



Introduction

Defence procurement within the European Union (EU) could be broadly defined as the section of public procurement performed for the benefit of the armed forces of the EU member states. Defence procurement therefore covers a wide scope of activities, ranging from the development and production of complex military equipment to the purchase of food and clothing for soldiers in the field. Within this broad definition, the procurement of ‘hard’ or ‘war-like’ defence materiel, such as tanks and missiles, can be subject to specific rules and could be referred to as ‘defence procurement *stricto sensu*’.

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

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

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

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

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

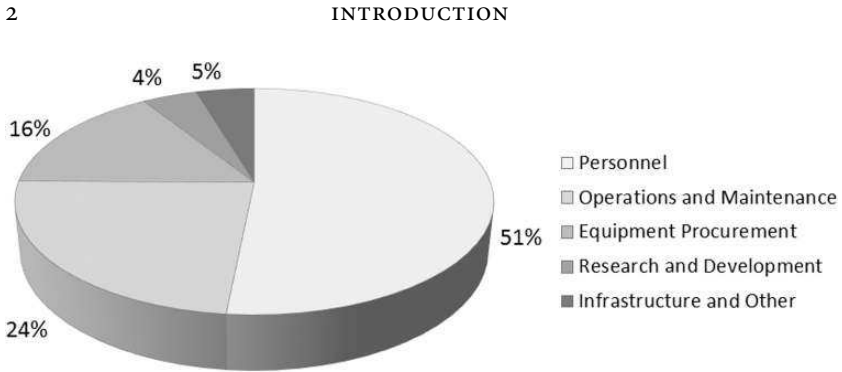


Figure 0.1 Defence expenditures breakdown in the EU for 2005–2013. Source: EDA

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

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

€82 billion, which are likely the sum of the operations and maintenance costs and equipment procurement costs: Commission Staff Working Document accompanying the Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement – Impact assessment, SEC(2006)1554, § 1.1.5.

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

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

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

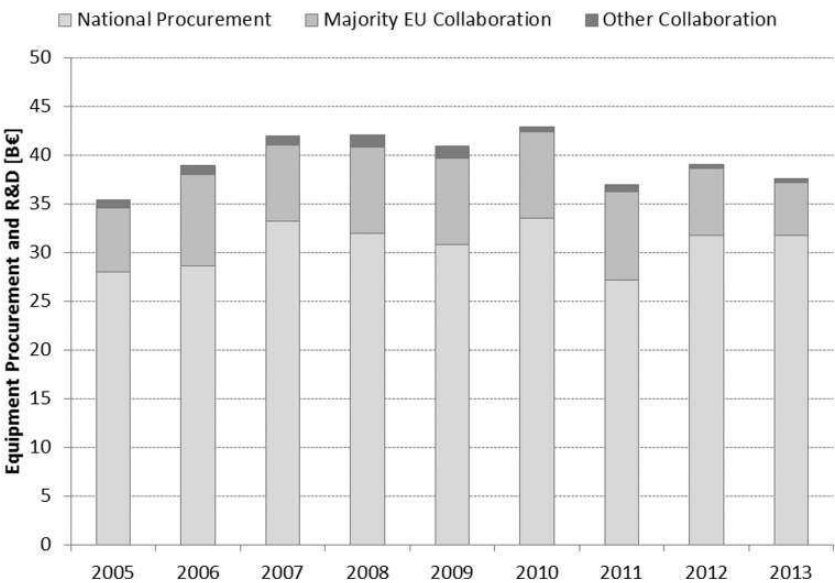


Figure 0.2 Defence equipment and R&D national/collaborative expenditures in the EU for 2005–2013. *Source:* EDA

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

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

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

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

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

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

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

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

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contribution to the programme (cost-share). This principle is a multinational version of offsets, which are discussed in Chapter 1.¹⁰

Another cause of concern is the considerable uncertainty surrounding the law applicable to collaborative defence procurement. The numerous organisations established in Europe to manage collaborative programmes have freestanding procurement rules that are often at variance with EU public procurement law, and the very relationship between EU law and these specific procurement rules seems quite uncertain, especially because those procurement rules are not drafted to transpose the public procurement directives (discussed in Chapter 7) that aim to harmonise the procurement law of the EU member states.¹¹

Collaborative defence procurement programmes are also particularly complex, since they often aim to procure most components of a weapon system: not only the major defence equipment itself, for instance a combat aircraft, but also what is necessary to ensure its operation, for instance spare parts, ground equipment, tooling, technical documentation, ammunitions (missiles, bombs, bullets), training courses for operators and mechanics, simulation and mission support equipment, etc., and this in a multinational context where participating states often have diverging requirements.¹² Because of those issues, some of the expected benefits of collaborative defence procurement are lost.

Over the years, some European states have attempted to take concrete measures to enhance the effectiveness of collaborative defence procurement, in particular through the creation of international organisations aiming at improving the management of collaborative programmes. However, the achievements of these initiatives in improving the efficiency of collaborative defence procurement have remained somewhat limited.

¹⁰ Bourn, *Maximizing the Benefits of Defence Equipment Co-Operation*, pp. 20–26; Michel and Rivière, *Rapport d'Information sur les nouveaux défis de la construction de l'Europe de la défense*, pp. 40–41; Trybus, *European Defence Procurement Law*, pp. 39–42; Bourn, *Ministry of Defence: Collaborative Projects*, §§ 3.32–3.34; Trybus, *Buying Defence and Security in Europe*, pp. 352–354.

¹¹ As explained in Heuninckx, 'A Primer to Collaborative Defence Procurement', pp. 140–142 and in Heuninckx, 'Applicable Law to the Procurement of International Organisations in the EU'.

¹² A weapon system can be defined as 'a combination of one or more weapons with all related equipment, materials, services, personnel, and means of delivery and deployment (if applicable) required for self-sufficiency', NATO Standardization Office, *NATO Glossary of Terms and Definitions*, p. 2-W-2.

There is not much literature on the law applicable to collaborative defence procurement. The issue has been touched in some articles and books,¹³ but no exhaustive research has been performed specifically on this topic. Considering the importance and the potential of collaborative defence procurement in the EU, it would be beneficial, for both practitioners and academics, to clarify the law applicable to that type of procurement. This book therefore examines the extent to which EU law applies or should apply to such procurement activities and critically analyses the organisational structure and regulatory regimes of collaborative defence procurement programmes. On this basis, it makes proposals to improve the legal and management framework of collaborative defence procurement in the EU. Even though this analysis is mainly focussed on legal, organisational and managerial issues, it also touches on some economic and political aspects of collaborative procurement. However, the book does not analyse why some states choose to cooperate more than others and with which other states, or why cooperation is more frequent in some sectors.¹⁴

As such, this book should be used as a reference by practitioners of collaborative defence procurement, but also by policymakers and international organisations as a basis to improve the efficiency of collaborative defence procurement programmes. Because it also analyses collaborative procurement in general terms, this book is also useful to those conducting collaborative procurement activities outside the defence sector. In addition, its analysis of the procurement rules of international organisations makes it a useful tool for those studying international institutional law.

In Part I of the book, we analyse collaborative defence procurement in the EU, highlighting the organisational and legal issues that could hinder cooperation and introducing what we called above the four-layer ‘matryoshka doll’ of legal relationships. Part II describes the legal framework of defence procurement in the EU and the institutional law of international organisations. Those two parts set the stage for the analysis performed in the following parts.

Part III presents some examples of collaborative procurement organisations and of State-to-State cooperation.

¹³ Trybus, *Buying Defence and Security in Europe*; Trybus, *European Defence Procurement Law*, pp. 16 et seq. and 31 et seq.; Trybus, ‘Procurement for the Armed Forces’; Trybus, ‘The New Public Sector Directive and Beyond’; Georgopoulos, ‘The New European Defence Agency’.

¹⁴ On those topics, see Gilli, *Unipolarity, Technological Change and Arms Manufacturing*; Zandee et al., *Internationale Materieelssamenwerking*, Ch. 2.

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The following three parts discuss the three main layers of our legal matryoshka doll: Part IV discusses the law applicable to the decision of a state to participate in a collaborative defence procurement programme and to appoint a specific programme management entity, Part V the law applicable to the relationship between the participating states and with the programme management entity and Part VI the law applicable to the procurement activities of the programme management entity.

On the basis of the conclusions of the previous parts, Part VII looks at how collaborative procurement organisations comply with the applicable law, and Part VIII makes a number of concrete proposals to improve collaborative defence procurement in the EU.