

The Law of Collaborative Defence Procurement in the European Union

Baudouin Heuninckx



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THE LAW OF
COLLABORATIVE DEFENCE
PROCUREMENT IN THE
EUROPEAN UNION

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THE LAW OF COLLABORATIVE DEFENCE PROCUREMENT IN THE EUROPEAN UNION

States increasingly cooperate to buy expensive defence equipment, but the management and legal aspects of these large collaborative procurement programmes are complex and not well understood. *The Law of Collaborative Defence Procurement in the European Union* analyses how these programmes are managed and highlights areas that require improvement. The book addresses the law applicable to these programmes, which is built upon a four-layer 'matryoshka doll' of legal relationships at the crossroads of public international law, EU law and domestic law. Using practical examples, the book makes proposals for clarifying the legal basis and improving the efficiency of defence equipment cooperation among EU member states. By covering a broad scope of legal issues, this analysis goes beyond the defence sector and is relevant to centralised or joint purchasing and to the procurement activities of international organisations, providing invaluable information for practitioners, policy-makers and academics aiming to analyse or improve these projects.

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ABBREVIATIONS

AECA	US Arms Export Control Act
ASB	NSPO Agency Supervisory Board
BENESAM	Belgium–Netherlands Cooperation
BoS	OCCAR Board of Supervisors
CDP	EDA Capability Development Plan
CEPMO/CEPMA**	NATO Central Europe Pipeline Management Organisation/Agency
CJEU	Court of Justice of the EU
CNAD	NATO Conference of National Armaments Directors
CODABA	EDA Collaborative Database
CSDP	EU Common Security and Defence Policy
CSO	NATO STO Collaboration Support Office
DCS	Direct Commercial Sales (US)
DFARS	US Department of Defence FAR Supplement
ECHR	European Court of Human Rights (Council of Europe)
ECR	European Court Reports (EU)
EDA	European Defence Agency (EU)
EDEM	European Defence Equipment Market
EDIR-FA	European Defence Industry Restructuring Framework Agreement
EDTIB	European Defence Technological and Industrial Base
EPM	EDA Effective Procurement Methods
EU	European Union
FAR	US Federal Acquisition Regulation
FMS	US Foreign Military Sales
ICJ	International Court of Justice of the United Nations Organisation
ICTM***	NATO Headquarters Information and Communication Technology Service
IEPG*	Independent European Programme Group
LOA	FMS Letter of Offer and Acceptance
LoI	Letter of Intent

LOR	FMS Letter of Request
MNFP	F-16 Multinational Fighter Programme
NAD	National Armaments Director
MOU	Memorandum of Understanding
NAC	North Atlantic Council (NATO)
NACMO/NACMA***	NATO Air Command and Control System Management Organisation/Agency
NAGSMO/NAGSMA	NATO Alliance Ground Surveillance Management Organisation/Agency
NAHEMO/NAHEMA	NATO Helicopters Management Organisation/Agency
NAMEADSMO/NAMEADSMA	NATO Medium Extended Air Defence System Management Organisation/Agency
NAMO/NAMA**	NATO Airlift Management Organisation/Agency
NAMSO/NAMSA**	NATO Maintenance and Supply Organisation/Agency
NAPMO/NAPMA	NATO Airborne Early Warning and Control Program Organisation/Agency
NATO	North Atlantic Treaty Organisation
NCIO/NCIA	NATO Communications and Information Organisation/Agency
NC3O/NC3A***	NATO Consultation, Command and Control Organisation/Agency
NCSO/NCSA***	NATO Communication and Information Systems Services Organisation/Agency
NETMO/NETMA	NATO Eurofighter and Tornado Management Organisation/Agency
NFR	NATO Financial Regulations
NPLSO	NATO Procurement, Logistics or Service Organisations
NSO/NSA	NATO Standardisation Organisation/Agency
NSPO/NSPA	NATO Support and Procurement Organisation/Agency
OCCAR	Joint Organisation for Armaments Cooperation
OCCAR-EA	Executive Administration of OCCAR
OMP	OCCAR Management Procedure
PAPS	NATO Phased Armaments Programming System
pMS	EDA Participating Member State
R&D	Research and Development
RTO/RTA****	NATO Research and Technology Organisation/Agency
SAMM	FMS Security Assistance Management Manual

SB	EDA Steering Board
SHAPE	Supreme Headquarters Allied Powers Europe (NATO)
STO	NATO Science and Technology Organisation
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the EU
UK	United Kingdom
US	United States of America
WEAG*	Western European Armaments Group (WEU)
WEU*	Western European Union

* Defunct entity

** Organisation/agency integrated in NSPO/NSPA

*** Organisation/agency integrated in NCIO/NCIA

**** Organisation/agency integrated in STO/STA

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Introduction

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 could be referred to as ‘defence procurement *stricto sensu*’.

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 EU law exemption in the Treaty on the Functioning of the EU (TFEU).¹

Defence procurement also has an important economic impact in the EU. Defence expenditures of EU member states amounted to an average of about €197 billion yearly in the period 2005–2013. Of that amount, as shown in Figure 0.1, an average of about 20 per cent (€40 billion per year) were used for the procurement of defence equipment and Research and Development (R&D) and about 24 per cent (€46 billion per year) for operations and maintenance,² a large share of which, such as in-service support contracts or the supply of parts, fuel and ammunitions, also finds its source in procurement activities.³

¹ Consolidated Version of the Treaty on the Functioning of the EU (TFEU), [2008] OJ C115/47, Art.346; Mezzadri, *L'ouverture des Marchés de la Défense*, p. 6; Schmitt (rapporteur), *Defence Procurement in the EU – The Current Debate*, p. 11; Trybus, *European Defence Procurement Law*, p. 25; Heuninckx, ‘Lurking at the Boundaries’; Georgopoulos, ‘Defence Procurement and EU Law’.

² European Defence Agency, Defence Data Portal, www.eda.europa.eu/info-hub/defence-data-portal, accessed 16/04/2015 – all these figures except Denmark.

³ Darnis et al., *Lessons Learned from European Defence Equipment Programmes*, p. 3; The European Commission estimates the total defence procurement costs for 2004 at about

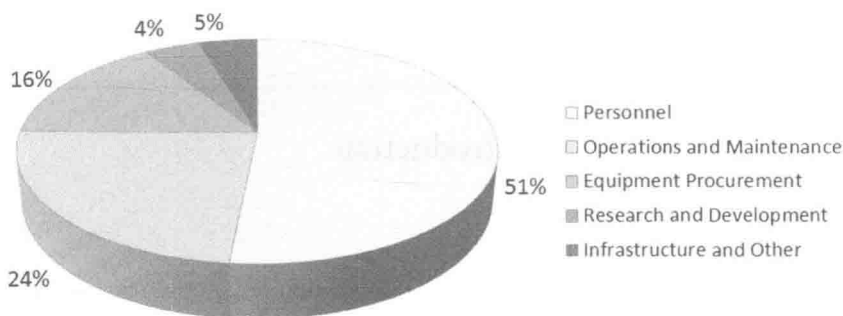


Figure 0.1 Defence expenditures breakdown in the EU for 2005–2013. Source: EDA

Despite this economic importance, the European Defence Equipment Market (EDEM) is still heavily segmented along national borders, much more so than any other sector of public procurement and is therefore considered as economically inefficient. Studies have shown that up to 32 per cent of the defence procurement budgets of EU member states could be saved by a combination of reduced market fragmentation and increased cooperation among the EU member states, in particular for the harmonisation of their operational requirements.⁴

In an attempt to improve the efficiency of defence procurement, in particular by sharing the development costs of expensive defence equipment and securing economies of scale, states sometimes resort to *collaborative procurement*, whereby they agree to procure such defence equipment and fund non-recurring costs (such as development costs) in common. Such aggregation of demand is also increasingly used in public procurement outside the defence sector.⁵ In addition to aiming at reducing costs,

€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.

⁴ Schmitt, *From Cooperation to Integration*, pp. 79–83; Georgopoulos, 'Defence Procurement and EU Law', p. 567; Dufour et al., *Intra-Community Transfers of Defence Products*, § 6.7; European Commission, *The Challenges Facing the European Defence-Related Industry*, COM(96)10, § 5.54; see Trybus, 'Challenges Facing the European Defence-Related Industry'.

⁵ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L94/65, Recital 59; Sánchez Graells and Herrera Anchustegui, *Impact of Public Procurement Aggregation on Competition*, p. 1; OECD, *Central Public Procurement Structures and Capacity in Member States of the EU*; Karjalainen, *Challenges of Purchasing Centralisation*.

collaborative procurement has operational advantages such as increasing the interoperability of the armed forces of the participating states, and allows states to procure military equipment that they would not be able to develop on their own because of diminishing budgets and lack of technical or industrial capacity.

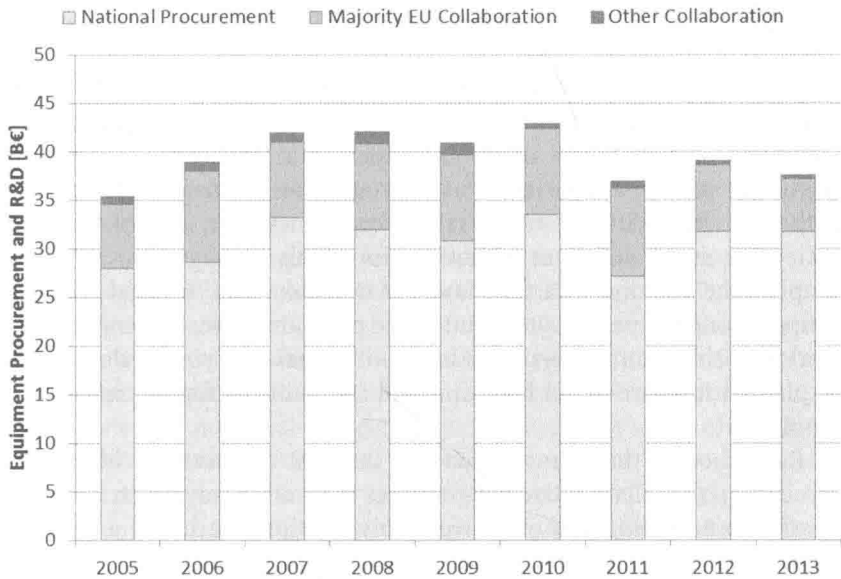


Figure 0.2 Defence equipment and R&D national/collaborative expenditures in the EU for 2005–2013. *Source:* EDA

An average of about 22 per cent of the defence equipment procurement and R&D expenditures of EU member states (almost €9 billion per year) was spent collaboratively in the period 2005–2013, and a significant portion of these collaborative procurement activities (about 90 per cent) was performed among states that were in majority Members of the EU, as shown in Figure 0.2. The EU's informal target is to reach 35 per cent of collaborative defence equipment procurement and R&D, but no date has been set to reach this objective.⁶

⁶ European Defence Agency, Defence Data Portal, www.eda.europa.eu/info-hub/defence-data-portal, accessed 16/04/2015. However, it seems that since 2012 several EU member states were not able to provide data relative to collaborative procurement, and the figures for collaborative procurement for 2012 and 2013 are therefore probably underestimated; see EDA, 'Trends in European Defence Spending'.

In addition, an average of about 9 per cent of the defence equipment procurement expenditures of EU member states in 2005–2013 (somewhat less than €3 billion per year) was spent through government-to-government transactions, of which about 79 per cent with the United States (US) and 17 per cent among EU member states.⁷ Even though this type of procurement does not always qualify as collaborative procurement in the strictest sense, it still represents some form of cooperation among states.

A collaborative defence procurement programme is led by a *programme management entity* that manages the programme and awards contracts on behalf and under the supervision of, or in collaboration with, the participating states. Such programme management entity is either an international organisation or agency,⁸ or one of the participating states acting as a ‘lead nation’. This management structure implies the creation of a four-layer ‘matryoshka doll’ of legal relationships among the participating states, the programme management entity and the prime contractors. This image of a legal matryoshka doll will be explained in more detail later and will stay with us for the rest of this book.

Even though they aim to increase the cost-effectiveness of defence procurement, collaborative programmes have not always been very successful in achieving this objective.⁹ This is primarily due to a complex and inefficient procurement and decision-making process and to an inefficient allocation of money and industrial resources, especially because of the so-called *juste retour* work allocation principle or variations thereof. Under that principle, also called ‘principle of fair industrial return’, the proportion of industrial activities allocated to the domestic industry of a participating State (work-share) is calculated to match the latter’s financial

⁷ Retter et al., *Study and Analysis of ‘Government-to-Government Sales’ of Defence Materiel – Executive Summary*, p. 2.

⁸ Depending on which definition of ‘international organisation’ is used under international law, some of the international bodies managing collaborative procurement programmes would not qualify as international organisations in the strictest sense, but we will nevertheless refer to them in this book as ‘international organisations’.

⁹ Trybus, *Buying Defence and Security in Europe*, p. 352; Hartley, *The Economics of Defence Policy*, Ch. 9; Hartley and Martin, ‘Evaluating Collaborative Programs’; Cox, ‘The Future of European Defence Policy’, p. 68; Mawdsey, *The Gap Between Rhetoric and Reality*, p. 6; Aalto, ‘Interpretations of Article 296’, in Keohane (Ed.), *Toward a European Defence Market*, p. 14.