

CONTENTS

<i>Acknowledgements</i>	page xvi
<i>Table of Cases</i>	xviii
<i>Table of Legislation and Other Instruments</i>	xxiii
<i>Abbreviations</i>	xliv

Introduction	1
1 Context	1
2 Motivations, Aims and Objectives	4
2.1 External Dimension of EU Defence Procurement Regulation	5
2.2 Legal Aspects of Defence Procurement in Comparative Perspective	6
2.3 Legal Barriers to Transatlantic Defence Trade	10
3 Limitations of Analysis and Qualification of Scope	12
3.1 Contract Formation not Contract Administration	12
3.2 Hard Defence not Security or Dual Use	13
3.3 USA and EU not NATO or Member States	13
3.4 Legal Perspective Rather Than Political or Economic	15
3.5 Limitations of Empirical Evidence	16
4 Chapters in Outline	17
5 Update	18

1 The Transatlantic Defence Market in the Context of Defence Trade Cooperation	20
1 Introduction	20
2 US and European Cooperation in Defence Trade	20
2.1 Re-establishing a European Armaments Industry and NATO	21
2.2 From European Defence Community to European Economic Community	23
2.3 Cooperative Programmes Through NATO	26
2.4 Reciprocal Defence Procurement	27
2.5 Independent European Programme Group	29
2.6 Free Acquisition Markets NATO-wide and Declaration of Principles	33

2.7	Letter of Intent, OCCAR and EDA	38
2.8	Transatlantic Defence Industrial Cooperation	46
3	Demand-side Characteristics of the Transatlantic Defence Market	48
3.1	Sovereignty	48
3.2	Security	51
3.3	Spending	52
4	Supply-side Characteristics of the Transatlantic Defence Market	54
4.1	Structure of the Transatlantic Defence Market	55
4.2	Transatlantic Defence Industry Integration	58
4.2.1	Defence Industry Consolidation	58
4.2.2	Defence Trade Flow	59
4.2.3	Foreign Direct Investment and Foreign Market Presence	63
5	Public Procurement and Procurement Law as Barriers to Defence Trade	66
6	Conclusions	69

Part I

2	Sources of EU Defence Procurement Law	73
1	Introduction	73
2	Primary EU Law: Free Movement of Goods, Establishment and Services	74
3	Limitations on Free Movement: Security Exceptions and Derogations	78
3.1	General Features of Article 346 TFEU	79
3.2	Public Security and Essential Security	81
3.3	Form and Standard of Review	83
4	Interpretations of Article 346 TFEU	85
4.1	Member States	86
4.2	General Court and Court of Justice of the EU	87
4.2.1	Strict Interpretation But Lighter Touch Scrutiny	87
4.2.2	Exports and Essential Security Interests	89
4.2.3	Military use and Strict Justifications Under Procurement Directives	92
4.2.4	Confidentiality Obligations in Relation to Third Countries	95
4.2.5	Derogation to Avoid Dependence on Third Countries	97
4.3	European Commission	99
4.4	European Parliament	102
5	Secondary EU Law: Directives Under the EU Defence Package	103
5.1	Defence Directive	104
5.1.1	Relative Scope	106
5.1.2	Material and Personal Scope	107

CONTENTS

vii

5.1.3	Specifications, Performance Conditions, Security of Information and Supply	109
5.1.4	Procurement Methods	110
5.1.5	Publication, Time-limits, Information Content, Communication and Conduct	114
5.1.6	Subcontracting	114
5.1.7	Remedies	115
5.1.8	Article 346 TFEU	116
5.2	Intra-Community Transfers Directive	117
6	Conclusions	118
3	Excluded Contracts Under the Defence Directive and Cooperative Procurement	121
1	Introduction	121
2	Exclusion from the Directives But Subject to the Treaties	122
2.1	Compliance with EU Principles in Procurement	123
2.2	Member States' Rights and Obligations in Relation to Third Countries	124
2.3	Circumvention of the Defence Directive	125
3	International Agreements and Arrangements	129
3.1	General Scope	129
3.2	International Agreements and Arrangements	130
3.3	Specific Procedural Rules	131
4	International Organisations	133
4.1	General	134
4.2	International Organisations as Contracting Authorities	134
4.3	Exclusion of Exclusive and Mixed Membership Organisations	136
4.4	Purposes of the International Organisation	137
4.5	Contracts Awarded by a Member State	139
4.6	International Organisations as Public Authorities	139
4.7	EDA, OCCAR and NATO	140
4.7.1	European Defence Agency	140
4.7.2	Organisation for Joint Armament Cooperation	141
4.7.3	NATO Agencies	141
5	Cooperative Programmes Based on Research and Development	142
5.1	Personal Scope	144
5.2	Material Scope	144
5.3	R&D for a New Product and Later Phases of the Life Cycle	145
5.4	EU Oversight Through Notification	147
5.5	Defence Directive as a Catalyst for Cooperative Procurement	148
5.5.1	Cooperation to Avoid Compliance with the Defence Directive	148

	5.5.2 Cooperative Procurement Remains Largely Unregulated	151
6	Conclusions	153
4	Third Country Modes of Participation in the EU Market for Defence Procurement	156
	1 Introduction	156
	2 Procurement Directives and Third Country Participation	157
	2.1 EU and Member State Competences in Public and Defence Procurement	158
	2.2 Third Country Provision in the Procurement Directives	160
	2.3 Enabling Direct Third Country Contractor Participation	162
	2.4 Factors Affecting Direct Third Country Contractor Participation	165
	2.5 Treatment of Participating Third Country Contractors	168
	3 Third Country Participation Under National Law After the Defence Directive	169
	3.1 Member States with Major Defence Capabilities	170
	3.1.1 United Kingdom	170
	3.1.2 France	172
	3.1.3 Italy	174
	3.1.4 Spain	175
	3.1.5 Germany	176
	3.2 Member States with Some or More Limited Capabilities	177
	4 Differentiating other Modes of Third Country Access	179
	4.1 EU Subsidiaries	180
	4.2 Subcontractors	181
	4.3 Products of Third Country Origin in Free Circulation	182
	4.4 Teaming Arrangements	184
	5 Third Country Relations in Defence Procurement	186
	5.1 Equalisation of Conditions on Third Country Participation	186
	5.2 Regulating Third Country Access and Treatment	187
	6 Conclusions	191
5	The Defence Directive as a Barrier to Trade with the United States	193
	1 Introduction	193
	2 Technical Specifications	194
	2.1 Emerging Practice in the Use of Technical Standards and Specifications	195
	2.1.1 Standardisation Organisations	196
	2.1.2 Use of Technical Specifications in Practice	197
	2.2 Technical Specifications Under the Defence Directive	199
	2.2.1 Order of Preference	200

CONTENTS

ix

2.2.2	Performance or Function	201
2.2.3	National Defence Standards	203
2.2.4	Equivalence and Interoperability	204
3	Security of Supply	204
3.1	Conceptualisation Under the Defence Directive	205
3.2	Content of Security of Supply Requirements Under the Defence Directive	208
4	Security of Supply and Third Country Export Controls	210
4.1	US Export Control Regulation: International Traffic in Arms Regulations	210
4.2	Security of Supply as a Disguised Market Access Barrier	213
4.2.1	Impact at the Prime or Lower Tiers of the Transatlantic Defence Market	214
4.2.2	Management of Security of Supply Risks	215
4.2.3	ITAR-free and the Defence Directives	216
4.2.4	ITAR as a Justification for Sole Source Procurement	220
4.3	Export Restriction Provisions Under the Defence Directive	224
4.3.1	Ability to Honour Export Obligations	225
4.3.2	Restrictions on Disclosure, Transfer and Use	228
5	Security of Supply and Supply Chain Organisation	229
5.1	Location and Organisation of the Supply Chain	229
5.2	Organisation and Location of Third Country Sources of Supply	230
6	Security of Supply and Guarantees in a Crisis	234
6.1	Guaranteeing Security of Supply	234
6.2	European Security of Supply Arrangements	236
7	Security of Information	240
7.1	General and Specific Provisions	240
7.2	Security of Information as a Disguised Market Access Barrier	242
7.3	EU Security of Information Arrangements	243
8	Conclusions	244

Part II

6	Sources of US Federal Defence Procurement Law	249
1	Introduction	249
2	Federal Statutory and Regulatory Law in the Field of Defence Procurement	250
2.1	Statutes	251
2.1.1	Armed Services Procurement Act	251
2.1.2	Competition in Contracting Act	251
2.1.2.1	Full and Open Competition	252

	2.1.2.2	Exclusion of Sources and Other Than Full and Open Competition	257
	2.2	Regulatory Sources: Federal Acquisition Regulation and Supplements	259
3		Exercise and Oversight of the Procurement Function	260
	3.1	Procurement by the Department of Defense and Military Departments	260
	3.2	Executive and Legislative Oversight of Federal Procurement	262
	3.2.1	Executive Oversight	262
	3.2.2	Legislative Oversight	264
	3.2.3	Administrative and Judicial Oversight	265
4		Conclusions	268
7		Foreign Participation in Open Competition Under US Law	270
	1	Introduction	270
	2	Foreign Competition Rates in Department of Defense Procurement	271
	2.1	General Competition Rates	271
	2.2	Foreign Competition Rates	273
	3	Full and Open Competition Under US Law	276
	3.1	Full and Open Competition	277
	3.2	Discretionary Exclusion of Foreign Competition	277
	3.2.1	No Foreign Personnel Requirements	279
	3.2.2	Facility Security Clearance Requirements	280
	3.2.3	Time Limits Between Request for Proposal Release and Submission	281
	3.3	Technical Specifications	283
	4	Full and Open Competition “Case Study”: KC-X	284
	4.1	Background	285
	4.2	Bid Protest	287
	4.3	GAO Review from a Foreign Contractor Perspective	292
	5	Full and Open Competition After Exclusion of Sources	296
	5.1	Establishing or Maintaining Alternative Sources	297
	5.1.1	Increase or Maintain Competition and Likely Cost Reduction	297
	5.1.2	Interest of National Defence and Industrial Mobilisation	300
	5.1.3	Continuous Availability of a Reliance Source	301
	5.2	Small Business Set-Asides	302
	5.2.1	EU Small Business Set-Asides in Defence Procurement	304
	5.2.2	Subcontracting Under the Defence Directive	305
	5.2.3	Contract Performance Conditions and Social Considerations	307

CONTENTS

xi

5.2.4	EU Small and Medium-sized Enterprises and Subcontracting Policies	308
5.2.5	Transatlantic Reciprocity in Defence Procurement for Small Businesses	309
6	Conclusions	310
8	Non-competitive Procurement Under US Law	312
1	Introduction	312
2	Justifications and Approvals	313
3	Only One Responsible Source	316
3.1	Privately Developed Items and Reasons Connected with Exclusive Rights	317
3.2	Follow-on Contracts and Additional Deliveries	319
3.3	Framework Contracting	320
4	Maintenance of the Industrial Base	324
5	National Security	326
5.1	Class Justifications and Approvals	327
5.2	Competition Failures	328
5.3	National Security Exceptions Under US and EU Law	329
6	Unusual and Compelling Circumstances	331
7	Requirements of International Agreements	333
8	Necessary in the Public Interest	334
9	Conclusions	336
9	US Law on Foreign Acquisition	338
1	Introduction	338
2	Domestic Source Restrictions and Security of Supply	339
2.1	Buy American Act	340
2.1.1	Qualified and Non-qualified Countries Under the Buy American Act	343
2.2	Specialty and Rare Earth Metals	346
2.2.1	Waiver of Specialty Metals Restrictions for Qualifying Countries	346
2.2.2	Strategic Materials Critical to National Security	348
2.2.3	Conceptualising Security of Supply Under EU and US Law	350
2.2.3.1	Security and Economic Reasons	351
2.2.3.2	Protection of Critical Materials Within the EU	353
2.2.3.3	Security of Supply Guarantees	354
3	Trade Agreements and Other International Agreements	355
3.1	Government Procurement Agreement	355
3.2	NATO Cooperative Projects	356
4	Reciprocal Defence Procurement Memoranda of Understanding	357

4.1	Context	358
4.1.1	Procurement Focus is not Exclusive	358
4.1.2	European and NATO Membership is not Exclusive	359
4.1.3	Uncertainty as to the Effects of the RDPs in Practice	361
4.2	Main Provisions	364
4.2.1	Material and Personal Scope	364
4.2.2	Principles Governing Reciprocal Defence Purchasing	364
4.2.3	Regular Discussion of Adverse Effects of Offsets and Other Policies	365
4.3	Implementing Procedures: Procurement	365
4.3.1	General Procedures	365
4.3.1.1	Obtaining Information About Possible Procurement	365
4.3.1.2	Full and Equitable Consideration of all Qualified Sources	366
4.3.1.3	Satisfaction of Requirements	367
4.3.1.4	Offers Evaluated Without Application of “Buy National” Laws	367
4.3.1.5	No Substantive Authorisation to Export Defence Items	367
4.3.2	Procurement Procedures	368
4.3.2.1	Publication of Contract Notices in a Generally Available Periodical	368
4.3.2.2	Content of Invitations to Tender	368
4.3.2.3	Publication of Invitations to Tender in Adequate Time	369
4.3.2.4	Absence of a Distinct Set of Rules Specifically Concerning Award	369
4.3.2.5	Notification of Outcome	370
4.3.2.6	Reasons for Non-award	370
4.3.2.7	Review and Dispute Settlement	371
5	US–UK Defence Trade Cooperation Treaty	373
5.1	Personal and Material Scope	374
5.2	No Export or Transfer Licence for Eligible Items	376
5.3	Oversight and Review	377
6	Conclusions	378
10	Government-to-Government Contracts and Offsets	381
1	Introduction	381
2	Government-to-Government Sales and Offsets in Transatlantic Defence Trade	382
2.1	Government-to-Government Contracts	382
2.2	Offsets	384
2.3	Significance in the Context of Transatlantic Defence Trade	387
3	Government-to-Government Sales Under US and EU Law	392

CONTENTS

xiii

3.1	Foreign Military Sales Under US Law on Foreign Acquisition	392
3.2	Open Competition in US Foreign Military Sales	394
3.3	Sole Sourcing in US Foreign Military Sales	396
3.4	Government-to-Government Contracts Under the Defence Directive	403
3.4.1	General Scope of the Exclusion	404
3.4.1.1	Material Scope	405
3.4.1.2	Personal Scope	406
3.4.2	Provision on Procurement Underlying the Sale	407
3.4.3	Third Country–EU Government Sales and Procurement from Third Countries	408
3.4.4	EU–Third Country Government Sales	413
3.4.5	Award of US Foreign Military Sales Without Recourse to the Exclusion	414
4	Offsets Under US and EU Law	415
4.1	Offsets Under US Law on Foreign Acquisition	416
4.1.1	Offsets Connected with Foreign Military Sales	416
4.1.2	Statutory Obligations to Report Offsets	420
4.2	Offsets Under EU Law	421
4.2.1	Third Country Offset Provision	425
4.2.2	Third Country Offset Receipt	426
4.2.3	Offset Receipt in Government-to-Government Contracts	428
5	Conclusions	429

Part III

11	Regulating Defence Procurement in a Transatlantic Defence Market and Beyond: Plotting a Legal Discourse	435
1	Introduction	435
2	Short-term	437
2.1	Constitutional Features Affecting Defence Procurement Legislation	438
2.2	Legal Conditions Impacting Foreign Access	440
2.2.1	Acquisition Planning	440
2.2.2	Statutory Limitations on Competition	441
2.2.3	Ad Hoc Developments Under National Law Addressing Foreign Participation	442
2.3	Security of Supply Requirements	444
2.4	Security Exceptions	445
2.5	Review and Remedies	446
3	Medium-term	447
3.1	EU Policy on Third Countries in Defence Procurement	447

- 3.2 Reciprocal Defence Procurement Memoranda of Understanding 450
 - 3.2.1 Bilateral Approach to Meeting Transatlantic Defence Trade Objectives 451
 - 3.2.2 Scope 452
 - 3.2.3 Procedural Requirements 452
 - 3.2.3.1 Conditions for Participation 453
 - 3.2.3.2 Justifications for Limited Tendering Procedures 453
 - 3.2.4 Buy American Act Waiver 454
 - 3.2.5 National Security and Other Exceptions 454
 - 3.2.6 Offsets and *Juste Retour* 456
 - 3.2.7 Dispute Settlement 457
- 3.3 US–EU Government-to-Government and Offsets Legal Dialogue 459
 - 3.3.1 Offsets are Economically Efficient and Should be Legally Prohibited 459
 - 3.3.2 The USA and the EU have Explicitly Called for a US–EU Dialogue 462
- 4 Long-term 463
 - 4.1 Extending Bilateral Defence Trade Treaties on a Transatlantic Basis 464
 - 4.2 Transatlantic Defence General Agreement on Tariffs and Trade 466
 - 4.2.1 Rationale 467
 - 4.2.2 Code of Conduct 468
 - 4.2.2.1 Non-discrimination and Transparency in Contract Procedures 469
 - 4.2.2.2 Publication of Contract Notices through a NATO-wide Portal 469
 - 4.2.2.3 Scope of Equipment Covered and Financial Thresholds 470
 - 4.2.2.4 Open Tendering Subject to Exceptions 470
 - 4.2.2.5 Harmonisation of Procedural Rules for Contract Award 470
 - 4.2.2.6 Notification and Debrief 471
 - 4.2.2.7 *Juste Retour* 471
 - 4.2.3 NATO Defence General Agreement on Tariffs and Trade 472
 - 4.2.4 Abandonment and Prospects for Reconsideration 473
 - 4.2.4.1 NATO Code of Conduct 473
 - 4.2.4.2 NATO Transatlantic Defence Trade Treaty 475
 - 4.2.4.3 Lost Opportunity to Examine Legal Obstacles to Transatlantic Trade 480
 - 4.3 Economic NATO: Transatlantic Trade and Investment Partnership 481

CONTENTS

xv

4.3.1	Recent Background to the TTIP Negotiations	481
4.3.2	Initial Inclusion of Defence Procurement Within TTIP	482
4.3.3	Long-term Structures for Coordinating EU and US Defence Procurement Rules	486
4.3.4	Towards a Defence TTIP	487
4.3.5	Defence Procurement and Global Trade Liberalisation	491
5	Conclusions	493
	<i>Index</i>	498