice', but only 'when such immunity can be waived without prejudicing the interests of OCCAR'.<sup>947</sup> The latter restriction should only concern the fundamental interests of OCCAR, such as its continuing existence, or if waiving immunity would threaten the essential security interests of its Member States, such as where a waiver could lead to the cancellation of a critical programme or to operationally

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<sup>941</sup> *McElhinney*, above, [37]

<sup>942</sup> *Waite and Kennedy*, above, [68]-[69]; *Beer and Regan*, above, [58]; *Hans-Adam II of Liechtenstein*, above, [48]; See Reinisch, *International Organisations before National Courts*, above, pp.366 et.seq.

<sup>943</sup> See the discussion of this issue in De Castro Meireles, *The World Bank Procurement Regulations*, above, pp.141 et.seq.

<sup>944</sup> OMP 6, *Contract Terms and Conditions*, issue 1, 3 August 2007, An.A, §§12.2.1.1 and 12.2.3

<sup>945</sup> A similar proposal has been made in general terms for international organisations in E. Gaillard and I. Pingel-Lenuzza, "International Organisations and Immunity from Jurisdiction: to Restrict or to Bypass" (2002) 51 I.C.L.Q. 1

<sup>946</sup> OCCAR Convention, above, An.I, Art.3; OMP 4, above, §3.4.1.1.3

<sup>947</sup> OCCAR Convention, above, An.I, Art.3(1)(a); OMP 4, above, §3.4.1.1.3

unacceptable delays in the deliveries of a weapon system required by troops in the field. Moreover, this restriction should include a balance of interests test for it to apply. However, the recourse to an independent arbitral tribunal in procurement disputes would in practice reduce the importance of the need to waive immunity.

## **20.14. Conclusions on OCCAR**

We have seen that bringing the OCCAR procurement rules in line with EU law would require amending the OCCAR Convention (which could be a lengthy process) and numerous amendments of the OCCAR Management Procedures. However, these amendments would not fundamentally alter the OCCAR procurement process, but rather clarify a number of uncertainties and render it compliant with EU law. We have also seen that the competitive procedure of OCCAR is more similar to the competitive dialogue of the EU Directives<sup>948</sup> than to the open or restricted procedures, and allows for negotiations in most cases (providing this has been stated at publication), and not only when the procurement is ‘particularly complex’. If amended as suggested in this section, it would therefore provide the flexibility in contract award required by most practitioners of defence procurement, as identified in the Commission’s consultation,<sup>949</sup> whilst still complying with EU Treaties principles.

## **21. Issues Identified within NAMSO**

### **21.1. General Considerations**

As we discussed in Section 15.4, the NAMSO procurement rules have most likely to be approved unanimously by the NAMSO Member States, and considering that the latter include non-EU Member States, this makes NAMSO for that purpose an international organisation ‘not controlled’ by EU Member States.

Referring to our discussion of the applicability of the EU public procurement directives in Section 15.2.2, we saw that the Public Sector Directive does not apply to contracts awarded pursuant to the particular procedure of an international organisation.<sup>950</sup> We concluded that the most likely view is that this exemption applies to all international organisations in the EU, even those of which only EU

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<sup>948</sup> Directive 2004/18/EC, above, Art.29; Directive 2009/81/EC, above, Art.27; see further Arrowsmith, *The Law of Public and Utilities Procurement*, above, Ch.10

<sup>949</sup> COM(2005) 626, above, § II 2

<sup>950</sup> Directive 2004/18/EC, above, Art.15(c)

Member States are Members, but that there was a contrary view that the exemption could only apply to international organisations of which non-EU Member States are members.<sup>951</sup> In the case of NAMSO, as some Members of NAMSO are not EU Member States, both views would conclude that the Public Sector Directive would not apply to NAMSO procurement.

In addition, we saw that the Defence and Security Directive does not apply to contracts governed by specific procedural rules pursuant to an international agreement or arrangement concluded between one or more EU Member States and one or more third countries.<sup>952</sup> Even though this provision does not explicitly refer to international organisations, NAMSO being created by an international agreement, and some of the signatories of the NAMSO Charter being non-EU Member States, this exemption most probably covers contracts awarded through the procurement rules of NAMSO, which means that NAMSO would also not have to comply with the Defence and Security Directive.

In addition, we discussed in Section 15.2.3 whether NAMSO had to comply with the procurement principles flowing from the EU Treaty. We concluded first that it is likely (because a number of NAMSO Member States are not EU Member States) that the condition of close dependence from EU Member States would not be fulfilled for NAMSO, and second that, as NAMSO sells goods or services, this activity could be found to have a commercial character. Therefore, NAMSO would probably not qualify as a contracting authority. Analysing whether NAMSO was a public authority, we also concluded that, for similar reasons, it likely was not. Therefore, it is probable that NAMSO procurement would not have to comply with the procurement principles flowing from the EU Treaties.

On the other hand, it seems that at least some NAMSO Member States allow their contracting authorities to contract with NAMSO without any call for competition and without seemingly needing to comply with any other requirement such as invoking an exemption from compliance with EU law.<sup>953</sup> This issue has already been discussed in Sections 15.3 and 19.6. The only logical conclusions should be that, either NAMSO is in a quasi in-house relationship with its Member States, but

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<sup>951</sup> Trybus, “Procurement for the Armed Forces”, above, pp.709-711; Georgopoulos, *European Defence Procurement Integration*, above, p.92; Arrowsmith, *The Law of Public and Utilities Procurement*, above, §6.108 and 6.111

<sup>952</sup> Directive 2009/81/EC, above, Art.12(a)

<sup>953</sup> This is the case of Belgium: Belgian Law of 13 January 2009 Containing the General Budget of Expenses for the Financial Year 2009, above

then qualifies as a public authority and as a result must comply with the EU Treaties procurement principles, or no in-house relationship exists, and NAMSO member States that are also EU Member States have to comply with EU public procurement law when procuring from NAMSO, but NAMSO does not qualify as a public authority and does not have to comply with EU public procurement law. In fact, the latter conclusion would seem not only the most likely, but also the most appropriate: in the first, non-EU Member States procuring from NAMSO would deal with an organisation procuring on the basis of EU law, which is not necessarily logical.

Even though the initial NAMSO Charter dates from 21 May 1958, it was entirely revised on 30 August 2000.<sup>954</sup> Therefore, on the basis of our analysis of Art.351 TFEU in Section 10.2.2, not only had the NAMSO Member States that are also EU Member States the obligation to ensure that the revised NAMSO Charter was drafted in accordance with EU law, but they now have the obligation to amend the NAMSO Charter where it is in contradiction with EU law, and an obligation to denounce the Charter cannot be excluded.<sup>955</sup> This could leave the EU Member States that are also Members of NAMSO in an awkward position between their international law obligations within NAMSO and their obligation to abstain from any measure which could jeopardise the attainment of the objectives of the EU Treaties.<sup>956</sup>

However, because NAMSO is not controlled by EU Member States, we have seen in Section 15.2.3 that it could enjoy a customary privilege that would exempt it from complying with EU public procurement law in order to preserve its functional independence, in which case NAMSO Member States that are also EU Member States would not have any obligation to ensure that the NAMSO Charter and procurement rules are in line with the EU Treaties procurement principles.

Like for the OCCAR Convention, as exemptions from compliance with EU law only apply to clearly defined and exceptional cases and do not create general or automatic exemptions,<sup>957</sup> it is very unlikely that the CJEU would accept their use to

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<sup>954</sup> NAMSO Charter, above, Preamble

<sup>955</sup> *Commission v Portugal* (Case C-62/98), above, [49]-[50]; *Commission v Portugal* (Case C-84/98), above, [58]-[59]; see Klabbers, “Moribund on the Fourth of July?”, above; See also *Commission v Belgium* (Case C-170/98), above, [42]; Manzini, “The Priority of Pre-Existing Treaties of EC Member States”, above, pp.788 et.seq.

<sup>956</sup> Art.4(3) TEU (formerly Art.10(2) EC)

<sup>957</sup> *Commission v Spain* (Case C-414/97), above, [21]; *Johnston*, above, [26]; *Sirdar*, above, [16]; *Kreil*, above, [16]

justify provisions of the NAMSO Charter, which is an agreement under which a number of varied procurement activities may be performed, certainly including some for which EU Treaty exemptions would not apply. Relying on an exemption in this case would most likely be found too broad, as it would not allow a case-by-case analysis of the applicability of the exemption.

Turning now to the EDA intergovernmental regime, we know by now that the regime applies to defence procurement above one million Euros when the Art.346 TFEU exemption is invoked, with a few exceptions, most notably collaborative procurement.<sup>958</sup> However, the mission of NAMSO is to provide logistic support to NATO or to its member states, not only collectively, but also individually.<sup>959</sup> A single NATO Member State may (and often does) request NAMSA to perform procurement activities for its sole benefit. This would only qualify as collaborative procurement if the latter concept is understood in a broad sense, as the only collaboration in such process is for NAMSA to look for synergies and consolidation of requirements. In some cases, such consolidation would not necessarily be possible, and NAMSA would simply act as a procurement agent for the relevant State. EU Member States that are Members of NAMSO could have to consider requiring NAMSO to comply with the regime in these cases, even though this is not obligatory, as the regime is voluntary and non-binding.

We will now move on to an individual discussion of the issues identified during our analysis of the NAMSO procurement rules. Even though NAMSO most likely has no obligation to comply with EU procurement law and could rely on a customary privilege that would relieve its Member States that are also EU Member States from the obligation to amend the NAMSO Charter in line with EU public procurement law, this is not entirely certain. So even though our analysis of the issues with the NAMSO procurement rules is based on the same principles than the analysis we performed for OCCAR, it is therefore performed in a different context. On the other hand, would NAMSO be found to be a contracting authority or public authority, it would have the obligation to amend its rules to comply with the procurement principles flowing from the EU Treaties, and our analysis could support that effort.

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<sup>958</sup> Code of Conduct on Defence Procurement, above; Capuano, "OCCAR: A Pragmatic View", above, p.110

<sup>959</sup> NAMSO Charter, above, Art.3(a)

## **21.2. Balancing of Production**

The first issue is that NAMSA is specifically tasked to carry out planning to balance the distribution of production among NAMSO Member States, and then to ensure such distribution to the greatest practicable extent.<sup>960</sup> This balancing of production is a softer and more flexible form of *juste retour* applied over a number of unrelated purchases over a long period of time. As such, it is in breach of the EU law principles of non-discrimination on the basis of nationality and equal treatment of tenderers. Even though measures to balance the distribution of production are only taken case-by-case on a contract by contract basis, those measures are taken by NAMSA acting on its own, which would not allow invoking an exemption from compliance with EU law, as only EU Member States are competent to do so.

A possible measure to render the application of the balancing of production more compatible with EU law would be to amend the relevant NAMSO Functional Directive to require NAMSA to request the Member State concerned to invoke an EU law exemption, such as Art.346 TFEU, before a tenderer is given the opportunity to match the lowest offer or before NAMSA is required to run a competition to meet a requirement for which an exemption should be invoked.

## **21.3. Inclusion in the Source File of Vendors**

The qualification of a supplier to be registered in the source file of past, present and potential vendors managed by NAMSA<sup>961</sup> is based on its residency, national eligibility status, present capability and past performance.<sup>962</sup> Of those, residency and national eligibility would be in breach of the EU law principle of non-discrimination. Moreover, those criteria are very vague, leave an important freedom to NAMSA to include a company in the source file, and the NAMSO procurement rules do not include any provision on information to be provided to firms that were not included in the source file. They are therefore probably in breach of the positive EU law obligation of transparency. In addition, the NAMSO rules do not include any remedial procedure to appeal a denial of inclusion.

This issue could be partially remedied by clarifying in the NAMSA Procurement Regulations the criteria for inclusion in the source file, requiring the agency to provide to the companies that would not have been included in the file some

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<sup>960</sup> Functional Directive 251, above, §§3.1 and 3.5

<sup>961</sup> Functional Directive 251, above, §4.1; NAMSA Procurement Regulations, above, §2.1.2

<sup>962</sup> NAMSA Procurement Regulations, above, §2.2.1

information about the grounds on which this decision was made, and by providing a complaint procedure against such decisions (we will discuss settlement of disputes in Section 21.8). However, even though the residency and nationality of firms could be listed in the source file, using these grounds as criteria for inclusion is a bigger issue and potentially less easy to resolve.

#### **21.4. Geographical Limitations of Tenderers**

NAMSO procurement is normally limited to firms located within NAMSO member states, which have equal opportunities to submit proposals.<sup>963</sup> In some cases, firms located in a Partnership for Peace State may, within limitations, also be invited to participate.<sup>964</sup> In case a Weapon System Partnership so decides, Requests for Proposals may, subject to approval by the NAMSO Board of Directors, be issued only to firms in specified geographical areas, and/or be subject to the application of certain criteria designed to give preference to firms located in such geographical areas.<sup>965</sup> Moreover, the NAMSA General Manager or his delegate only have the authority to place contracts with entities from NAMSO Member States and with commercial firms in NATO Member States not members of NAMSO, but not with non-NATO Governments or with firms from non-NATO Member States, except in some limited cases. Any other contracts with non-NATO Governments or with firms from non-NATO Member States require advance approval of the Board of Directors.<sup>966</sup>

Considering the different membership patterns of NAMSO and the EU, these geographical limitations are clearly contrary to the EU law principles of non-discrimination and equal treatment. Moreover, as they are generally applicable, they would not allow invoking an exemption from applicability of EU law on a case-by-case basis, as is required. Even the specific source selection rule for Weapon System Partnership, which require approval of the Board of Directors, is probably too broad to be covered by a single invocation of an exemption, as the aim of Weapon Systems Partnerships is to ensure the collaborative support of the military equipment concerned over its whole life-cycle, which may extend for decades.

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<sup>963</sup> Functional Directive 251, above, §3.4.1-3.4.2

<sup>964</sup> Functional Directive 251, above, §3.4.3; Functional Directive 090, above

<sup>965</sup> Functional Directive 251, above, §3.4.4

<sup>966</sup> NAMSO Charter, above, Art.31(a)(iii); Functional Directive 251, above, §3.4.5

The only measure that could resolve this issue would be the amendment of the relevant Functional Directive in two ways: first to extend the national eligibility of firms to those located in Member States of NAMSOS, and to those located in Member States of the EU not Members of NAMSOS and allowing the General Manager to place contracts with all such firms without prior authorisation, and second to specify that the geographical limitation within a Weapon System Partnership would have to be approved by the NAMSOS Board of Directors on a contract per contract basis rather than once for the whole Weapon System Partnership. This would allow the EU Member States that participate in the Weapon System Partnership to invoke an exemption from compliance with EU law such as Art.346 TFEU in line with CJEU case law.

### **21.5. Low Value Contracts**

For procurements with an estimated value above €75,200,<sup>967</sup> all known qualified sources must be invited to bid, but for purchases comprised between €75,200 and €9,400, NAMSOS determines which of the sources registered in the source file will be contacted for solicitations.<sup>968</sup> For purchases below €9,400, an informal procedure may be applied, whereby NAMSOS contacts a maximum of three qualified sources.<sup>969</sup> For contracts of a value lower than €3,760,<sup>970</sup> single source procurement is acceptable provided that the prices quoted by this single source are considered reasonable.<sup>971</sup>

This means that, for contracts below €75,200, selection of tenderers is entirely left to the discretion of NAMSOS, and requirements below that value do not seem to be published (they clearly are not published for contracts below €9,400). This could be in breach of the EU law principle of equal treatment and of the obligation of transparency. Even though the €75,200 threshold is smaller than the thresholds for the applicability of the EU procurement directives, the lowest of which is

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<sup>967</sup> RFP N° MNE90454U, above allows to determine that which Financial Level B is €18,800, and Financial Level C, which applies in this case, is four times Financial Level B in accordance with NAMSOS Functional Directive 410, above; Smit, “NAMSOS Procurement Policy and Implementation”, above, Slide 6; Russel, “NAMSOS Support of Common and Nationally Funded Aviation Systems”, above, Slide 10

<sup>968</sup> NAMSOS Procurement Regulations, above, §4.5.1

<sup>969</sup> NAMSOS Procurement Regulations, above, §10.1.3-10.1.5

<sup>970</sup> By cross-referencing with provisions found in RFP N° MNE90454U, above: small value purchases apply for amounts smaller than 0.4 x Financial Level A

<sup>971</sup> NAMSOS Procurement Regulations, above, §10.1.2



€125,000,<sup>972</sup> the NAMSO procurement rules do not assess if the procurement could have a cross-border interest in the decision to publish.

This issue could be resolved by amending the NAMSA Procurement Regulations to provide that all requirements would have to be published on the NATOLOG website, thereby allowing firms to submit expressions of interest. Among the firms having expressed an interest, NAMSA would select which qualified firms it would contact, with a minimum of three for all contracts between €75,200 and €9,400. In addition to being more in line with EU law, this would also be more efficient, as it would allow the market to provide opportunities of which NAMSA is not necessarily aware.

## **21.6. Rules on Technical Specifications**

The NAMSA Procurement Regulations include a number of rules on the drafting of Requests for Proposal,<sup>973</sup> but no specific rules on the drafting of the technical specifications for the goods or services to be procured. This seems to be left entirely to the discretion of the customer and/or NAMSA staff. This practice could prove discriminatory if the technical specifications only require national standards and reject comparisons of equivalency, something that is not allowed under the procurement principles flowing from the EU Treaties.

The NAMSA Procurement Regulations should be amended to clarify what standards may be used for such specifications, and especially to require comparison of the equivalence of standards.

## **21.7. Selection and Award Criteria**

Another issue concerns the contract award and tenderer selection criteria. There is no mention of contract award criteria or of their weighting in the NAMSO procurement rules, but those criteria are in fact published in the Request for Proposals.<sup>974</sup> In addition, we have seen in Section 15.4.4 that the ‘selection’ phase is in fact performed by NAMSA in two phases: at the time of the inclusion in the source file, and then after the evaluation of the tenders, but only for the tenderer to which the contract would be awarded. This involves a determination of the responsibility, capability and financial stability of the prospective contractor on the

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<sup>972</sup> Directive 2004/18/EC, above, Art.7

<sup>973</sup> NAMSA Procurement Regulations, above, §4.6

<sup>974</sup> RFP N° MNE90454U, above, General Introduction, §5

basis either of information in the source file or, in case this is insufficient, of a Pre-Award Survey.<sup>975</sup>

However, the NAMSO procurement rules do not clarify on what detailed grounds this ‘determination’ has to be made (only the generic headings quoted above are mentioned), and do not mention selection criteria, nor their publication. In addition, even though one could logically assume that if the prospective contractor is determined to be unsuitable the contract would be awarded to the second most economical offer, the rules do not specify what the consequence of such determination of unsuitability would be. Even though this issue is not necessarily a breach of EU law, it is an unclear provision of the rules.

The NAMSA Procurement Regulations should be amended to include rules on contract award and their weighting, and on the grounds for determination of the responsibility, capability and financial stability of the prospective contractor, that would require their publication in the Requests for Proposals. Clarification should also be included on the consequences for the procurement process of a finding of unsuitability of the prospective contractor. Inspiration could be drawn from the EU public procurement directives.

## **21.8. Contestation Process for the Award of Contract**

The first possibility for the NAMSO Member States to contest the award of a contract as proposed by NAMSA is the Customer Price Approval process, whereby, before the contract can be awarded, the customer is required to approve the price of the contract.<sup>976</sup> The second possibility is when NAMSA intends to award a contract of a value of more than €376,000,<sup>977</sup> not to the ‘lowest compliant’ tender (in terms of price), but to the ‘most economical’ one (on the basis of price, delivery schedule, technical capability, and the balance of production, amongst other criteria).<sup>978</sup> We have described this process in Section 15.4.4.9, which may lead to a review of the contract award decision or to the initiation of the Protest of

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<sup>975</sup> Functional Directive 251, above, §4.6; NAMSA Procurement Regulations, above, §5.9

<sup>976</sup> Functional Directive 251, above, §4.7

<sup>977</sup> RFP N° MNE90454U, above allows to determine that which Financial Level B is €18,800, the threshold in this case is and five times Financial Level C; Smit, “NAMSA Procurement Policy and Implementation”, above, Slide 9

<sup>978</sup> NAMSA Procurement Regulations, above, §5.6-5.7

Award Procedure, through which a NAMSO Member State may submit the dispute for resolution through the NAMSO Board of Directors.<sup>979</sup>

The first of such provisions acts as a safeguard to ensure that NAMSA will not be allowed to award a contract at a price that the customer cannot afford to pay. However, one could wonder if some NAMSO Member States could not use these provisions to block the award of a contract to a company from another country, even if that would require restarting the procurement process.

The second provision is more questionable. NAMSO Member States have no recourse to question the award of contract to the lowest compliant bidder, even if it considers that this bid had lower technical characteristics, or when contract award involves the balancing of production. Moreover, only NAMSO Member States are allowed this possibility of veto or to invoke the protest of award procedure: tenderers themselves do not seem to have any possibilities to file a complaint about the procurement process. In the protest of award procedure, the State where an aggrieved tenderer is located has to agree to assume the interests of the company, and the State of the company to whom the contract was supposed to be awarded has to do the same. Despite the fact that States often attempt to protect their defence industry, there is no guarantee that they would always do so, and this is in any case left to their discretion. This means that aggrieved tenderers have no means to directly challenge a contract award decision. In fact, they are only informed that they are not awarded the contract after contract award.

In addition, NAMSO has immunity from every form of legal process, even though it may waive this immunity in some cases.<sup>980</sup> However, as explained in Section 12, international organisations, when relying on their immunity, have to provide reasonable alternative means in the organisation's legal instruments to protect effectively the rights of a plaintiff, such as specific modes of settlement of private-law disputes.<sup>981</sup> The North Atlantic Council was supposed to make provisions for appropriate modes of settlement of disputes of a private character of an origin other than contractual.<sup>982</sup> As it is not apparent if such provisions were ever adopted, and as they do not seem to be publicly available, it is unclear if they can in fact be used

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<sup>979</sup> NAMSA Procurement Regulations, above, §6.6

<sup>980</sup> Ottawa Agreement, above, Art.V

<sup>981</sup> *Waite and Kennedy*, above, [68]-[69]; *Beer and Regan*, above, [58]; *Hans-Adam II of Liechtenstein*, above, [48]; See Reinisch, *International Organisations before National Courts*, above, pp.366 et.seq.

<sup>982</sup> NAMSO Charter, above, Art.19 and Ottawa Agreement, above, Art.XXIV

in procurement disputes (and how could they be used, if they are not public?). All this is clearly in breach of the EU law principles of non-discrimination on the grounds of nationality, equal treatment and right of access to court. In addition, even if NAMSO does not have to comply with the EU public procurement law, the right of access to court is also protected by the European Convention of Human Rights that has developed a case law on the immunity of international organisations, as explained in Section 12.3, that could also apply to NAMSO.

The only way to resolve these issues would be to delete the possibility of NAMSO Member States to challenge the proposed award of a contract except through the Customer Price Approval process, and to create a right for tenderers and other economic operators to challenge procurement decisions. For that purpose, the relevant Functional Directive should be amended to provide that candidates or tenderers may refer complaints regarding procurement decisions to an independent arbitration tribunal that would render a decision binding on the parties. In the course of such proceedings, the provisions of the NAMSO Functional Directives and of the NAMSA Procurement Regulations would have to be considered as binding on NAMSO. The remaining problem is that no waiver of NAMSO's immunity may extend to measures of execution or detention of property.<sup>983</sup> As we discussed in Section 12, it is not certain that this position would be upheld by most national courts, who could very well decide to waive the immunity from enforcement of judgment of NAMSO in some circumstances.

In addition, the NAMSO procurement rules do not include a standstill period between the award decision and the actual contract signature,<sup>984</sup> except when the award of contract is to be made to another tenderer than the one having submitted the lowest compliant bid.<sup>985</sup> However, even in that case, the information is provided to the NAMSO Member State where the latter is located, and not to the bidder in question or to the other bidders. It would be beneficial to include such standstill in the new complaints procedure.

## **21.9. Conclusions on NAMSO**

Resolving most of the issues raised in this section would require an amendment of the applicable NAMSO Functional Directives and of the NAMSA Procurement

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<sup>983</sup> Ottawa Agreement, above, Art.V

<sup>984</sup> NAMSA Procurement Regulations, above, §6.3.3

<sup>985</sup> NAMSA Procurement Regulations, above, §6.6

Regulations, which, even though this would require the unanimous agreement of the NAMSO Member States, would not require ratification by national parliaments. However, some major issues remain uncertain, such as whether or not NAMSO has to comply with the procurement principles flowing from the EU Treaties, and the immunities of NAMSO from execution of judgement.

## **22. Issues Identified within the EDA**

### **22.1. General Considerations**

As all EDA participating Member States are EU Member States, this clearly makes the EDA an organisation or agency ‘controlled’ by EU Member States in the sense of our discussions on the topic in Section 11. Therefore, the EDA would have to comply with EU law in general terms, subject to its privileges and the provisions of the EU law applicable to the area of the law concerned. The Council itself seems also to agree that EU law in general applies to the EDA.<sup>986</sup>

Based on the definition of the Public Sector Directive, we have shown in Section 16.2.2 that the EDA would most likely qualify as a body governed by public law. However, the definition of ‘central purchasing body’ in the Defence and Security Directive, states that such body has to be a contracting authority or a ‘European public body’,<sup>987</sup> and mentions the EDA as an example of European public body,<sup>988</sup> which raises questions as to whether the EU legislator considers the EDA as a contracting authority. In any case, the EU General Court held that the purpose of the Public Sector Directive was to coordinate national laws, and that it was therefore not applicable to international bodies that have been set-up by the EU institutions, which were not subject to the public procurement law of the EU Member States.<sup>989</sup> Therefore, EDA procurement does not have to comply with the Public Sector Directive. The same reasoning is entirely applicable to the Defence and Security Directive.

Despite this conclusion, the EDA procurement rules have been drafted to respect the Public Sector Directive to the same extent as the other European institutions

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<sup>986</sup> Decision 2007/643/CFSP, above, Art.1(2)

<sup>987</sup> Directive 2009/81/EC, above, Art.1(18)

<sup>988</sup> Directive 2009/81/EC, above, Recital 23

<sup>989</sup> *Sogelma*, above, [115]

procurement regulations.<sup>990</sup> Following the same principle, the EDA procurement rules should probably be amended to reflect the Defence and Security Directive, as the main procurement to be performed by the EDA is related to defence and security. Nevertheless, as we explained in the previous paragraph, the EDA has no legal obligation to do so.

However, if the EDA is found to be a public authority, which is likely, as EU Member States hold a controlling majority in its decision-making process and as the EDA does not currently operate on the market, it would nevertheless have to comply with the procurement principles flowing from the EU Treaties. As all EDA participating Member States are also EU Member States, the functional necessity principle would most likely not justify a customary privilege exempting the EDA from complying with EU procurement law in general.

As the Joint Action creating the EDA was approved after 1957, it had to be drafted in accordance with EU law, and the EDA participating Member States would have the obligation to amend it if it were found not to comply with EU law. In addition, as exemptions from compliance with EU law only apply to clearly defined and exceptional cases and do not create general or automatic exemptions,<sup>991</sup> it is very unlikely that the CJEU would accept their use by EU Member States for the adoption of provisions of the EDA Joint Action.

In Section 11.4, we concluded that most international organisations or agencies of which only EU Member States were members would meet the conditions for a quasi in-house relationship with their Member States, and that therefore the latter would not need to comply with EU procurement law when assigning a procurement task to such organisation. This conclusion, based on the amount of control exercised by EU Member States, is also valid for the EDA. However, as we explained in Section 19.5, this conclusion would only be coherent if the EDA is also found to be a public authority.

In addition, considering that the EDA operational procurement consists exclusively of activities performed for the benefit of more than one EU Member State, they almost certainly qualify as collaborative procurement. The EDA would therefore

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<sup>990</sup> EDA Steering Board Decision to amend the financial provisions (Title III on procurement), above; EDA Steering Board Decision No. 2006/29 (COR.) on revision of EDA financial rules, above

<sup>991</sup> *Commission v Spain* (Case C-414/97), above, [21]; *Johnston*, above, [26]; *Sirdar*, above, [16]; *Kreil*, above, [16]

not have to comply with its own intergovernmental procurement regime if Art.346 TFEU is invoked for one of its procurement activities.

## **22.2. The Global Return Principle**

Contracts awarded by the EDA and entirely financed through the budget of projects or programmes may impliedly deviate from the principles of transparency, proportionality, equal treatment and non-discrimination,<sup>992</sup> and the Member States and third parties contributing to an EDA project or programme, even though they will not seek to apply *juste retour* on an individual project or programme basis, will seek ‘a global return’.<sup>993</sup> It is not clear what that ‘global return’ should be, even though it is at least clear that it does not mean a strict application of *juste retour* for each project or programme individually. However, how such global return is planned, assessed, calculated or implemented is not defined, or at least not publicly available. In addition, such global return would be *prima facie* in breach of the EU law principles of non-discrimination and equal treatment.

Therefore, the EDA General Conditions should be amended or supplemented by detailed procedures on how global return is to be calculated, and especially how it is to be applied in line with EU law, especially taking into account the fact that six participating Member States (France, Germany, Italy, Spain, Sweden and the United Kingdom) represent 98% of defence R&D spending within the EU.<sup>994</sup> In addition, these procedures should include a step whereby the relevant contributing EU Member States invoke an EU Treaties exemption, such as Art.346 TFEU, if global return is to be corrected.

## **22.3. Relationship with the Public Sector Directive**

The EDA procurement rules are said not to ‘affect existing measures taken by EU Member States under [Art.346 TFEU] or under Art.10 and 14 of the Public Sector Directive’.<sup>995</sup> It is unclear what this provision exactly means. It could signify that the EDA procurement rules would not apply when an EU Member State invokes one of the exemptions contained in these articles. On the other hand, as it refers to

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<sup>992</sup> Decision 2007/643/CFSP, above, An.II, Art.2(1); This had been envisioned before the publication of the EDA procurement rules by Georgopoulos, “The New European Defence Agency”, above, p.107

<sup>993</sup> General Conditions Applicable to EDA Projects and Programmes, above, §2.4

<sup>994</sup> Communication on the results of the consultation launched by the Green Paper on Defence Procurement, COM(2005)626, above, p.2

<sup>995</sup> Decision 2007/643/CFSP, above, An.II, Art.55; Directive 2004/18/EC, above, Art.10 and 14

‘existing’ measures, this provision could be referring to domestic law in force at the time of adoption, and that relates to the stated exemptions, or only to activities or procurement processes already ongoing at the time of adoption of the EDA rules.

This could be fairly easily corrected by amending the EDA procurement rules to clarify this point. It is submitted that the clearest meaning would be to replace ‘existing measures’ with ‘domestic laws and regulations in force at the time of adoption of this Decision’. However, such wording would not clarify if EU Member States would be allowed to adopt laws and regulations contrary to the EDA procurement rules after its adoption, even though this would be unlikely.

## **22.4. Contracts Related to Defence**

Within the EDA procurement rules, certain provisions do not apply to ‘contracts related to defence’, which is a term that refers to a contract to be concluded by the EDA in the fields where EU Member States may invoke the exception of Art.10 of the Public Sector Directive,<sup>996</sup> which is supposed to refer to Art.346 TFEU. However, because of the use of the word ‘may’, this provision could be read to amount to an automatic exemption of the equipment on the 1958 list from the applicability of certain EDA rules. This reading would be acceptable only if the EDA rules to be applied in case of derogation would still be in line with EU law (which is not the case). However, a more appropriate reading would interpret it as meaning that the exemptions for contracts related to defence only apply when all the conditions to validly invoke Art.346 TFEU are met. This second interpretation would be more in line with the CJEU case law that holds that exemptions may only be invoked case-by-case.

The EDA procurement rules should be amended to clarify the definition of contracts related to defence. This should be done by defining them as ‘contract to be concluded by the EDA when EU Member States have invoked the exception of Art.346 TFEU’. Alternatively, this definition and the relevant rules could be amended in line with the provisions of the Defence and Security Directive: the ‘contracts related to defence’ of the EDA rules currently have a different meaning than the ‘contracts in the field of defence and security’ of the Defence and Security Directive,<sup>997</sup> even though such definitions may of course differ.

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<sup>996</sup> Decision 2007/643/CFSP, above, An.II, Art.1(i)

<sup>997</sup> Directive 2009/81/EC, above, Art.2; Directive 2009/81/EC, above, Recitals 15 and 16



## **22.5. Grounds for Using the Negotiated Procedure without Publication**

### ***22.5.1. Major Preliminary Investments***

The grounds on which the negotiated procedure without publication of a contract notice may be applied include a number of grounds not found in the Public Sector Directive.<sup>998</sup>

One such ground is that the negotiated procedure may be used for reasons connected with major preliminary investments related to defence equipment or technology (a ground that sounds like the ‘buy OCCAR’ policy), to unique specific defence facilities, or in order to ensure the security of supply in defence equipment or technology, or in view of the need to further develop an innovative defence technology. This ground does not mention explicitly ‘contracts related to defence’ or the Art.346 TFEU exemption. Even though, from a cost-effectiveness and efficiency point of view, this rule makes sense, such open exemption could be abused and, as it totally precludes advertising and competition, it is clearly in breach of the EU Treaties procurement principles.

Therefore, the EDA procurement rules should be amended to make this exemption subject to Art.346 TFEU (or another public security exemption of the EU Treaties), or to refer explicitly to contracts related to defence, as this ground in fact applies in the field of defence.

### ***22.5.2. Security Research***

Another ground allows the use of the negotiated procedure where the Commission or another European or international organisation or entity has entered into an agreement with a particular economic operator in the field of security research and it is appropriate to award a research contract related to defence to the same economic operator. Even though, this exemption could, in some cases, fit within an EU Treaties exemption, it is not certain that this would always be the case, and it could therefore be in breach of the procurement principles of the EU Treaties. However, as this provision is said to apply to contracts related to defence, the narrow interpretation of the latter term would ensure that it would be used only when Art.346 TFEU has been validly invoked.

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<sup>998</sup> Decision 2007/643/CFSP, above, An.II, Art.31

### **22.5.3. *Contracts Related to Defence***

The last ground for using the negotiated procedure without publication, contracts related to defence, to be let in the framework of a programme or project managed in cooperation with another international organisation, clearly relates to the cases whereby the EDA would rely on the services of an organisation such as OCCAR to manage the procurement side of the programme, which the EDA currently sees as its normal way of working.<sup>999</sup>

First, it should be noted that, in this case, at least three candidates should be invited to negotiate,<sup>1000</sup> so that this use of the procedure remains competitive and does not amount to a single tender procedure.

Second, it is not entirely clear to what contracts this provision applies. It could be held to apply to the relationship between the EDA and the other international organisation, but this is unlikely, as the EDA Joint Action includes, as explained above, specific provisions covering arrangements of that nature.

It could also apply to the contracts concluded by the EDA within the scope of that project or programme, but in that case the exemption could have a very broad scope indeed: as soon as the project or programme is announced to be managed in cooperation with another international organisation, all contracts to be placed by the EDA within the scope of that programme (even for the preliminary studies and feasibility phases, that in the current division of work between the EDA and, for instance, OCCAR, would be concluded before the other organisation is actively involved) would be concluded by the negotiated procedure.

Finally, one could argue that it would apply to the contracts to be awarded by the other international organisation within the scope of the programme. However, in that case, the interaction between this provision and the procurement rules of the organisation is unclear.

As the exemption applies to contracts related to defence, this would only cover contracts for which Art.346 TFEU has been invoked as long as the narrow interpretation of ‘contracts related to defence’ is chosen, so that EU law would not have to be complied with, but the fact remains that the application of this provision is unclear. The text of the EDA procurement rules should be adapted to clarify the points raised in this Section.

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<sup>999</sup> EDA Bulletin Issue 12, above, p.9

<sup>1000</sup> Decision 2007/643/CFSP, above, An.II, Art.26(2)(d)

## **22.6. Lists of Potential Tenderers**

On the basis of the answers to a call for expressions of interest, a list of potential tenderers is established by the EDA, which is valid for three years. Any interested person may submit an application to be included in the list at any time during its period of validity.<sup>1001</sup> Where a specific contract is to be awarded, the EDA will invite either all candidates entered on the list or only some of them, on the basis of selection criteria specific to that contract, to submit a tender.<sup>1002</sup>

Like with the NAMSA source file, it is unclear what the criteria to be included in the list are, even though they could be defined case-by-case for each of such lists in the call for expression of interest. Such criteria most likely do not cover selection criteria, as those seem to be related to each specific contract, so they probably include only the conditions for participation. In addition, it is unclear what the level of details of such list is. This is probably a wilful decision in order to leave the EDA the freedom to manage many or few of such lists. However, it is submitted that, in some cases, these lists could be used in a discriminatory manner if their scope is aimed at particular companies. In addition, the fact that it is unclear on what grounds an economic operator would be included in the list is probably not in line with the principle of transparency of the EU Treaties, unless the criteria are systematically published.

This issue could be resolved fairly easily by including in the EDA procurement rules the criteria for listing potential tenderers in such lists and the information to be included, or to require in those rules the publication of the criteria in the call for expression of interest. The recommendations we made for the NAMSO source file could also be used for the EDA.

## **22.7. Contacts with Candidates and Tenderers**

All contacts between the EDA and candidates or tenderers while the procurement procedure is underway are strictly limited by the EDA procurement rules, except for contracts for legal services and for contracts related to defence, where the EDA may enter into the necessary contacts with tenderers ‘to check the selection and/or award criteria’.<sup>1003</sup> These provisions do not say if such contacts may be held before or after the tenders are submitted (or both), and it does not clarify what ‘to check

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<sup>1001</sup> Decision 2007/643/CFSP, above, An.II, Art.33(2)

<sup>1002</sup> Decision 2007/643/CFSP, above, An.II, Art.33(3)

<sup>1003</sup> Decision 2007/643/CFSP, above, An.II, Art.15 and 51

the criteria’ means. This probably allows the EDA to amend those criteria in function of the information received (for instance, if the contacts show that no tenderer would be able to match a mandatory requirement).

These provisions can be beneficial to prevent the procurement process from being declared ineffective in case of complex projects, but would have to be applied carefully if unequal treatment is to be avoided. More guidance on this process should be included in the EDA procurement rules.

## **22.8. Standstill Period**

The provisions on information of tenderers and contract award<sup>1004</sup> do not mention any standstill period between the information of the unsuccessful candidates and the award of the contract. This is not in line with the amended Remedies Directive,<sup>1005</sup> even though the latter does not apply to the EDA. However, it could be beneficial to amend the EDA procedures to include such period.

## **22.9. Lack of Complaints Procedure**

The EDA procurement rules do not contain any provisions on remedies or on a complaint procedure, but the CJEU is competent to review the legality of acts of all bodies, offices or agencies of the EU intended to produce legal effects vis-à-vis third parties.<sup>1006</sup> These provisions also cover decisions made during a procurement process.<sup>1007</sup>

However, the CJEU does not have jurisdiction with respect to the CFSP provisions of the TEU and decisions made in application of these, such as those that founded and regulate the working of the EDA. Nevertheless, implementation of the CFSP may not affect ‘the application of the procedures and the extent of the powers of the institutions for the exercise of the Union competences’, and the CJEU has jurisdiction to monitor compliance with this principle.<sup>1008</sup> Those provisions are not entirely clear, but a possible reading could be that, even though the CJEU could not review the compliance of an EDA procurement decision with the procurement

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<sup>1004</sup> Decision 2007/643/CFSP, above, An.II, Art.16(2)-(3)

<sup>1005</sup> Directive 89/665/EEC, above, Art.2a

<sup>1006</sup> Art.263 TFEU (formerly Art.230 EC); *EMSA*, above, [75] and [103]; *Evropaiki Dynamiki*, above, [147]; *ESN*, above, [130]

<sup>1007</sup> *Les Verts v Parliament* (Case 294/83) [1986] E.C.R. 1339, [23]-[25]; *Sogelma*, above, [36]-[37]; *EMSA*, above, [61]-[75] and especially [67]

<sup>1008</sup> Art.24(1) and 40 TEU (ex-Art.11 and 47 EU); Art.275 TFEU (ex-Art.225a EC)

rules of the agency or with its founding instrument, which are approved within the scope of the CFSP, it could review the compliance of such decision with the applicable procurement principles of EU law.

In addition, the Steering Board is responsible for resolving any issues on general matters that arise under the general conditions, and disputes regarding the interpretation or application of these will be resolved by consultation between the EDA and the participating Member States, and will not be referred to any tribunal.<sup>1009</sup> If a third party, for instance an aggrieved tenderer, files a claim for loss or damage in connection with a Programme/Project Arrangement, as explained below, this provision would also probably apply if there is a dispute about the interpretation of the general conditions.

Finally, privileges and immunities necessary for the performance of the duties of the Agency must be provided for in an agreement between participating Member States.<sup>1010</sup> It seems that such agreement has been approved as a Council decision,<sup>1011</sup> but it is not publicly available. It is imperative that the Council Decision setting-out the privileges and immunities of the EDA be published in the OJ.

In addition, the mechanisms of dispute settlement within the Agency are not entirely satisfactory. An aggrieved economic operator could bring proceedings against the EDA before the CJEU, but it seems that the jurisdiction of the CJEU would then be limited to verify compliance of the EDA procurement decisions with EU law, and that it would have no jurisdiction to rule over CFSP matters, such as compliance with the EDA procurement rules. This regime would therefore probably not meet the ECtHR requirement that international organisations, when relying on their immunity, provide reasonable alternative means in the organisation's legal instruments to protect effectively the rights of a plaintiff, such as specific modes of settlement of private-law disputes.<sup>1012</sup> In fact, this is even more so if the EDA is found to be merely an agency of the EU, because any CJEU ruling would then be internal to the organisation.

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<sup>1009</sup> General Conditions Applicable to EDA Projects and Programmes, above, §2.7-2.8

<sup>1010</sup> Joint Action 2004/551/CFSP, above, Art.26

<sup>1011</sup> Council Decision on the privileges and immunities granted to the European Defence Agency, above

<sup>1012</sup> *Waite and Kennedy*, above, [68]-[69]; *Beer and Regan*, above, [58]; *Hans-Adam II of Liechtenstein*, above, [48]; See Reinisch, *International Organisations before National Courts*, above, pp.366 et.seq.

Therefore, as with the other international organisations under analysis, the EDA procurement rules have to be amended to include a dispute settlement system that would allow aggrieved economic operators to submit their disputes with the EDA to an independent arbitral tribunal. The proposals made in Sections 20.13 and 21.8 could also apply to the EDA.

## **22.10. Conclusion on the EDA**

We can therefore conclude that the EDA procurement rules are probably those that present the fewest deviations from EU law. Those we identified can be corrected by some clarifications of the procurement rules, which can be introduced by amending such rules and would only require an internal decision within the EU. Such amendment would also allow including some improvements in the rules. The largest problem, as with the other international organisations, remains the dispute resolution mechanism with aggrieved candidates or tenderers.

## Chapter 7 – Conclusions

We have, in this thesis, performed a critical analysis of the procurement rules of international organisations or agencies performing collaborative defence procurement in the EU. In collaborative defence procurement programmes, States agree to procure equipment or services for their armed forces in common, thereby sharing R&D costs and looking for economies of scale. The management of such programmes is often entrusted to an international organisation or agency. We have seen that one of the issues with collaborative defence procurement is that the applicable law, and especially its relationship with EU public procurement law, was complex and not necessarily well understood.

In order to clarify this issue, we have identified in Section 3.1 generic research questions aiming to clarify how collaborative defence procurement performed through international organisations or agencies should and/or is affected by EU law. These issues were analysed in details in Chapter 4, and the answers to these research questions were provided in Section 13.

In short, domestic law and EU law will, in general terms, apply to an international organisation or agency in the EU, but this has to be confirmed on the basis of the legal provisions concerned and of relevant international law, such as the privileges and immunities of the organisation. Moreover, international agreements concluded by EU Member States after 1957, which is the case of all the international agreements founding the international organisations or agencies under analysis in this thesis, must be drafted in line with EU law, and amended as necessary if this is not the case. In addition, it is likely that most international organisations or agencies would not have the power to invoke exemptions from compliance with EU law.

Domestic public procurement law seems to be universally not applied for the procurement activities of international organisations or agencies, probably thanks to a customary privilege aiming to preserve their functional independence. In addition, because of the exemptions found in the EU public procurement directives and because those directives aim to harmonise domestic procurement law, which is not applicable to international organisations or agencies, the latter most likely do not have to comply with those directives. Nevertheless, it is likely that international

organisations or agencies of which EU Member States control the decision-making would have to comply with the EU Treaties procurement principles (such as non-discrimination on the grounds of nationality, equal treatment, an obligation of transparency, and effective judicial protection).

EU Member States would not need to comply with EU public procurement law when assigning the management of a collaborative programme to an organisation or agency that fits within the quasi in-house exemption, but they would likely have to comply with EU public procurement law when assigning a collaborative programme to an organisation or agency that does not meet that test.

The international organisations' or agencies' immunities from the jurisdiction of domestic courts and from execution of judgment will likely be upheld and found not to breach the right of access to court if the organisation concerned has a legitimate purpose and if a plaintiff is able to rely on reasonable alternative means of dispute resolution independent from the organisation to protect effectively its rights.

In addition, we identified in Section 3.2 a number of research questions to be answered for three case studies of organisations or agencies performing collaborative defence procurement in the EU, namely OCCAR, NAMSO and the EDA, of which we analysed in detail the procurement rules in Chapter 5. The answer to these research questions was provided for each case study in Sections 14.5, 15.5 and 15.6 respectively. As these conclusions are specific to each international organisation or agency concerned, we will not repeat them here.

Finally, on the basis of our analysis and of the answers to the research questions, we identified in Chapter 6 the lessons and common trends of our three case studies, and made recommendations to improve the legal aspects of collaborative defence procurement in Europe.

The most difficult issues to resolve are probably the interrelationship between EU law and the institutional law of international organisations, which we discussed in Section 18. As these issues cover two types of legal system (regional and international), they cannot be entirely resolved in either system. However, clarification could be provided by CJEU judgments, and interpretative communications of the Commission could provide some guidelines. The adoption of international instruments to clarify these issues is very unlikely because of the complexity and political sensitivity of the process involved.

The issues specific to EU law discussed in Section 19, which aim at clarifying current EU procurement law to resolve uncertainties or incoherence identified in



this thesis, could be settled more easily, as a Directive amending the Public Sector and Defence and Security Directives would constitute the most evident measure to clarify these issues. However, such measure could potentially open a Pandora's Box, as it could lead to other amendments of the Directives. In addition, CJEU rulings on specific issues would provide additional clarity, with the disadvantage that such rulings can only arise when a relevant case is raised to the Court. Amending existing interpretative communications of the Commission would also provide some clarification, but such communications only reflect the views of the Commission and therefore only have an informative value.

The issues specific to each international organisation or agencies under analysis, discussed in Sections 20 to 22, are mostly related to the coherence of their procurement rules with EU law, and not so much with their internal coherence. Even though the procurement procedures of the international organisations under analysis differ, they generally constitute coherent sets of rules that would only require some occasional clarification, in particular to increase the transparency of the procurement process.

However, a major issue common to all international organisations or agencies under analysis is the inadequacy of their complaints procedure for procurement cases, which is in most cases limited to an internal review within the organisation, and is compounded by the immunities of the organisations. This is probably in breach of the fundamental right of access to court. Each of the organisations under analysis should adopt a process whereby procurement disputes are settled by an independent body, such as an arbitral tribunal.

Bringing the procurement rules of the organisations or agencies under analysis in line with EU law would require amending such rules to comply with the procurement principles flowing from the EU Treaties, and to clarify in which cases EU Member States should invoke EU Treaties exemptions. However, an organisation of which the decision-making process is not controlled by EU Member States, such as NAMSO, would likely not qualify as a public authority and could probably, out of functional necessity, rely on a privilege to avoid compliance with EU procurement law.

As we mentioned in the introduction, almost no academic research has been performed on the specific issues discussed in this thesis, and very few procurement practitioners of international organisations or agencies are therefore even aware of the importance of our research questions and of our conclusions. We hope

therefore that the latter will provide a substantial contribution to bridge that gap and will eventually help develop in a coherent manner the law applicable to collaborative defence procurement through international organisations or agencies in the EU.

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