COLLABORATIVE PROGRAMS: A STEP TOWARDS MORE EFFICIENT DEFENSE PROCUREMENT IN THE EU?

Baudouin Heuninckx*

ABSTRACT. Collaborative programs, those in which a number of states agree to procure the development, production and/or support of a weapon system together, have become a prominent feature of defense procurement in Europe. However, the management structures and legal regimes of such programs are often considered inefficient because of large cost overruns and delays. This paper critically analyzes the process of collaborative defense procurement, in particular how such activities are initiated and managed, and the applicable law in the European Union. On this basis, it makes proposals to increase the efficiency of collaborative programs, essentially by consolidating and streamlining the related management structures and decision-making process. This paper is built around a black-letter analysis of the recent studies and academic publications on the subject, relevant legislation, rules and jurisprudence, and on the wide experience of the author in the management of collaborative programs.

---

* *Dr. Baudouin Heuninckx, Ph.D., D.Sc., LL.M., M.Sc., M.A., MCIPS, is the Head of Aeronautical Programs of the Belgian Armed Forces' Procurement Division and a part-time tutor at the Public Procurement Research Group of the University of Nottingham. His research interests cover European public procurement law and policy, especially in the field of defense, and the law of international organizations. The views expressed in this paper are the author's only.*

INTRODUCTION – THE NATURE OF COLLABORATIVE DEFENSE PROCUREMENT

Defense procurement could be broadly defined as *public procurement performed for the benefit of the armed forces*. Defense procurement activities obviously play a key role in the security of the European Union (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, 2008, Art.346; Trybus, 1999, p.25; Georgopoulos, 2005a; Mezzadri, 2005; Schmitt, 2005; Heuninckx, 2010).

Defense procurement also plays an important economic role in the EU. Defense expenditures of EU Member States amounted in 2010 to about €194 billion. Of that total amount, as shown on Figure 1, about 22% (€43 billion) were used for the procurement of defense equipment and Research and Development (R&D), and about 23% (€44 billion) for operations and maintenance (European Defense Agency, 2011a), a large part of which also find their source in procurement activities (European Commission, 2006b, §1.1.5; Darnis, 2007, p.3).

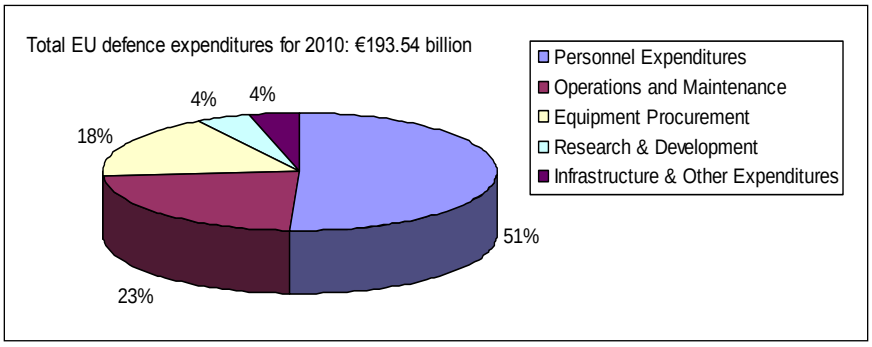

Figure 1: EU Defense Expenditures in 2010

Despite this economic importance, defense procurement is still heavily segmented, much more so than any other sector of public procurement (Schmitt, 2000, pp.79-83; Georgopoulos, 2005a, p.567), and is therefore considered as economically inefficient.

Studies show that 10-30% of the European defense procurement budgets could be saved by a combination of reduced market fragmentation, harmonization of requirements in time and scope, and especially increased efficiency of major procurement programs (European Commission, 1996, §5.54; Trybus, 1996; Dufour, 2005, §6.7).

In an attempt to increase such efficiency, States sometimes resort to *collaborative procurement*, whereby they agree to procure and/or support some expensive defense equipment in common. Within the scope of this paper, collaborative defense procurement is defined by its origin in multinational cooperation leading to the agreement of common requirements among the participating States, and to the collaborative procurement of the weapon system through a procurement agent.

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 standardization of equipments across the participating States, industrial benefits such as technology transfers, and political benefits by helping the participating States foster mutual understanding (Lorell, 1980, pp.1-4; Rich & Stanley, 1981, p.5; Rich & Stanley, 1984, p.1; Covington, Brendley & Chenoweth, 1987, p.30; Bourn, 1991, §1.1; Lorell & Lowell, 1995, p.7; Hayward, 1997; Mawdsley, 2002, p.5; Public Accounts Committee, 2002, §6; Fraser, 2004; Keohane, 2004; Flournoy & Smith, 2005, §6; Darnis, 2007, pp.11-14).

In addition, collaborative procurement allows States to procure military equipment that they would not be able to develop on their own because of insufficient budget and technical or industrial capability (Creasey & May, 1988, p.17; Keohane, 2002, p.39; Maulny, 2006, pp.6-7). In that sense, for smaller States, it is the only procurement alternative that allows both to afford major weapon systems and to influence their specifications.

About 21-27% of the defense equipment procurement and R&D within the EU (about €10 billion) is performed through collaborative efforts each year, as shown on Figure 2 (EDA, 2011).

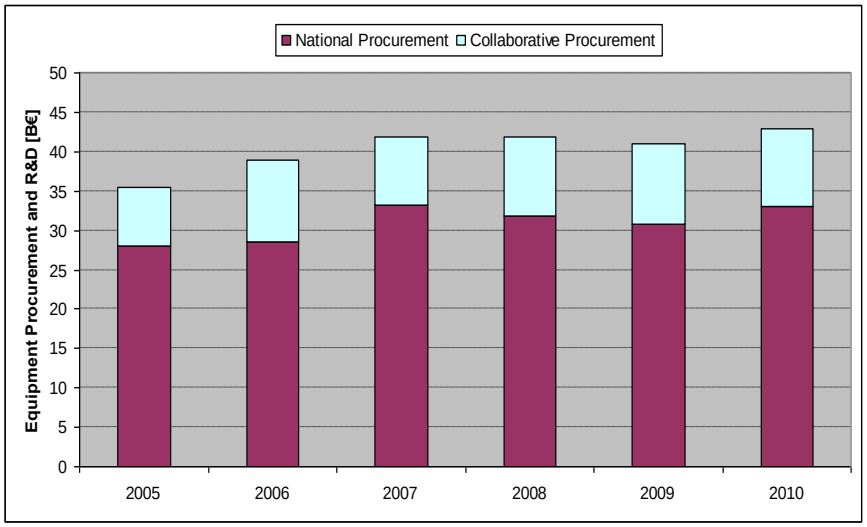

Figure 2: EU Defense Equipment and R&D National/Collaborative Expenditures

However, collaborative programs have not always been successful at increasing the cost-effectiveness of defense procurement. Even though, in a world of drastically reduced defense budgets and increasingly costly and complex military equipments, collaborative defense procurement is, for most European States, the most adequate compromise between an often impossible national development and an off-the-shelf purchase from another country, European collaborative defense procurement suffers from a number of shortfalls (Darnis, 2007, pp.15-27; Heuninckx, 2008a, pp.142-144), which we will discuss in the following sections. Because of those inefficiencies, some have argued that collaborative defense 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 (Kinkaid, 2004; Cox, 2009, pp.5-10).

The main shortfalls of collaborative defense programs seem 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 and work allocation principles of the relevant contracts. All these aspects therefore require improvement if collaborative defense procurement is to deliver its full potential (Maulny, 2006, pp.27-31; Darnis, 2007, p.31; Heuninckx, 2008b, §7).

We will discuss in §3 how collaborative procurement is managed. After this, as the procurement rules applicable to collaborative defense procurement are not entirely clear, and as the very relationship between EU law and these rules seems uncertain (Heuninckx, 2008b, pp.140-142; Heuninckx, 2011b), we discuss in §4 the generic process of collaborative defense procurement and the applicable law in the EU. These sections will allow identifying and analyzing the main issues reducing the efficiency of collaborative programs. On the basis of the previous sections, §5 develops proposals for improving collaborative defense procurement, first to streamline its management, and second to resolve some of the legal issues identified.

1. MANAGEMENT OF COLLABORATIVE DEFENSE PROCUREMENT

1.1. Intergovernmental Cooperation

On the side of the participating States, older collaborative programs were usually managed either through a 'lead nation' (often the United States or France), who would place contracts and manage the program for the benefit of, and in collaboration with, the other participating States, or through a very informal and weak intergovernmental decision-making structure. More recently, the participating States in European programs have opted for a more balanced and slightly stronger management structure based on the allocation of the program management responsibility to an international organization or agency acting as a not-for profit agent under the supervision of the participating States (Covington, Brendley & Chenoweth, 1987, p.30; Creasey, 1988, p.186; Maulny, 2006, pp.19-20).

For that purpose, a number of specialized procurement and management organizations and agencies were created within the

ambit of the North Atlantic Treaty Organization (NATO) and operate in Europe (NATO, 2006, Ch.11 and 42), many of them managing a single collaborative program. Outside NATO, four EU Member States (France, Germany, Italy and the United Kingdom, later joined by Belgium and Spain) founded in 1998 the Joint Organization for Armaments Cooperation (OCCAR), which is an international organization aiming to manage more efficiently collaborative armaments programs and to strengthen the competitiveness of the European defense technological and industrial base (Cardinali, 2004).

More recently, the EU created a European Defense Agency (EDA) to support the EU Member States in their effort to improve the EU defense capabilities in the field of crisis management and to sustain the Common Security and Defense Policy. To that end, the EDA responsibilities cover capabilities development, armaments cooperation, defense industry strengthening, and research and technology (Council Joint Action 2004/551/CFSP, replaced by Council Decision 2011/411/CFSP).

However, most of these initiatives have produced limited results to date (Cox, 1994, p.68; Mawdsley, 2002, p.6; Aalto, 2008, p.14). Even though they do improve the management of collaborative programs after their launch and provide a more stable management structure, they still reflect a piecemeal approach: there are simply too many organizations or agencies managing collaborative defense procurement programs.

In addition, national administrations have up to now been rather unwilling to delegate much management power to the standing administrative bodies of those organizations, preferring instead to closely direct the entity managing the program. It has even been argued that international organizations or agencies managing collaborative defense programs were not procurement agents, as they do not actually make procurement decisions (Taylor, 2003, pp.28-30).

Finally, the allocation of collaborative program management to one or the other international organization or agency has very often been performed spontaneously on an ad-hoc basis, sometimes for political

reasons, but also because no body upstream in the procurement cycle at the European level could develop a common coherent policy on this topic (Schmitt, 2003, pp.25 and 40; Kuelche, 2006, §3.3). This leads to a significant fragmentation of the collaborative programs' management structures.

1.2. Industrial Structure

As for the organizational structure on the side of the participating States, the organization of industry for collaborative programs was originally often fairly informal, and the participating States' management entity sometimes had to manage an important number of contracts to cover the whole program work scope (Covington, Brendley & Chenoweth, 1987, p.30). This increased dramatically the administrative burden, whilst at the same time shifting the risk of inadequate industrial coordination towards the participating States.

Following the evolutions in the intergovernmental management of collaborative procurement, for newer collaborative programs, the European industry now usually creates an ad-hoc consortium or joint venture of which the participating national industries are both shareholders and subcontractors for the development and production of the equipment (Bourn, 1991, §§4.27-4.28). Despite the fact that this usually increases the industrial cohesion and facilitates program management, this also leads to a heavier structure involving sometimes competing companies, and to a related increase in costs and delays (Fraser, 2004; Kuelche, 2006, §3.3). Harmonizing the positions of the participating companies can be as difficult as for the positions of the participating States.

Moreover, work allocation principles at the subcontractor level are usually defined by the participating States on the basis of the *juste retour* principle (principle of fair industrial return) or variations thereof, which can dramatically reduce the efficiency of the supply chain (Rich & Stanley, 1981, p.5; European Commission, 2004, §1). This political principle is used as a guideline by the States participating in a collaborative program in order to define the work allocation rules that will apply to the program. Under this principle, the amount of work allocated to the domestic industry of a participating State is calculated to match as closely as possible the

latter's financial contribution to the program (Bourn, 1991, §§3.32-3.34; Trybus, 1999, pp.39-42; Michel & Rivière, 2005, pp.40-41; Bourn, 2007, pp.20-26). Even though that principle guarantees that the money paid by each participating State flows back to its domestic industry, it also contributes to the preservation of inefficiencies and fragmentation within the defense technological and industrial base. Offset practices and *juste retour* are considered as one of the main obstacles to the creation of a genuine European defense equipment market (European Commission, 2004, §I.3). However, States participating in collaborative programs are often more interested in reinforcing their domestic industrial structure, maintaining employment, and keeping their technological independence than in rendering the European industry as a whole more efficient (Lorell, 1980, p.7; Covington, Brendley & Chenoweth, 1987, pp.59-60).

Collaboration in aeronautical and missile programs has been substantially higher than for major armored vehicles and battleships (Andresson, 2001, p.3). Combined with the facts that the defense equipment market is demand-driven and that the European aeronautical and missiles sectors have now become more integrated than other defense sectors (European Commission, 2003, p.10; Neuman, 2006, p.19), this could be evidence that collaborative procurement actually favors defense industry consolidation and has the potential to reduce the current fragmentation of the European defense industry (Schmitt, 2003, p.10; Georgopoulos, 2005b).

However, this could also show that collaborative procurement, by reducing the number of buyers, drives the European defense equipment market more towards a monopsony or oligopsony (a market form with a limited number of buyers and a potentially high number of sellers), thereby reducing prices closer to the costs of production and forcing suppliers into mergers to form stronger and more efficient companies to compensate this oligopsony power with a monopoly or oligopoly (Trybus, 1999, p.24). Such evolution can create new issues, as the States procuring together would be faced by a limited number of very large companies that could potentially abuse their dominant position on the European market.

2. LEGAL ASPECTS OF COLLABORATIVE DEFENSE PROCUREMENT

2.1. Procurement Process

2.1.1. Requirement Definition and International Agreement

The decision to initiate a collaborative defense procurement program can be initiated in a number of forums. The EDA, as agency of the EU, coordinates a Capability Development Plan (CDP) aiming at providing a systematic and structured approach to the building of the capabilities required by the armed forces of the EU Member States for operations under the European Security and Defense Policy and at assisting EU Member States in developing their national plans and programs. The aims of the CDP were described as identifying priorities for capability development and bringing out opportunities to pool resources and to cooperate (EDA, 2006). As such it is a crucible where possible collaborative procurement programs can be identified (EDA, 2008a; Heuninckx, 2009).

Within NATO, the Conference of National Armaments Directors (CNAD) aims to identify collaboration opportunities and to plan for standardization in the research, development and production of military equipment (Bourn, 1991, §§2.21-2.24; NATO, 2006, p.285). This is another source for possible collaborative procurement programs.

However, the overall achievements of these initiatives have remained limited (Cox, 1994, p.68; Mawdsley, 2002, p.6), even though the EDA, which is a relatively recent institution, has the potential to play a more important role in the future. As a consequence, possible collaboration is also often discussed between States on a case-by-case basis, even though this can also be one of the causes for the limited results achieved by the multinational identification of capabilities requirements.

Once a possible collaborative program has been identified, the participating States start an often protracted process of agreeing common requirements for the weapon system to be procured. This is one of the most complex parts of the collaboration and requires long technical and operational discussions involving military personnel,

subject matter experts, and sometimes consultants and representatives of the defense industry. The harmonization of differing national requirements often leads to equipment that is more complex than it would have been for a purely national program because the resulting product attempts to meet as many as possible of the requirements of each participant (Rich & Stanley, 1984, p.6; Kuechle, 2006, p.34). This increases development costs and sometimes, by implication, the unit price of the equipment.

In parallel with the agreement of requirements for the weapon system, the participating States draft the intergovernmental agreements that will articulate the conditions of their participation in the program. Such intergovernmental agreements usually take the form of one or more Memorandum of Understandings (MOU), a form of 'informal' international agreement concluded between States and governed by international law that is usually considered not to be legally binding (Aust, 2000, Ch.3). Such MOU usually defines the objectives of the program, its phases and schedule, its organizational and management framework, the cost share of each participating State, and the work share rules to be applied for the work allocation to the defense industry (based on some variation of the *juste retrour* principle) (Bourn, 1991, §§3.32-3.34).

These MOU do not always cover the whole program scope, and therefore multiple MOU are required for the development, production (sometimes in different 'tranches') and in-service support phases of the program (Maulny, 2006, p.9). This means that the actual overall commitment of each participating State is not known from the start, and that each phase of the program has to be preceded by negotiations leading to the signature of the new MOU or to an amendment of the previous one. By implication, the industry is contracted only for the phase covered by the current MOU, and new contracts have to be negotiated for each separate phase. This does not allow developing a through-life approach for the management of the weapon system concerned.

In addition, the intergovernmental agreements setting-up the program also appoint the program management agent that will manage the procurement on behalf of the participating States. Even though this agent could be one of the participating States ('lead

nation' concept), we have seen above that it is currently more often an international organization or agency, such as the Joint Organisation for Armaments Cooperation (OCCAR) (Cardinali, 2004), specialized procurement and management agencies created within the ambit of NATO (NATO, 2006, Ch.11, 36 & 42), or potentially the EDA. As mentioned in §3.1, the selection of such agent is usually done spontaneously on an ad-hoc basis, sometimes for political reasons, without any real structured approach. Some hope that the upstream work conducted within the EDA could put some structure into this obscure process (Schmitt, 2003, p.25; Kuechle, 2006, §3.3; Heuninckx, 2008a, p.130).

The agreement of the requirements and the drafting of intergovernmental agreements can cause long delays before the actual launch of a collaborative defense procurement program. Those delays flow from the time needed for setting-up the program arrangement, harmonizing the differing requirements and delivery schedules of the participating States, slow and inefficient decision-making (all participating States must agree and secure the necessary funding at the same time) (Lord Garden, 2004; Hartley, 2006, p.24), accommodating differing national procurement procedures, and agreeing work allocation among the industry of the participating States (Rich & Stanley, 1981, p.41). The delays caused by this preparation phase can indeed be significant, and have been identified as one of the main causes of concern for collaboration (Bourn, 1991, §§3.20-3.22; Hartley, 2006; Kirat & Bayon, 2006, p.115; EDA, 2008b; European Defense Agency, 2008b, Heuninckx, 2008a, pp.133-134; Heuninckx, 2009).

2.1.2. Award of Contract

Once the common requirements of the participating States have been agreed, the intergovernmental agreements finalized, and the program management organization appointed, the collaborative procurement contract can be awarded. In theory, such award should be concluded, after the signature of the necessary intergovernmental agreements, on the basis of the procurement rules of the management organization: either the national procurement law of the lead nation

or the procurement rules of the international organization or agency concerned (Heuninckx, 2011a).

In practice, however, and especially when the program management agent is an international organization or agency, the contract is often negotiated by the participating States in parallel with the definition of their requirements and with the negotiation of the intergovernmental agreements. Once the contract has been finalized, it is simply handed out to be signed by the international organization or agency, which is then only responsible for managing the program, not for the actual procurement. Whatever procurement rules international organizations or agencies dealing with collaborative deference procurement can have, they are therefore rarely applied for the award of collaborative prime contracts (Cornu, 2001, p.79; Schmitt, 2003, fn.62; Arrowsmith, 2005, §6.107; Darnis, 2007, p.33).

In addition, the procurement rules of international organizations or agencies responsible for collaborative defense procurement activities are different for each organization, are little-known by procurement officers and contractors alike and, in the EU, do not always comply with the applicable EU public procurement law (Heuninckx, 2011a, Ch.5). Likewise, the national rules applicable to the approval of collaborative procurement are not harmonized.

2.2. Applicable Law

2.2.1. The Participating States and the Procurement Agent

As we explained above, the legal basis of each collaborative defense procurement program is usually one or more MOU among the participating States that allocates on an ad-hoc basis the management of the collaborative procurement program, sometimes to a lead nation but now more often to an international organization or agency (Schmitt, 2003, p.25; European Commission, 2004, §3.3). The legal status of an MOU can vary from State to State, and the strength of the obligations incurred by each participating State through such MOU is not necessarily clear (Bourn, 1991, §§3.32-3.34; Aust, 2000, Ch.3; Marsia, 2002, p.9).

In the EU, a first question is whether the Member States of an international organization 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 defense procurement programs to such international organization (Arrowsmith, 2005, §§6.180-6.181 and 6.189). One could argue that this decision is a form of outsourcing, the international organization 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.

However, it is likely that the appointment of an international organization or agency as procurement agent would not have to comply with EU public procurement law as long as the participating States exercise, collectively, over the entity concerned, a control which is similar to that which they exercise over their own departments and, at the same time, the organization or agency carries out the essential part of its activities with the controlling States (CJEU Case C-107/98; CJEU Case C-26/03, [49] and [52]; CJEU Case C-84/03, [38]; CJEU Case C-458/03, [62]; CJEU Case C-337/05, [39]-[41]; CJEU Case C-324/07; CJEU Case C-573/07, [36]-[37]; Arrowsmith, 2005, §§6.166-6.172; Wauters, 2009, pp.10-21; European Commission, 2011, §3.2; Heuninckx, 2011a, pp.108-110). Specialized collaborative defense procurement organizations or agencies with no commercial character and of which EU Member States control the decision-making process will in most cases meet this test.

Likewise, the relationship between the participating States in a cooperation based on the 'lead nation' concept would probably not have to comply with EU procurement law. However, the aim of such cooperation may not be to avoid complying with EU law, and such cooperation would not prejudice the conditions of award by the lead nation for any public contract required for the execution of the cooperation (CJEU Case C-480/06, [44] and [48]; Pedersen & Olsson, 2010, pp.42-44; European Commission, 2011, §3.3). This probably means that the lead nation awarding contracts to private undertakings in order to meet its requirements and those of the other

participating States would have to comply with the applicable EU procurement law.

2.2.2. Procurement Law for the Award of Contracts

In the EU, the procurement of military equipment, of works, supplies and services directly related to such equipment during its whole life cycle, and of works and services procured for specifically military purposes, has to comply with Directive 2009/81/EC as amended: the Defense and Security Directive. 'Military equipment' is defined as equipment specifically designed or adapted for military purposes and intended for use as an arm, munitions or war material. Collaborative defense procurement programs are almost always related to such military equipment, so the applicable law would potentially have to be based on the Defense and Security Directive.

However, the applicability of the Defense and Security Directive is subject to a number of exemptions, some of them very relevant to collaborative defense procurement (Heuninckx, 2010, pp.108-114; Heuninckx, 2011b).

First and foremost, the Defense and Security Directive does not apply to contracts awarded in the framework of a cooperative program 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 (Directive 2009/81/EC, Art.13(c) and Recital 28). This exemption would apply to collaborative programs managed by international organizations or agencies, as well as to those managed by a lead nation. However, if the collaborative procurement concerns only off-the shelf military equipment (without any significant R&D), or if an international organization or agency performs procurement on behalf of only one EU Member State, then the exemption would not apply.

Second, the 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 (Directive 2009/81/EC, Art.12(a)). This exemption would clearly apply to collaborative programs managed by a lead nation when such lead nation is a third country (for instance

the United States) and performs the related procurement activities on the basis of its domestic rules. In addition, even though this provision does not explicitly refer to international organizations, considering that international organizations are usually created by an international agreement (American Law Institute, 1987, §221; International Law Commission, 2003, p.38; Schermer & Blokker, 2003, §33-45; White, 2005, pp.1-2; Klabbers, 2006, pp.7-13), this exemption probably also covers contracts awarded through the procurement procedures of organizations of which some Member States are not EU Member States, such as NATO.

Third, the Directive does not apply to contracts governed by specific procedural rules of an international organization purchasing for its purposes, or to contracts which must be awarded by a Member State in accordance with those rules (Directive 2009/81/EC, Art.12(c)). This exemption, would certainly apply to the few (but significant) items of military equipment that are owned and managed directly by international organizations, such as the NATO AWACS (NATO, 2006, Ch.34). In addition, it could be argued that, when one of the functions of an international organization is to perform procurement on behalf of its member States, such procurement would also fall within this exception.

Moreover, the purpose of the Defense and Security Directive is to coordinate national laws, and it is therefore, like the Public Sector Directive, 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 (CJEU Case T-70/05, [126]; CJEU Case T-411/06, [115]). The same reasoning could apply to other international organizations or agencies as well.

On the basis of these exemptions, the Directive would most likely not apply to the procurement activities of international organizations or agencies managing collaborative programs. In addition, it would not have to be complied with by a lead nation managing a collaborative program, except in the rare cases when such lead nation is an EU Member State procuring off-the shelf weapon systems on behalf of the other participating States.

Nevertheless, The Court of Justice of the EU (CJEU) identified procurement principles flowing from the EU Treaties that would have to be complied with even when the Directives do not apply. Those principles include non-discrimination on the grounds of nationality (TFEU, 2008, Art.18) and a positive obligation of transparency that must ensure sufficient advertising to enable the market to be opened up to competition and allow the review of the impartiality of the procurement procedures (CJEU Case 45/87, [16]; CJEU Case C-275/98, [31]; CJEU Case C-324/98, [60]-[62]; CJEU Case C-231/03, [16]; CJEU Case C-260/04, [22]-[24]; CJEU Case C-91/08, [36]; Szydlo, 2009, pp.723-724; European Commission, 2006a; Treumer & Werlauff, 2003, p.126).

However, those principles only apply if the procurement agent qualifies as a public authority, if the procurement concerned has a link with intra-EU trade (CJEU Case C-26/03, [48]-[50]; CJEU Case C-507/03, [25]-[31]; CJEU Case C-412/04, [65]-[66]; CJEU Case C-380/05, [67]; CJEU Joined Cases C-147/06 and C-148/06, [21], [24]-[26]; CJEU Case C-91/08, [34], [47]-[52] and [60]; Wauters, 2009; Sundstrand, 2009, §4; Arrowsmith, 2005, §§4.25 and 4.34), and if the contract is not awarded to an entity over which the public authority exercises a control similar to that which it exercises over its own departments or that does not carry out the essential part of its activities with the controlling authority (CJEU Case C-107/98, [50]; CJEU Case C-26/03, [49]; CJEU Case C-458/03, [62]; CJEU Case C-573/07, [36]-[37]; Arrowsmith, 2005, §§6.166-6.172).

Collaborative defense 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 management agent: those contractors are almost always major defense companies. In any case, the analysis of this evaluation will have to be made on a contract-by-contract basis.

In addition, for the collaborative procurement of major weapon systems, EU Member States routinely invoke the Art.346 TFEU exemption that, in some circumstances, allows a Member State to

avoid complying with EU law in order to protect the essential interests of its security (Maulny, 2006, pp.18-19). If that exemption is successfully invoked, the Member State may derogate from all provisions of EU law, including the EU Treaties principles applying to public procurement as well as the EU Procurement Directives and related national implementing rules (Trybus, 2002; Georgopoulos, 2005a; Heuninckx, 2006). Likewise, the EDA non-binding intergovernmental regime for defense procurement, which the EDA subscribing Member States may apply when they invoke Art.346 TFEU, does not apply to collaborative procurement (Heuninckx, 2008b, p.6).

It has been convincingly argued that, when defense procurement cannot be excluded from the scope of the EU Treaties though the use of the Art.346 TFEU or another exemption, the use of *juste retour* would be *prima facie* in breach of the EU Treaties as a measure having equivalent effect to quantitative restrictions on imports, and would also breach the right of establishment and the freedom to provide services (Trybus, 1999, p.40). As most, if not all, collaborative procurement programs rely on some form of *juste retour*, this means that the Art.346 TFEU exemption must have been invoked by the participating States in each case, either explicitly or impliedly. This means that, if reliance of the exemption complies with the CJEU case law, the relevant collaborative procurement would not have to comply with EU procurement law at all. However, such analysis has to be performed on a case-by-case basis for each collaborative procurement activity.

3. MEASURES TO IMPROVE COLLABORATIVE DEFENSE PROCUREMENT

3.1. Increasing Efficiency

3.1.1. More Integrated Management Structures

Many attempts have been made to rationalize European collaborative defense procurement and make it more efficient (Covington, Brendley & Chenoweth, 1987; Creasey, 1988, p.166; Bourn, 1991, §§2.24-2.27). As explained in §3.1, one of the most important measures

taken was to create stable structures to manage collaborative programs more efficiently and independently. However, there are still too many organizations managing too many similar programs, and this fragmentation hinders the sharing of best practices, especially in agencies that manage only one or two programs. A consolidation of those program management structures would therefore be highly beneficial. Such consolidation would also help create a more coherent legal framework for European collaborative defense procurement (see our discussion in §5.2.1), as each of these organizations currently applies its own procurement rules.

Contrary to the integration of the European defense industry, the integration of such management organizations or agencies would not create a risk of oligopoly power in collaborative program management, as those entities operate on a not-for-profit basis under the direct control of the participating States, and not for commercial gains.

It seems clear, however, that such consolidation has to take into account the current political structure of European defense, which is currently based both on the EU's European Defense and Security Policy and on NATO. This dichotomy is likely to persist, as NATO provides the forum for the involvement of the United States. Some major collaborative procurement programs will most likely continue to require the involvement of the latter, and collaborative defense procurement will continue to be performed within the NATO framework as well as outside it.

Within NATO, the fourteen independent procurement and logistic agencies that have been created over time should be consolidated into a single one where common services such as human and financial resources would be pooled, procurement rules and policies harmonized, and best practices effectively shared. The reform of the NATO agencies currently underway (NATO, 2011) is probably a step in the right direction, but the actual depth of the integration resulting from this reform remains to be seen. To improve the management of collaborative programs within NATO, it has to lead to an actual integration of all procurement agencies.

Outside of NATO, the synergies currently being put in place between the EDA and OCCAR, whereby the EDA would act in the requirements identification and preparation phase and would hand over the resulting collaborative programs to be managed by OCCAR, should be strengthened (Council Decision 2011/411/CFSP, Art.5.3 and 24; European Defense Agency, 2009, p.9). In a further stage, the full integration of OCCAR as the procurement directorate of the EDA should be seriously considered. In addition, the practice of creating ad-hoc program management structures outside those organizations should be entirely discontinued.

3.1.2. Streamlined Decision-Making

In addition to integrating the management structures of collaborative defense procurement, we have also seen in §3.1 that the internal efficiency of those organizations and agencies should be improved, especially to streamline their decision-making process. Requiring unanimity among the participating States for most procurement decisions leads to unnecessary delays, as all the participants must be ready, willing and able to decide the same thing at the same time. This is often not the case, frequently for reasons unrelated to the procurement activity itself (such as upcoming national elections or budgetary constraints).

More power should be delegated to the independent administrative body of the organizations, allowing management agencies to make more procurement decisions without requiring approval of the participating States (Heuninckx, 2011a, p.224). The management agencies should be given clear objectives to be achieved within an approved budget, and the freedom to make the required decisions without being micromanaged by the participating States.

However, the most important procurement decisions would necessarily remain the responsibility of the participating States. For those, decision-making rules where unanimity is not required should be adopted by each organization (the EDA, OCCAR and the NATO agencies) in order to avoid that a single State prevents such decisions from being made.

Of course, no State should be forced into decisions that it cannot fund. In order to build financial safeguards, the decision-making rules of the organization should specify that, as long as the long-term financial impact of a decision, as estimated by the management agency, remains within the budget ceilings defined by each participating State for the program as a whole, a minority of States may not block that decision. On the contrary, if estimates show that its financial ceiling would be exceeded, any participating State could veto a decision.

Even though the States participating in a collaborative program often argue that this type of process would prevent taking into account their peculiar operational requirements, in an international security context where the armed forces of Western States operate together in the same operations, one could question why individual States would have specific requirements that widely differ from those of their partners. Peculiar requirements should be considered during the preparation phase of a program (discussed in §5.1.3) in a transparent process of convergence and harmonization, rather than be a part of a unanimity-based decision-making process.

In addition, program management structures based on international organizations or agencies are generally seen as being heavier than those of a national program. In particular, they are seen as adding an additional administrative burden and cost to collaborative programs, even though they are recognized as being most likely fairer and more efficient than previous structures (Covington, Brendley & Chenoweth, 1987, p.58). However, increased delegation to the administration managing the program, as we advised above, could partially alleviate this burden by allowing reduction in the administrative burden *within* the participating States by, for instance, downsizing the project teams within national ministries of defense.

3.1.3. A More Efficient Preparation Phase

We have seen in §4.1 that most delays in collaborative procurement programs are due to an inefficient preparation phase, during which the intergovernmental agreements setting-up the program and the requirements for the weapon system to be procured are negotiated. Not only do the participating States tend to stick to peculiar national

requirements (European Commission, 2007, p.4), which often find their source in outdated doctrine or in the personal desires of some influential individuals, but they also more often than not are unable to make common decisions at the same time because of incoherent procurement planning (European Commission, 2007, §3.2.1).

These issues have been identified within the EDA, and the latter attempts to resolve them through its Capability Development Plan (EDA, 2006). However, this plan is currently no supranational capability plan aiming to replace national defense plans and programs, but rather only aims to support national decision-making (EDA, 2008a; Heuninckx, 2009). Even though this non-intrusive approach is probably found convenient by the EU Member States, it does not promote enough coherence in capability planning at the EU level. The CDP should indeed become a multinational defense capability planning tool that takes precedence over national planning and ensure the coordination of national defense equipment procurement budgets, so that States participating in collaborative programs can indeed make the same decisions at the same time.

In addition, in order to promote more effective European armaments co-operation, the EDA approved a European Armaments Cooperation Strategy (EDA, 2008b) with three strategic aims: to generate, promote and facilitate cooperative programs early in the life-cycle of the capability requirements on the basis of the CDP; to ensure that the European defense technological and industrial base supports the CDP and future collaborative programs; and to improve the effectiveness and the efficiency of European armaments programs by identifying possible cooperation as early as possible and by rendering the harmonization of the requirements of the participating States more effective. This could be achieved by an improved dedicated preparation phase, by enhancing the working interfaces between the participating States, the EDA and the program management agencies, and by applying best practices in program management. A list of actions was identified against each of the three strategic aims in order to implement the strategy (Heuninckx, 2009).

If such implementation is adequate, the strategy would help enhance the pre-contract award phase of collaborative programs, during which

much of the delays and cost increases are created (Heuninckx, 2008b).

In particular, the harmonization of the operational requirements of the participating States should start as early as possible after the identification of a possible collaborative program during the CDP process in order to ensure early convergence.

Moreover, such harmonization, which is currently usually performed in an informal multinational setting before the program is assigned to the program management agent, should rather be managed within an international organization or agency. In such forum, decisions related to the multinational requirements for the weapon system that cannot be reached through consensus should be made without requiring the unanimity of the participating States (as suggested in §5.1.2) in order to speed-up the harmonization process and to avoid costly peculiar national requirements, unless of course the State concerned is willing to fund such specificities on its own.

Outside NATO, the EDA would be an ideal forum for such harmonization of requirements before the start of the procurement process. The States that would not find their operational needs sufficiently reflected in the resulting multinational statement of requirements would have the option of not participating in the resulting procurement program when the latter starts, presumably within OCCAR.

Unfortunately, the steps taken for the implementation of the strategy, if any, do not seem particularly visible, which is usually not a good sign.

3.1.4. Avoiding Monopoly Creation

We have seen in §3.2 that the concentration of demand on the side of the Participating States could be driving the EU defense market towards a monopsony, thereby forcing prices down, but that the industrial concentration that could follow leads the supply side of the market towards an oligopoly or even a monopoly. Even though this concentration removes one of the main inefficiencies of the defense procurement market, its industrial fragmentation, it creates a new risk of abuse by the European defense industry.

Indeed, in some parts of the European market (for instance for military helicopters or transport aircraft) only a few companies or consortia are able to design and develop new weapon systems. This could put the armed forces of European States in a strong dependency position, especially for the in-service support of the weapon system, whereby a monopolist could demand excessive prices for the support the equipment. Because of the current restrictions in the defense budgets of European States, this attitude puts national security, as well as the life of soldiers, at risk.

The European Armaments Cooperation Strategy introduced in §5.1.3 above mentions the need for the European defense technological and industrial base to supports future collaborative programs. As such, it should lead to a European defense industrial strategy (as suggested in European Commission, 2007), identifying not only critical sectors of the defense industry and options for consolidating them to secure more efficiency, but also how to manage the industrial side of collaborative defense procurement to ensure that sufficient competition is nevertheless maintained.

However, because of the long life of military equipment, this double objective could be difficult to achieve. A company that is not awarded a contract for the development and production of a major weapon system will not be presented again with such an opportunity for decades, and could very well in the meantime decide to abandon the market for such weapon system.

One way this could be prevented would be to ensure that no company participating in a collaborative program incurs losses, even if it is not awarded the contract to produce the weapon system. This would mean that the costs of preparing a bid, which might include significant research and development and prototyping, would be funded by the participating States, an approach that is usual in the United States, but uncommon in Europe. Of course, this would significantly increase the costs of major procurement programs for the participating States, but would provide much-needed investment in European research and development in the field of defense, which is about six times lower than in the United States (European Defense Agency, 2011b, pp.10-11; European Commission, 2007, p.3), that could spur innovation in other fields as well.

However, following the selection of the weapon system by the participating States, the manufacturer will still find itself in a monopoly position for the support of that weapon system. If the in-service support phase is considered independently from the acquisition phase, the original equipment manufacturer can often abuse its monopoly position during the negotiation of in-service support contracts. The negative effects of such monopoly could be limited by adopting a through-life approach to the procurement of major weapon systems. Contracting from the start for the acquisition as well as the in-service support of the weapon system in a through-life fashion would allow competition to be effective at the time of the weapon system selection: the acquisition process would cover not only its development and production, but also its in-service support.

In addition, adopting such through-life approach could dramatically reduce the time spent to transition to the in-service support phase of the weapon system, as no new MOU and contracts would be required for the new phase.

3.2. Legal Improvements

3.2.1. A More Coherent Legal Framework

On the legal front, collaborative programs could be rendered more efficient by a more coherent legal framework. Each international organization or agency performing collaborative defense procurement in Europe (OCCAR, the EDA, as well as the fourteen NATO procurement and logistic agencies) has its own procurement rules (as explained in Heuninckx, 2011a, Ch.5). Even though the procurement laws of the EU Member States are strongly harmonized through the EU procurement directives, we have seen that the latter do not apply to international organizations or agencies performing collaborative defense procurement (see §4.2.2). This results in such organizations applying different contract award processes, industrial return principles, and complaints procedures, and using different forums for adjudicating claims.

Those multiple rules of infrequent use are not necessarily well-known by the staff of the States participating in a program, but also by the procurement personnel of the organizations themselves, who are

usually hired on limited duration contracts. Moreover, the principles of interpretation applicable to domestic procurement law are often not applicable to the rules of international organizations, and the rulings interpreting such rules are often inexistent. This frequently leads to incoherent application of the rules and to legal uncertainty.

Moreover, certain concepts, especially non-discrimination on the basis of nationality, have different meanings depending on the organization or even of the specific program. Very often, procurement rules require non-discrimination against the companies from the States participating in a program or that are Members of the organization concerned. This in fact creates discriminating conditions of access at the European level for those companies originating from States not participating in the program or not Member of the organization.

A more coherent legal framework would by definition flow from the consolidation we advised in §5.1.1, as the number of procurement organizations and agencies, and therefore of applicable procurement rules, would drastically decrease. Even though this consolidation would probably still lead to two pillars for the management of collaborative programs (NATO and the EU), most likely applying different procurement rules, it would still constitute a considerable improvement.

Moreover, increasing compliance with EU law would, as explained in §5.2.2 below, at least ensure that the same principles are complied with for collaborative procurement and that a coherent approach to non-discrimination is applied.

In addition, as we have seen in §4.1.2 that the States participating in collaborative programs in fact prefer not to apply the procurement rules of the management organization or agency when they find it more convenient. Instead, European States should commit to the application of such procurement rules in good faith.

3.2.2. More Compliance with EU Law

As explained in §4.2, even though EU Member States probably do not have to comply with EU public procurement law when tasking an international organization or agency that they control with the

management of a collaborative program, this agent would then have to comply with the procurement principles flowing from the EU Treaties, such as non discrimination, equal treatment and transparency, unless an exemption from EU law, such as Art.346 TFEU, is invoked.

Unfortunately, the procurement rules of the international organizations or agencies concerned are often not entirely in line with the applicable provisions of EU law (Heuninckx, 2011a, Ch.5). Remedying this issue is complex because of the many States and organizations involved. However, complying with EU procurement law would not only ensure that the EU Member States abide by their EU law obligations, but in addition would increase the coherence of the applicable law because the basic procurement principles applied by all international organizations and agencies managing collaborative defense procurement in the EU would be the same.

One could argue that ensuring non-discrimination on the basis of nationality in favor of companies from the EU could create problems for collaborative programs managed by NATO agencies, of which some Members are not EU Member States. Companies from non-EU Member States could be discriminated against. However, EU law does not prevent EU Member States from granting third States equal right of access to defense procurement conducted within NATO. Companies from non-EU Member States participating in a collaborative program would be granted equal access to the procurement, and companies from all EU Member States would be granted the same access.

A commitment to more systematic compliance with EU law would also drastically reduce reliance on the Art.346 TFEU exemption, which is currently relied on for most collaborative defense procurement as a justification for the *juste retour* principle, but which, according to CJEU judgments may only be invoked in exceptional cases. It is not at all certain that such systematic use for collaborative programs could be justified on the basis of the CJEU case law, as the exemption cannot be used in support of aims of a purely economic nature (CJEU Case 36/75, [30]-[32]; CJEU Case C-260/04, [35]; CJEU Case C-54/99, [17]), such as job creation. As this exemption is one of the main sources of economic inefficiencies of collaborative programs,

stricter compliance with EU law is therefore also likely to increase the efficiency of collaborative defense procurement.

4. CONCLUSIONS

Collaborative programs involving a number of participating States have now become a common feature of defense procurement in Europe. About 25% of the defense equipment procurement and R&D within the EU is performed through collaborative efforts each year and, for smaller States, collaboration is the only procurement alternative whereby the State may afford major weapon systems and influence their specifications.

The procurement process for the launch of a collaborative program involves the drafting of intergovernmental agreements (MOU) between the participating States to set-up the principles under which the program will be managed and appoint a procurement agent, the agreement on the requirements and specifications for the weapon system to be procured, and on that basis the award of the contract by the procurement agent, sometimes a lead nation, but more often an international organization or agency.

Even though EU Member States probably do not have to comply with EU public procurement law when appointing an international organization or agency that they control to manage a collaborative program or when the lead nation of a collaborative program is designated, such organization would nevertheless have to comply with the procurement principles flowing from the EU Treaties, such as non discrimination, equal treatment and transparency, and the lead nation would have to apply its domestic procurement law, unless an exemption from EU law is invoked.

Collaborative programs clearly have economic, operational and political benefits, but also suffer from inefficiencies, in particular a complex decision-making structure, difficulties in harmonizing requirements and procurement planning, inefficient work-sharing rules (based in particular on the *juste retour* principle), and an unclear and complex legal framework. Such inefficiencies have to be remedied if collaborative programs are to reach their full potential.

This paper made proposals to that effect. The measures already initiated for the optimization of the procurement structure, based on dedicated program management organizations, have to be improved by the consolidation and reduction of the number of such organizations, and giving their executive agencies more delegation within a streamlined decision-making process moving away from unanimity between the participating States.

In addition, an integrated procurement planning process at the EU level must be applied within the EDA Capability Development Plan, which should become a multinational tool superseding national capability plans. The preparation phase of collaborative programs should be shortened and rendered more efficient, in particular by understanding that national specificities should be kept at a minimal level in drafting specifications.

Regrettably, one of the positive consequences of collaboration, a reduction of the fragmentation of the European defense industrial base by concentration of redundant companies, could lead, in some segments of the market, to the creation of monopoly positions that could be abused to the detriment of national defense budgets, and consequently endangering the operations of European armed forces. This issue has to be taken into account in any defense industrial strategies of the EU. Adopting a though-life approach to the procurement of major weapon systems could also reduce the negative effects of any monopoly position of the prime contractor during the in-service phase of the program.

Finally, improvements should be made to the legal framework of collaborative programs, in particular by ensuring more compliance with EU law, as well as increasing transparency and the coherence of the rules applicable to collaborative procurement, something that should be facilitated by the consolidation of the procurement organizations mentioned above. Compliance with EU law would also reduce reliance on work allocations principles such as *juste retour*, thereby increasing economic efficiency.

Much remain to be done to make collaborative programs fully achieve their potential benefits to defense procurement. However, the measures to be taken principally require that the Member States of

the EU show enough political courage and good faith to initiate the necessary transformation process.

REFERENCES

Aalto E. (2008). "Interpretations of Article 296", in Keohane D. (Ed.), *Toward a European Defence Market* (pp.13-50), Chaillot Paper No 113, Institute for Security Studies

American Law Institute (1987). *Restatement of the Law – The Foreign Relation Law of the United States* (3rd Ed.), American Law Institute Publishers

Andresson J.J. (2001). *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

Arrowsmith S. (2005). *The Law of Public and Utilities Procurement* (2nd Ed.), Sweet and Maxwell

Aust A. (2000). *Modern Treaty Law and Practice*, Cambridge University Press

Bourn J. (1991). *Ministry of Defence: Collaborative Projects*, document 1990/91 HC 247, UK House of Commons

Bourn J. (2007). *Maximizing the Benefits of Defence Equipment Co-Operation*, HC 300 Session 2000-2001, UK National Audit Office

Cardinali N. (2004). "L'OCCAR, un Outil pour les Coopérations Futures en Europe", *CAIA Bulletin* 75, 26-30

CJEU Case 45/87, *Commission v Ireland* [1988] ECR 4929

CJEU Case C-107/98, *Teckal* [1999] ECR I-8121

CJEU Case C-119/06, *Commission v Italy* [2007] ECR I-168

CJEU Case C-231/03, *Coname* [2005] ECR I-7287

CJEU Case C-26/03, *Stadt Halle* [2005] ECR I-1

CJEU Case C-260/04, *Commission v Italy* [2007] ECR I-7083

CJEU Case C-275/98, *Unitron Scandinavia* [1999] ECR I-8291

CJEU Case C-324/07, *Coditel Brabant* [2008] ECR I- 8457

CJEU Case C-324/98, *Telaustria* [2000] ECR I-10745

CJEU Case C-337/05, *Commission v Italy* [2008] ECR I-2173

CJEU Case 36/75, *Rutili v Minister for the Interior* [1975] ECR 1219

CJEU Case C-380/05, *Centro Europa 7* [2008] ECR I-349

CJEU Case C-412/04, *Commission v Italy* [2008] ECR I-619

CJEU Case C-458/03, *Parking Brixen* [2005] ECR I-8585

CJEU Case C-480/06, *Commission v Germany* [2009] ECR I-4747

CJEU Case C-54/99, *Église de Scientologie* [2000] ECR I-1335

CJEU Case C-507/03, *Commission v Ireland* [2007] ECR I-9777

CJEU Case C-573/07, *Sea* [2009] ECR I-8127

CJEU Case C-84/03, *Commission v Spain* [2005] ECR I-139

CJEU Case C-91/08, *Wall* [2010] ECR I-2815

CJEU Case T-411/06, *Sogelma* [2008] ECR II-2771

CJEU Case T-70/05, *Evropaïki Dynamiki* [2010] ECR II-313

CJEU Joined Cases C-147/06 and C-148/06, *SECAP* [2008] ECR I-3565

Cornu C. (2001). "Fortress Europe – Real or Virtual", in Schmitt B. (Ed.), *Between Cooperation and Competition: The Transatlantic Defence Market* (pp.51-92), Chaillot Paper No44, Institute for Security Studies

Covington T., Brendley K. and Chenoweth M. (1987). *A Review of European Arms Collaboration and Prospects for its Expansion under the Independent European Programme Group*, Note N-2638-ACQ, RAND

Cox Andrew (1994). "The Future of European Defence Policy: The Case for a Centralised Procurement Agency" *Public Procurement Law Review* 3(2), 65-86

Cox Antonia (2009). *More bang for the buck – How we can get better value from the defence budget*, Centre for Policy Studies

Creasey P. (1988). "The Options and Prospects for Defence Procurement Collaboration", in Creasey P. and May S. (Eds.), *The European Armaments Market and Procurement Cooperation* (pp.165-192), St.Martin's Press

Creasey P. and May S. (1988). "The Political and Economic Background", in Creasey P. and May S. (Eds.), *The European Armaments Market and Procurement Cooperation* (pp.1-30), St.Martin's Press

Darnis J-P., et al. (2007). *Lessons Learned from European Defence Equipment Programmes*, Occasional Paper N° 69, Institute for Security Studies

Dufour N. et al. (2005). *Intra-Community Transfers of Defence Products*, Unisys, February 2005

European Commission (1996). *Communication from the Commission: 'The Challenges Facing the European Defence-Related Industry, a Contribution for Action at the European Level'*, COM(96) 10, 24 January 1996

European Commission (2003). *Communication from the Commission: 'European defence – industrial and market issues – Towards an EU Defence Equipment Policy'*, COM(2003) 113, 11 March 2003

European Commission (2004). *Commission Green Paper on Defence procurement*, COM(2004) 608, 23 September 2004

European Commission (2006a). *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

European Commission (2006b). *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, 7 December 2006

European Commission (2007). *Communication from the commission: 'A strategy for a stronger and more competitive European defence industry'*, COM(2007) 764, 5 December 2007

European Commission (2011). *Commission staff working paper concerning the application of EU public procurement law to relations between contracting authorities ('public-public cooperation')*, SEC(2011) 1169, 4 October 2011

European Defense Agency (2006). Press Release, *EU Governments Launch New Plan to Build Defence Capabilities for Future ESDP Operations*, 14 December 2006

European Defense Agency (2008a). *Background Note – Capability Development Plan*, 8 July 2008

European Defense Agency (2008b). *European Armaments Co-operation Strategy*, [online], available at http://www.eda.europa.eu/Libraries/Documents/European_Armaments_Cooperation_Strategy.sflb.ashx, [Retrieved on 28 January 2012]

European Defense Agency (2009). *EDA Bulletin*, Issue 12, June 2009

European Defense Agency (2011a). *Defence Data 2010*, [online], available at http://www.eda.europa.eu/DefenceData, [Retrieved on 24 December 2011]

European Defense Agency (2011b). *Europe and United States Defence Expenditure in 2010*, [online], available at http://www.eda.europa.eu/DefenceData, [Retrieved on 24 December 2011]

Flournoy M. and Smith J. (2005). *European Defense Integration: Bridging the Gap between Strategy and Capabilities*, Center for Strategic and International Studies

Fraser S. (2004). "European Defence Equipment Collaboration: A View from the UK Ministry of Defence", *RUSI Defence Systems* 7(1), 16-17

Georgopoulos A. (2005a). "Defence Procurement and EU Law", *European Law Review* 30, 559-572

Georgopoulos A. (2005b). "The Commission's Green Paper on Defence Procurement", *Public Procurement Law Review* 14(2), NA34-NA38

Hartley K. (2006). *The Industrial and Economic Benefits of Eurofighter Typhoon*, University of York

Hayward K. (1997). *Towards a European Weapons Procurement Process – The shaping of common European requirements for new arms programmes*, Chaillot Paper No 27, Institute for Security Studies

Heuninckx B. (2006). "Defence Procurement in the EU: Time to Listen to the Wake-up Calls", *Business Law International* 7(2), 208-225

Heuninckx B. (2008a). "Towards a Coherent European Defence Procurement Regime? European Defence Agency and European Commission Initiatives", *Public Procurement Law Review* 17(1), 1-20

Heuninckx B. (2008b). "A Primer to Collaborative Defence Procurement in Europe: Troubles, Achievements and Prospects", *Public Procurement Law Review* 17(3), 123-145

Heuninckx B. (2009). "The European Defence Agency Capability Development Plan and the European Armaments Cooperation Strategy: Two Steps in the Right Direction", *Public Procurement Law Review* 18(4), NA136-NA143

Heuninckx B. (2010). "Lurking at the Boundaries: Applicability of EU Law to Defence and Security Procurement", *Public Procurement Law Review* 19(3), 91-118

Heuninckx B. (2011a). *The Law of Collaborative Defence Procurement through International Organisations in the European Union*, PhD thesis, University of Nottingham

Heuninckx B. (2011b). "Applicable Law to the Procurement of International Organisations in the European Union", *Public Procurement Law Review* 20(4), 103-122

International Law Commission (2003). *Report of the ILC, 55th Session*, UN Doc. A/58/10

Keohane D. (2002). *The EU and Armaments Co-operation*, Centre for European Reform

Keohane D. (2004). "Why Collaborate in Europe?", *RUSI Defence Systems* 7(1), 15-16

Kinkaid B. (2004). "We Can't Do Collaborative Projects!", *RUSI Defence Systems* 7(1), 12-13

Kirat T. and Bayon D. (2006). *Les Marchés Publics de la Défense – Droit du Contrat Public, Pratique Administrative et Enjeux Economiques*, Bruylants

Klabbers J. (2006). *An Introduction to International Institutional Law*, Cambridge University Press

Kuechle H. (2006). *The cost of non-Europe in the area of security and defence*, European Parliament, DG External Policies, DGExPo/B/PolDep/2005/13

Lord Garden (2004). "We Need Capability Integration – Not Equipment Cooperation", *RUSI Defence Systems* 7(1), 13-14

Lorell M. (1980). *Multinational Development of Large Aircraft: The European Experience*, Paper R-2596, RAND

Lorell M. and Lowell J. (1995). *Pros and Cons of International Weapons Procurement Collaboration*, RAND

Marsia J. (2002). "La Base Légale des Accords de Coopération Internationale pour l'Acquisition de Matériel Militaire", *Bulletin des Anciens* 3, 8-9

Maulny J-P. et.al. (2006). *Cooperative Lessons Learned: How to Launch a Successful Co-Operative Programme*, Final Report for Study 06-EDA-008, IRIS/CER/DGAP/IAI

Mawdsey J. (2002). *The Gap Between Rhetoric and Reality: Weapons Acquisition and ESDP*, Bonn International Center for Conversion

Mezzadri S. (2005). *L'ouverture des Marchés de la Défense: Enjeux et Modalités*, Occasional Paper No 12, Institute for Security Studies

Michel J. and Rivière J. (2005). *Rapport d'Information sur les nouveaux défis de la construction de l'Europe de la defense*, French National Assembly

NATO (2006). *NATO Handbook*, NATO

NATO (2011). *Organizations and agencies*, [online], available at http://www.nato.int/cps/en/natolive/topics_66470.htm, [Retrieved on 28 January 2012]

Neuman S. (2006). *Defense Industries and Dependency: Current and Future Trends in the Global Defense Sector*, International Relations and Security Network

Pedersen K. and Olsson E. (2010). "*Commission v Germany* – a new approach to in-house providing?", *Public Procurement Law Review* 19(1), 33-45

Public Accounts Committee (2002). *Ministry of Defence: Maximising the Benefits of Defence Equipment Co-Operation*, Document number 2001/02 HC 586, UK House of Commons

Rich M., Stanley W. et al. (1981). *Multinational Coproduction of Military Aerospace Systems*, Paper R-2861, RAND

Rich M., Stanley W. et al. (1984). *Cost and Schedule Implications of Multinational Coproduction*, Paper P-6998, RAND

Schermer H.G. and Blokker N.M. (2003). *International Institutional Law* (4th Ed.), Nijhof

Schmitt B. (2000). *From Cooperation to Integration: Defence and Aerospace Industries in Europe*, Chaillot Paper No 40, Institute for Security Studies

Schmitt B. (2003). *The European Union and Armaments – Getting a Bigger Bang for the Euro*, Chaillot Paper No 63, Institute for Security Studies

Schmitt B. (2005). *Defence Procurement in the European Union – The Current Debate*, Institute for Security Studies

Sundstrand A. (2009). "Procurement Outside the EC Directives", conference paper presented at the 4th Public Procurement PhD Conference, Nottingham

Szydlo M. (2009). "Contracts beyond the scope of the EC procurement directives - who is bound by the requirement for transparency?", *European Law Review* 34(5), 720-737

Taylor C. (2003). *UK Defence Procurement Policy*, Research Paper 03/78, UK House of Commons

TFEU (2008). Consolidated Version of the Treaty on the Functioning of the European Union (TFEU), [2008] OJ C115/47

Treumer S. and Werlauff E. (2003). "The leverage principle: secondary Community law as a lever for the development of primary Community law", *European Law Review* 28(1), 124-133

Trybus M. (1996). "Challenges Facing the European Defence-Related Industry – Commission Communication COM(96)08", *Public Procurement Law Review* 5(4), CS98-CS102

Trybus M. (1999). *European Defence Procurement Law – International and National Procurement Systems as Models for a Liberalised Defence Procurement Market in Europe*, Kluwer

Trybus M. (2002). "Procurement for the Armed Forces: Balancing Security and the Internal Market", *European Law Review* 27, 692-713

Wauters K. (2009). "In-house Provision and the Case Law of the European Court of Justice", conference paper presented at the 4th Public Procurement PhD Conference, Nottingham

White N.D. (2005). *The Law of International Organisations* (2nd Ed.), Manchester University Press