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978-1-107-00250-0 - Buying Defence and Security in Europe: The EU Defence and Security Procurement Directive in Context

Martin Trybus

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## Introduction

Public procurement law regulates the acquisition of goods, services and works by public bodies from the private sector. Objectives of this regulation include the achievement of value for money, transparency, competition, non-discrimination and equal treatment of bidders. Some legal frameworks also aim to promote social and environmental objectives or to fight corruption. Procurement law, inter alia, requires the publication of contract opportunities, prescribes certain award procedures and criteria and provides a review and remedies system for aggrieved bidders. The main objective of EU public procurement regulation is to open the public procurement markets of the Member States, to ensure non-discrimination on grounds of nationality and thus to facilitate the EU Internal Market in public procurement. The EU legislator has passed a set of procurement Directives which had to be transposed into the national laws of the 28 Member States.

While the procurement of sensitive goods, works and services was covered by the legislation since the first procurement Directives of the 1970s, the acquisition of armaments had been left unregulated by a specific instrument at EU level until recently. Many legal, political, economic and historical reasons have been cited for this “gap” in specific regulation: national security, sovereignty in the core area of defence and industrial considerations. Thus while goods and services are subject to the Internal Market and had been covered by Public Sector Procurement Directive 2004/18/EC and its predecessors, in practice the extensive use of a number of derogations, most notably of what is now Article 346 TFEU, had taken most armaments and related services outside the EU’s trade, competition and procurement rules. This resulted in 28 separate defence markets characterised by protectionism, inefficiencies and sometimes corruption, resulting in reduced levels of innovation and competitiveness, high prices and a lack of transparency. Overall, a widespread incomprehension or defiance of the then existing legal framework of defence procurement could be observed. For example, few of the relevant contracts were published in the Official Journal (OJ) of the EU. This does not necessarily mean that defence contracts were not subject to procurement regulation. Contracts were often published but in national or other media, not in the OJ. Contracts were awarded on the basis of prescribed procedures, but not on the basis of the

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EU procurement Directives. Most importantly, these procedures only rarely resulted in the award of a contract to a bidder from another EU Member State.

This situation represented an extensive exclusion from the public procurement regime of the Internal Market in practice because the importance of the defence market to the European economy is considerable. According to 2012 figures of the European Defence Agency, the EU Member States spent €194 billion on defence in 2010. Their total procurement budget for armaments, civil goods, services and works, including operations and maintenance, was estimated at €86 billion<sup>1</sup> and the European defence industries have an annual turnover of €55 billion employing 400,000 people.<sup>2</sup>

Economists have argued that European integration in defence procurement would result in substantial economic benefits, most importantly for the taxpayer through lower equipment prices, for employment through the increased competitiveness of the European industries and for technology innovation as EU capabilities would be preserved.<sup>3</sup> The background to these economic benefits is that an integrated European defence market would allow for economies of scale and learning, greater competition and transparency. Legal analysts generally accept the benefits of European integration in public procurement, though some with certain reservations.<sup>4</sup> Legal writers on defence procurement also expect cost savings and an increased competitiveness of the European

<sup>1</sup> Based on the 26 Member States then participating in the European Defence Agency. The figure is the overall €86 billion figure for procurement and research and development, including €9 billion for the latter, and including 22–23% of the overall €194 billion spent on operations and maintenance, see [www.eda.europa.eu/docs/default-source/news/eu-us-defence-data-2011.pdf](http://www.eda.europa.eu/docs/default-source/news/eu-us-defence-data-2011.pdf) [accessed 28 March 2014]. The overall figure of €194 billion for 2010 is also confirmed in the recent Commission Communication “A New Deal for European Defence: Towards a More Competitive and Efficient Defence and Security Sector”, COM (2013) 542 final, at 7.

<sup>2</sup> 2012 figures of the Commission Staff Working Document on Defence, SWD (2013) 279 final accompanying COM (2013) 542 final, at 32. Up to 960,000 additional indirect jobs are also mentioned citing the 2012 IndustriAll Study on the Perspectives of the European Land Armaments Sector, [www.industriall-europe.eu/sectors/defence/2012/INFF\\_E3779\\_Final%20Report\\_v03-EN.pdf](http://www.industriall-europe.eu/sectors/defence/2012/INFF_E3779_Final%20Report_v03-EN.pdf) [accessed 28 March 2014]. 2007 figures of COM (2007) 764 final, 2 indicate a figure of 300,000; the Communication also points out that 20 years ago these figures were almost twice as high.

<sup>3</sup> See especially Keith Hartley, *The Economics of Defence Policy: A New Perspective* (Abingdon: Routledge, 2011); and “The Future of European Defence Policy: An Economic Perspective” (2003) 14 *Defence and Peace Economics* 107–115. See also the 2006 European Parliament Study, *The Costs of Non-Europe in the Area of Security and Defence* (2006) prepared by Hartmut Küchle of the Bonn International Centre for Conversion (BICC), Bonn, Germany, [www.bicc.de/uploads/tx\\_bicctools/bicc\\_study\\_for\\_ep.pdf](http://www.bicc.de/uploads/tx_bicctools/bicc_study_for_ep.pdf) [accessed 1 November 2013].

<sup>4</sup> See the discussion in the English language public procurement law classics: Sue Arrowsmith, *The Law of Public and Utilities Procurement*, 2nd edn (London: Sweet & Maxwell, 2005), at 119–25; Peter Trepte, *Public Procurement in the EU: A Practitioner’s Guide*, 2nd edn (Oxford University Press, 2007), at 3–5; Christopher Bovis, *EC Public Procurement: Case Law and Regulation* (Oxford University Press, 2006), ch. 1.

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defence industries.<sup>5</sup> Moreover, some military experts expect strategic benefits through the increased interoperability of defence equipment in the context of the UN, NATO and the EU's Common Security and Defence Policy.<sup>6</sup> Finally, anti-corruption experts expect benefits from the transparency and review requirements of the relevant legislation.<sup>7</sup>

In 2009, after years of preparation and discussion, the Defence and Security Procurement Directive 2009/81/EC<sup>8</sup> (hereinafter "Defence Directive") entered into force. It forms part of a wider EU "defence package"<sup>9</sup> and aims to contribute to the establishment of an Internal Market for defence and security goods and services, complementing the EU arsenal of procurement Directives.<sup>10</sup> The Defence Directive regulates the procurement of armaments and other sensitive supplies, services and works by the defence ministries and other relevant contracting authorities and entities of the Member States. As in the other procurement Directives, this covers, inter alia, the precise definition of the goods and services, their publication in the OJ, procurement procedures, the qualification and rejection of bidders and award criteria. It also covers a review and remedies

<sup>5</sup> See especially Aris Georgopoulos, "European Defence Procurement Integration: Proposals for Action within the European Union", PhD Thesis, University of Nottingham (2004); Baudouin Heuninckx, "The Law of Collaborative Defence Procurement through International Organisations in the European Union", PhD Thesis, University of Nottingham and Belgian Military Academy (2011).

<sup>6</sup> See, for example, the welcome address by Jukka Juusti, European Defence Agency Armaments Director, SDR Conference, Tuusula (Finland), 17–18 November 2009, [www.eda.europa.eu/docs/documents/Jukka\\_s\\_SDR\\_opening.pdf](http://www.eda.europa.eu/docs/documents/Jukka_s_SDR_opening.pdf) [accessed 1 November 2013].

<sup>7</sup> Mark Pyman, *Addressing Corruption and Building Integrity in Defence Establishments*, Transparency International Working Paper 02/2007 (Berlin, 2007), [www.ethicsworld.org/publicsectorgovernance/PDF%20links/national\\_defence\\_and\\_corruption.pdf](http://www.ethicsworld.org/publicsectorgovernance/PDF%20links/national_defence_and_corruption.pdf) [accessed 1 November 2013]; Sanjeev Gupta, Luiz de Mello and Raju Sharan, *Corruption and Military Spending*, IMF Working Paper, February 2000, [www.imf.org/external/pubs/ft/wp/2000/wp0023.pdf](http://www.imf.org/external/pubs/ft/wp/2000/wp0023.pdf) [accessed 1 November 2013].

<sup>8</sup> Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, [2009] OJ L216/76.

<sup>9</sup> The EU Defence Package also consists of Directive 2009/43/EC simplifying terms and conditions of transfers of defence-related products within the Community [2009] OJ L146/1 and the Commission Communication "A Strategy for a Stronger and More Competitive European Defence Industry", COM (2007) 764 final. On the initial drafts: P. Koutrakos, "The Commission's 'Defence Package'" (2008) 33 *European Law Review* 1–2.

<sup>10</sup> Apart from the Defence Directive, in 2009 this "arsenal" consisted of Public Sector Directive 2004/18/EC (now replaced by Directive 2014/24/EU [2014] OJ L94/65), the Public Sector Procurement Remedies Directive 89/665/EEC [1989] OJ L395/33, the Utilities Procurement Directive 2004/17/EC [2004] OJ L134/1 (now replaced by Directive 2014/25/EU [2014] OJ L94/243), and the Utilities Procurement Remedies Directive 92/13/EEC [1992] OJ L76/14. Moreover the 2014 reforms added a new Directive 2014/23/EU on concessions [2014] OJ L94/1.

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regime for aggrieved bidders in its Title IV, which for the public sector and utilities is regulated in separate Directives. The Directive is largely based on Public Sector Procurement Directive 2004/18/EC (hereinafter “Public Sector Directive”). However, the latter was adapted to take the specific characteristics of defence and security procurement, its complexity and in particular security of supply and security of information, into account. This was necessary to limit the use of the national security and secrecy and public security derogations in the TFEU, namely Articles 36, 52(1), and especially 346 TFEU, thereby keeping the majority of contracts “inside” the regime of the Defence Directive and the Treaty.

The author conducted extensive research on European defence procurement *before* the topic was subjected to regulation, resulting especially in his monograph *European Defence Procurement Law* (1999)<sup>11</sup> and parts of his monograph *European Union Law and Defence Integration* (2005).<sup>12</sup> This research showed the fragmentation of the European defence equipment market as a result of the legal framework, mainly the Internal Market rules and especially procurement regulation, but also competition law, State aid, merger regulation, intra-Community transfers and exports. It also showed that the Member States followed three different approaches to the national regulation of defence procurement – regulated, semi-regulated and non-regulated – without necessarily always following this regulation in practice. Moreover, the research showed that EU Internal Market law applies to the defence market and that thus the TFEU is an instrument of EU defence integration. The present book is built on this research but provides an analysis of EU defence procurement *after* the introduction of detailed defence and security specific regulation. The project evolved from the entering into force of the Defence Directive in 2009 to *after* its recent transposition in the Member States and *while* these national laws are starting to be implemented (applied) in practice. The book was completed in November 2013, two years after the transposition date, when the stakeholders already had been working in a legal context determined by the new national instruments. However, these dates also imply a limitation of the analysis possible at this stage. While the conception, introduction, substance and transposition of the Defence Directive can already be discussed, there is not yet sufficiently reliable data to analyse the implementation of the instrument in practice.

This book aims to address the crucial question to what extent the legal framework for the defence and security procurement has changed through the introduction and transposition of the Defence Directive. The methodology to answer this question is to provide a critical analysis of the provisions of the Defence Directive and other closely related instruments in their historical, economic,

<sup>11</sup> Martin Trybus, *European Defence Procurement Law: International and National Procurement Systems as Models for a Liberalised Defence Procurement Market in Europe* (The Hague: Kluwer Law International, 1999).

<sup>12</sup> Martin Trybus, *European Union Law and Defence Integration* (Oxford: Hart, 2005).

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political and legal contexts. First, this requires a comparative analysis of the provisions of the Defence Directive with those of Public Sector Directive 2004/18/EC. The Defence Directive was based on Public Sector Directive 2004/18/EC; the latter was adapted to take national security considerations into account. Thus the comparison of the two Directives is the most important element of the analysis. The question of what has changed in the legal framework of defence and security procurement can to a large extent be answered by an analysis of these national security adaptations in the Defence Directive. However, beyond the comparison with the Public Sector Directive, the analysis will at times provide a comparison with other relevant sources, most importantly the Utilities Directive 2004/17/EC, the Procurement Remedies Directives 665/89/EEC and 92/13/EC, the former European Defence Agency Codes of Conduct for Procurement and the Supply Chain,<sup>13</sup> instruments of the Letter of Intent and the former Western European Armaments Group and NATO agencies.<sup>14</sup> The analysis will include a discussion of the impact of these instruments on the Defence Directive and vice versa. This is necessary to assess the change in the legal framework brought about by the Directive since these instruments form or formed part of that framework.

The analysis will not include a discussion of the new Public Sector Directive 2014/24/EU. First, at the time of writing the latter was still very much a “moving target”.<sup>15</sup> Most importantly, the 2004 Public Sector Directive and not the future instrument was the “rock from which the legislator chiselled” the Defence Directive. However, at times reference is made to the new Directive and the new Utilities Directive 2014/25/EU to support an argument that a particular provision of the Defence Directive is specific to that instrument and not a feature of a general trend in EU procurement regulation. Moreover, in principle all the innovations of the new Public Sector Directive 2014/24/EU could be considered in a possible reform of the Defence Directive. However, this should be the subject of a separate publication and is therefore, apart from a few exceptions on procedures in chapter 7, not addressed in this book.

The necessary interpretation of the Defence Directive and the TFEU is also based on a number of relevant Communications (including the consultation of stakeholders before the Directive),<sup>16</sup> the 2007 Impact Assessment of the

<sup>13</sup> See ch. 5.    <sup>14</sup> See ch. 5.

<sup>15</sup> 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 was officially published on 28 March 2014 when this book, completed in November 2013, was already at the proof stage. See, for the changing versions, “Proposal for a Directive of the European Parliament and of the Council on Public Procurement”, COM (2011) 896 final (20/12/2011); Draft Report of the European Parliament of 3/5/2012, at [www.europarl.europa.eu/document/activities/cont/201205/20120521ATT45494/20120521ATT45494EN.pdf](http://www.europarl.europa.eu/document/activities/cont/201205/20120521ATT45494/20120521ATT45494EN.pdf); and quite different: Presidency compromise/consolidated version 24/7/2012, <http://register.consilium.europa.eu/pdf/en/12/st12/st12878.en12.pdf> [accessed 22 November 2013].

<sup>16</sup> COM (1996) 10 final, COM (1997) 583 final, COM (2003) 113 final, COM (2004) 608 final, COM (2005) 626 final, COM (2006) 779 final and COM (2013) 542 final.

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Defence Directive,<sup>17</sup> a set of Commission “Guidance Notes” on several questions of the implementation of the Defence Directive,<sup>18</sup> relevant case law of the ECJ and academic literature. This will allow a perspective of the evolution of the Defence Directive until 2013, from the first proposals of the Commission in the 1990s, the evolving ECJ case law, the consultation with stakeholders of 2004 to 2006, the Proposal of 2007, the legislative process in Council and Parliament in 2008 to 2009 and the transposition from 2011 to mainly 2013.

Moreover, the analysis will include a discussion of the transposition of the Defence Directive in the Member States. In this context reference will be made to the 2012 Commission Transposition Report.<sup>19</sup> However, the analysis will also include relevant provisions of a selection of national laws and regulations of the Member States transposing the Defence Directive. The national laws discussed are the Austrian Federal Procurement Defence and Security Act 2011,<sup>20</sup> the German Competition Act as amended in December 2011<sup>21</sup> and the Defence and Security Procurement Regulation 2012,<sup>22</sup> the Irish European Union (Award of Contracts Relating to Defence and Security) Regulations 2012<sup>23</sup> and the United Kingdom Defence and Security Contracts Regulations 2011.<sup>24</sup> This selection of Member States includes civil law and common law jurisdictions, smaller and larger Member States and NATO and neutral states. This should provide an understanding of the Defence Directive in its various national “incarnations”, which would be enhanced by but does not require a comprehensive discussion of the transposing laws and regulations of all the Member States. The inclusion of a comparative discussion of a selection of national laws transposing the Defence Directive enhances in some cases the understanding of its defence and security adaptations. Some but not all adaptations were transposed into the

<sup>17</sup> Commission Staff Working Document – Impact Assessment SEC (2007) 1593, [http://ec.europa.eu/governance/impact/ia\\_carried\\_out/docs/ia\\_2007/sec\\_2007\\_1593\\_en.pdf](http://ec.europa.eu/governance/impact/ia_carried_out/docs/ia_2007/sec_2007_1593_en.pdf) [accessed 1 November 2013].

<sup>18</sup> On the topics field of application, exclusions, research and development, security of supply, security of information, subcontracting, and offsets, all are available at [http://ec.europa.eu/internal\\_market/publicprocurement/rules/defence\\_procurement/index\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/rules/defence_procurement/index_en.htm) [accessed 22 November 2013].

<sup>19</sup> COM (2012) 565 final.

<sup>20</sup> Bundesgesetz über die Vergabe von Aufträgen im Verteidigungs- und Sicherheitsbereich (Bundesvergabegesetz Verteidigung und Sicherheit 2012 – BVergGVS 2012), BGBl. I Nr. 10/2012.

<sup>21</sup> Gesetz gegen Wettbewerbsbeschränkungen, of 15 July 2005, BGBl. I S. 2114; 2009 I S. 3850, as last amended by Art. 1 and Art. 4(2) of the Law of 5 December 2012, BGBl. I S. 2403.

<sup>22</sup> Vergabeordnung für die Bereiche Verteidigung und Sicherheit – VSVgV, BGBl. I S.1509/2012.

<sup>23</sup> European Union (Award of Contracts Relating to Defence and Security) Regulations 2012, SI No. 62 of 2012.

<sup>24</sup> United Kingdom Defence and Security Public Contracts Regulations 2011, SI 2011/1848.

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national laws. This suggests that not all adaptations were considered necessary, which allows an assessment of their significance.

The book is divided into two parts: Part I on the context of the Defence Directive and Part II on the rules of the Defence Directive itself. Part I is divided into five chapters. Chapter 1 discusses the economic, historical and political background of the Defence Directive, the specific factors of the defence and security sectors that influence defence procurement and its regulation. First, the structure and capacities of the European defence and security industries, both with regards to principal or prime contracts and the supply chain, will be explained. Moreover, special economic characteristics of the defence procurement context that differentiate it from other public sector and utilities procurement – and even security procurement under the Defence Directive – will be addressed. The discussion will distinguish between the armaments producing defence industries on the one hand and providers of non-military security goods and services on the other hand. Secondly, political and strategic factors, such as the different defence policies and ambitions of the EU Member States and the importance of sovereignty will be explained. This includes an introduction to the paramount objectives of national security and secrecy which feature throughout the book. Thirdly and finally, technological and contractual factors of defence procurement having an impact on its regulation, most importantly the long life cycles, the high costs, offsets and the importance of research and development are addressed.

Chapter 2 discusses the legal base of the Defence Directive in the EU Internal Market. Like all EU procurement Directives, the Defence Directive is a secondary EU law instrument with the purpose to amplify and give detail to the primary EU Internal Market regimes of the TFEU. Secondary EU law is legislation created by the relevant EU institutions within the limits authorised by legal bases in the primary TFEU. Directives are to be transposed into the national laws of the Member States, thereby harmonising these laws. The chapter will first discuss the foundations of the Defence Directive in the EU Internal Market regimes of the TFEU, namely the free movement of goods in Article 34 TFEU, the free movement of services in Article 56 TFEU and the freedom of establishment in Article 49 TFEU. This will include a discussion of the relevant regime-specific limitations to these freedoms in the public security dimensions of the derogations in Articles 36 and 52(1) TFEU. Moreover, this will include a discussion of the Internal Market legal bases for the Defence Directive in Articles 53(2), 62 and 114 TFEU.<sup>25</sup>

Chapter 3 discusses the specific national security derogations of the TFEU. As discussed in chapter 2, the Internal Market regimes of the TFEU on the free

<sup>25</sup> In the Preamble of the Defence Directive, before para. 1, still “Articles 47(2) and Article 55 and 95 [EC Treaty]” as the Directive dates from 13 July 2009 and the EC Treaty was replaced by the TFEU on 1 December 2009.

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movement of goods and services apply to armaments and to other security goods and services, subject to narrowly defined and intensely scrutinised public security exemptions. However, with respect to armaments which are not the exclusive subject of the Defence Directive but at its core, and also with respect to secrecy concerns and crisis situations, an additional set of derogations may apply. This chapter will discuss these defence-specific exemptions in the Treaty relating to armaments in Article 346(1)(b), to secrecy in Article 346(1)(a) and to crisis situations in Article 347 TFEU. An understanding of the armaments exemption in Article 346(1)(b) TFEU will be particularly important since the main objective of the Defence Directive is to reduce the cases in which this exemption is used in practice to establish an Internal Market for armaments and other security-sensitive goods and services. Thus this provision is important for the understanding of all other chapters of the book and especially Part II: a book about the Defence Directive is necessarily a book about the armaments derogation in Article 346(1)(b) TFEU. It will be shown that compared to the public security exemptions from the Internal Market regimes of the Treaty discussed in chapter 2, the use of these exemptions can be subject to different pre-judicial and judicial review procedures and to a different standard of review. The purpose of this crucial chapter is to provide an understanding of the scope and interpretation of the fundamental derogation for the TFEU which determined the substance of the Defence Directive discussed in the chapters of Part II almost as much as its Internal Market objectives discussed in chapter 2. Moreover, more specifically it has to be understood as a provision limiting the scope of the Defence Directive discussed in chapter 6.

Chapter 4 discusses the EU Internal Market context of the Defence Directive beyond its legal base and limitations in the TFEU. This includes the secondary trade law regimes which partly amplify and harmonise the primary Internal Market regimes of the TFEU discussed in chapter 2 and partly regulate trade with third countries: customs duties, intra-Community transfers and defence exports. A special emphasis is put on intra-Community transfers, divided into transfers of armaments and dual-use goods due to the particular importance of the former leading to the relevant Intra-Community Transfers Directive being introduced in concert with the Defence Directive, as the second legally binding instrument of the EU “Defence Package”. The regimes on intra-Community transfers, essentially regulating Member State licences of these transfers to other Member States, are also the focus of this chapter since they have a direct impact on the regulation and operation of the Defence Directive, especially with regards to the need for security of supply discussed in chapter 8. This is followed by sections on standardisation, competition (anti-trust) law, merger control and State aid. The chapter concludes with a very brief overview of other relevant Commission initiatives and policies.

Chapter 5 discusses European armaments law and policy beyond the EU Internal Market. European policy on armaments, not the only but the central

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object of the Defence Directive, is not exclusively regulated by the TFEU and the Defence Directive. First, defence procurement and other related issues are addressed as part of a European armaments policy, which is a crucial element of the emerging Common Security and Defence Policy (CSDP), which forms part of the Common Foreign and Security Policy (CFSP) of the EU. In 2005 a European Defence Agency (EDA) was established to manage those parts of the European armaments policy perceived to be outside the scope of the TFEU by the Member States. Until recently that included rules on procurement. Secondly, organisational structures outside the EU addressed the reorganisation and preservation of the European defence industrial base or parts of it as one of their tasks similar to EDA, complementing or competing with the Internal Market regimes and initiatives. The relevant frameworks are the Organisation for Joint-Armaments Procurement (OCCAR) and the Letter of Intent (LoI) which both only include EU Member States. Their initiatives do *not* include rules on defence procurement directed at the Member States. However, they affect various aspects of the Internal Market regime of which the Defence Directive is the most important part. Similar to the EDA regime, these initiatives complement or compete with some of those of the Commission. Furthermore, an understanding of the OCCAR and LoI activities is needed for the discussion of the scope of the Defence Directive in chapter 6: whatever is excluded from the scope of application of the Directive and TFEU can be addressed in frameworks outside the EU Internal Market. Part 6 will discuss how the fragmentation and overlap of these frameworks outlined in the previous parts of this chapter can be overcome. A short discussion of relevant agencies such as the NPSA, NETMA or NEHEMA which are parts of NATO and therefore not “European” organisations, and on some bilateral initiatives, will conclude this last chapter of Part I on the background of the Defence Directive.

Building on the discussion of the context of the instrument Part II of the book provides an analysis of the contents of the Defence Directive itself. Part II is subdivided into five chapters on scope, procedures, security of supply and information, offsets and subcontracting and review and remedies. The EU legislator used Public Sector Directive 2004/18/EC as the “rock from which they chiselled” the Defence Directive. In other words, the latter represents a Public Sector Directive adapted to the special needs of defence and security procurement. The purpose of the adaptations is to avoid Member States derogating from the procurement regime on the basis of Article 346 TFEU, but also Articles 36, 51, 52 and 62 TFEU explained in chapters 2 and 3. The Defence Directive is intended to accommodate most national security needs of the Member States to keep most of their procurement activities inside that Directive (and the TFEU). The most relevant adapted provisions are those on scope (chapter 6), procurement procedures and the situations in which they can be used (chapter 7), specifications and contract performance conditions (chapter 8), the qualification of bidders to ensure their reliability (chapter 8), award criteria determining the eventual

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contractor (chapter 8), offsets and subcontracting (chapter 9) and on review and remedies for aggrieved bidders (chapter 10). As the new instrument takes the specific needs of defence and security into account, recourse to security exemptions should be necessary in fewer situations than under the previous regime. As a consequence, procurement in the relevant areas and especially for armaments should no longer be conducted completely outside the rules of the Internal Market. Thus a Directive “tailored” for defence and security was created.<sup>26</sup> At the same time other objectives of EU public procurement law, such as non-discrimination on grounds of nationality, the equal treatment of bidders, competition, market access and transparency are promoted.

Chapter 6 addresses a crucial issue to be considered at the beginning of any analysis of procurement law, which is its scope or field of application, its coverage. In the context of the EU procurement Directives this concerns the questions of which contracting entities (personal scope) and which of their contracts (material scope) are covered. The latter aspect looks at the contract type, its value and at a number of exceptions. The earlier looks at the legal nature of the entity awarding the contract to a private sector economic operator. The extensive rules on procedures discussed in chapter 7; on specifications and contract conditions, qualification, selection and award criteria discussed in chapter 8; on offsets and subcontracts discussed in chapter 9; and finally on review and remedies discussed in chapter 10, only apply if the entity and contract are within the scope of the Defence Directive. Therefore it is necessary to commence Part II of this book with a discussion of the scope of the new instrument. It will be shown that the legislator adapted the rules on coverage through “limitation”, through higher-value thresholds and most importantly additional and adapted exclusions from the material scope of the Directive.

Chapter 7 discusses the set of procurement procedures of the Defence Directive. Procurement procedures, also called methods of procurement, provide the contracting officer or committee with a legal framework for the acquisition process, from the publication of the contract to the conclusion or making of the eventual contract. It is this procurement phase *strictu sensu*, after the definition of the need and before the contract management or performance phase, which is affected by EU Internal Market law and regulated by the EU procurement

<sup>26</sup> As A. Georgopoulos, “Legislative Comment: The New Defence Procurement Directive Enters into Force” (2010) 19 *Public Procurement Law Review* NA1–3, at NA2 put it, “The new instrument is ... tailor-made for the specific characteristics of the sector.” C. Kennedy-Loest and N. Pourbaix, “The New Defence Procurement Directive” (2010) 11 *ERA Forum* 399, at 403 called the objective “to create a procurement regime that would be ‘fit for purpose’ for the award of defence and security contracts”. The Commission itself called it a “perfectly suited instrument” for defence, see Defence Procurement – Frequently Asked Questions, Brussels, 28 August 2009, Question 2: What are the main innovations of the Directive?: [http://ec.europa.eu/internal\\_market/publicprocurement/docs/defence/faqs\\_28-08-09\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/defence/faqs_28-08-09_en.pdf) [accessed 23 September 2013].