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## Cross-Border Competition in the European Union: Public Procurement and the European Defence Equipment Market

Susan R. Sandler  
*European Union*

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## **CROSS-BORDER COMPETITION IN THE EUROPEAN UNION: PUBLIC PROCUREMENT AND THE EUROPEAN DEFENCE EQUIPMENT MARKET<sup>†</sup>**

**SUSAN R. SANDLER\***

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<sup>†</sup> A previous version of this Article was submitted to the University of Leicester Faculty of Law (Leicester, UK), in January 2007 as a course requirement for the Degree of Master of Laws in European Union Commercial Law. Both European and American spellings for defense (“defence” and “defense”) are used in this Article as appropriate.

\* The author is an attorney licensed in the United States. She holds B.A. and J.D. degrees, as well as an L.L.M. in European Union Commercial Law (With Distinction). She has lived in Africa, Asia, Europe, the Middle East, North America, and the West Indies. Her twenty years of international law and business experience include positions as a corporate attorney in Japan; a lawyer and technical consultant to the U.S. Government on environment, governance, and private-sector reform projects overseas; and as Resident Attorney to the Human Rights Research and Education Centre at the University of Ottawa, Canada, advising on international law, human rights, democracy, and legal reform. In 2007, she worked for the European Commission Directorate-General for Enterprise and Industry’s International Affairs Unit in Brussels. She currently resides in the Middle East and is a consultant on European Union law and EU commercial initiatives in security, defense, and space policy.

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The author may be contacted at [srsandler@gmail.com](mailto:srsandler@gmail.com).

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## INTRODUCTION

For decades, European Union (EU)<sup>1</sup> Member States resisted competitive public procurement. Efforts to protect domestic industries resulted in anti-competitive procurement practices, distorted the Internal Market, compromised procurement integrity, and eroded confidence in public officials. Towards addressing these ills, the European Commission initiated procurement modernization, targeting, *inter alia*, the European defense industrial sector, a sector long known for the glaring absence of procurement integrity.

Until recently, the great potential contribution of competition in the defense sector went unrealized, truncated by the general application of

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1. Although it is common practice to use the terms European Union (EU) and European Community (EC) interchangeably, there is in fact a legal distinction. A detailed explanation may be found in Rafael Leal-Arcas, *EU Legal Personality in Foreign Policy?*, 24 B.U. INT'L L.J. 165 (2007). If the Treaty of Lisbon ultimately enters into force, the term “European Community” will disappear, eliminating this constant source of confusion. All references to the Community will be replaced by the “Union,” “European Union,” and “EU.” Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 2 [hereinafter “Lisbon Treaty”], available at [http://europa.eu/Lisbon\\_treaty/full\\_text/index\\_en.htm](http://europa.eu/Lisbon_treaty/full_text/index_en.htm). A detailed discussion of the Lisbon Treaty, also known as the Reform Treaty, is outside the scope of this Article due to its uncertain status, however, it is discussed *infra*, Part XVIII. A website has been established to facilitate access to Treaty information and current ratification status and news. See EUROPA-Treaty of Lisbon, [http://europa.eu/lisbon\\_treaty/index\\_en.htm](http://europa.eu/lisbon_treaty/index_en.htm) (last visited June 20, 2008) [hereinafter “Lisbon Website”].

Article 296 of the Treaty Establishing the European Community (Article 296).<sup>2</sup> This legislation permitted Member States to derogate from competition rules by declaring specific transactions exempt from competition in order to protect sovereign interests. Member States invoked derogations with such frequency that a reported fifty percent of defense-related procurements were excluded from the Community's Internal Market. This shielded considerable economic activity from competition oversight on national security grounds,<sup>3</sup> which in turn kept the economic benefits of such transactions out of the Internal Market's bottom-line. The result was inefficient public spending, diminished economic opportunity, and, consequently, obstruction of EU economic objectives. Such conditions also facilitated corruption, especially in the defense industrial sector, where transactions were easily protected under the vaguely defined cloak of national security confidentiality.

In 2004, new legislation was adopted to improve cross-border competition in public procurement.<sup>4</sup> Simplified procedures were established to complement transparency, fairness, and non-discrimination initiatives and objectives. E-technology was introduced and has been incorporated to improve procedural consistency, ensure wider and immediate dissemination of procurement information, and track data. In addition, defense was expressly added to the Internal Market's remit.

The European Defence Agency (EDA) was another initiative launched in 2004 to coordinate defense activities. EDA members adopted a Voluntary Code of Conduct on Defence Procurement, effective July 2006. In December 2006, an Interpretative Communication on Article 296<sup>5</sup> was released. This initiative was expected to reduce misapplication of defense procurement derogations, and thus clarify and strengthen European Court of Justice (ECJ) authority over the application of Article 296. Yet it was recognized that the Communication was not enough and that targeted

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2. Treaty Establishing the European Community, Feb. 7, 1992, 1997 O.J. (C 340) 1, amended by Treaty of Amsterdam amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts Nov. 10, 1997, 1997 O.J. (C 340) 1 [hereinafter "EC Treaty"], in which Article 223 was renumbered as Article 296. *See* EC Treaty art. 12 and Annex A (Tables of Equivalences Referred to in Article 12 of the Treaty of Amsterdam). Future references to Article 296 herein will include its previous numbering as Article 223. If the Lisbon Treaty is ratified, the EC Treaty will be renamed "Treaty on the Functioning of the European Union." Lisbon Treaty art. 2(1).

3. Press Release, European Defence Agency, EDA Welcomes European Commission Move on Defence Procurement Rules (Dec. 6, 2005), <http://www.eda.europa.eu/newsitem.aspx?id=29>.

4. *See infra* notes 54–55.

5. *Interpretative Communication on the Application of Article 296 of the Treaty in the Field of Defence Procurement*, COM (2006) 779 final (Dec. 7, 2006) [hereinafter "IC296"].

legislation would still be necessary to guide and govern national procurement procedures for defense goods (arms, munitions, and war material) and services.

From past practice, one might easily have projected that proposals for such legislation would never materialize. Thus it was welcome testimony to the resolve of Member States and relevant interested stakeholders to effect change when a “Defence Package” was adopted by the Commission on December 5, 2007.<sup>6</sup> This “package” consisted of a Communication on defense industries,<sup>7</sup> and two legislative proposals: one for a new defense procurement Directive<sup>8</sup> and one for a Directive on intra-community defense transfers.<sup>9</sup> Thus, just as the EDA materialized quickly, the EU is attempting other expeditious action to strengthen its defense procurement regime.

The new legislation, however, will not be part of the EU’s *acquis communautaire*<sup>10</sup> until the co-decision process is completed<sup>11</sup> and the legislation is adopted by the European Council and Parliament.<sup>12</sup> It is

6. A detailed analysis of the Defence Package is outside the scope of this Article, however, for key points, see *infra* Part XIV. The entire Package can be viewed on EUROPA, Enterprise and Industry, Towards an EU Defence Equipment Policy, [http://ec.europa.eu/enterprise/defence/eu\\_defence\\_policy.htm](http://ec.europa.eu/enterprise/defence/eu_defence_policy.htm) (last visited Mar. 25, 2008). See *infra* note 19 for more information on Commission Directorates-General.

7. Commission Communication, *A Strategy for a Stronger and More Competitive European Defence Industry*, COM (2007) 764 final (Dec. 5, 2007) [hereinafter “2007 Defence Communication”].

8. *Proposal for a Directive of the European Parliament and of the Council on the Coordination of Procedures for the Award of Certain Public Works Contracts, Public Supply Contracts and Public Service Contracts in the Fields of Defence and Security*, COM (2007) 766 final (Dec. 5, 2007) [hereinafter “Defence Directive”].

9. *Commission Proposal for a Directive of the European Parliament and of the Council on Simplifying Terms and Conditions of Transfers of Defence-Related Products Within the Community*, COM (2007) 765 final (Dec. 5, 2007) [hereinafter “Defence Transfer Directive”].

10. “The Community *acquis* is the body of common rights and obligations which bind all the Member States together within the European Union.” EUROPA’s Glossary, Definition of Community *Acquis*, [http://europa.eu/scadplus/glossary/community\\_acquis\\_en.htm](http://europa.eu/scadplus/glossary/community_acquis_en.htm) (last visited June 10, 2008). Countries applying for EU membership must accept the Community *acquis*. Derogations can be granted, but only in exceptional circumstances and with limitations in scope. The applicant must transpose the *acquis* into its national legislation and implement it from the moment of accession. See *id.*

11. A detailed explanation of the co-decision process is outside the scope of this Article, however, a description is available on EUROPA Glossary, Definition of Co-decision Process, [http://europa.eu/scadplus/glossary/codecision\\_procedure\\_en.htm](http://europa.eu/scadplus/glossary/codecision_procedure_en.htm) (last visited June 7, 2008). A co-decision guide can be found at EUROPA, Codecision Step-by-Step Guide, [http://ec.europa.eu/codecision/stepbystep/text/index\\_en.htm](http://ec.europa.eu/codecision/stepbystep/text/index_en.htm) (last visited June 7, 2008).

12. See the legislative status of the two Directives on Europa’s Prelex (legislative tracking) webpages, [http://ec.europa.eu/prelex/detail\\_dossier\\_real.cfm?CL=en&DosId=196507#389808](http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=196507#389808) (last visited June 3, 2008), and [http://ec.europa.eu/prelex/detail\\_dossier\\_real.cfm?CL=en&DosId=196506](http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=196506) (last visited June 7, 2008).

difficult to predict how soon—if ever—this will occur and if so, whether Member States will willingly open their defense-related procurements to stronger scrutiny, or whether past practices intended to evade transparency principles will remain the norm.

Notwithstanding the Defence Package's uncertain fate, it is a welcome prospect; it is well-timed and consistent with Commission promises to address deficiencies in public procurement transparency and procedure in the area of defense. In that respect, it represents a credible initiative toward that objective and is a major step toward achieving a self-sustaining European Defence Equipment Market (EDEM). In addition, even if it is not adopted under co-decision, experience suggests that Member States will rely on elements of the Package to guide decisions with respect to the development of EDEM.

This Article first considers public procurement and competition, highlighting unique issues applicable to a competitive defense equipment market, the need for targeted guidance on defense procurement, and the application of Article 296. After setting the issue in context, consideration will be made of the evolution and the 2004 modernization of public procurement policy. Discussion thereafter will focus on the establishment of a competitive defense equipment market, Article 296, and the Commission's 2006 Interpretative Communication on its application. The main points of the Defence Package will be identified. A commentary with respect to the Treaty of Lisbon is also included. The conclusion will address whether pending procurement initiatives are likely to enhance cross-border competition, particularly with regard to the defense sector.

## I. BACKGROUND—THE PROCUREMENT DIMENSION

In 1957, six European nations<sup>13</sup> agreed that a strong economic union would produce peace in perpetuity. Their agreement, The Treaty Establishing the European Economic Community, or Treaty of Rome (the Treaty), established the European Economic Community (EEC) to increase economic prosperity and create "*an ever closer union among the peoples of Europe.*"<sup>14</sup> The EEC's successor, now the twenty-seven-

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13. Belgium, France, West Germany, Italy, Luxembourg, and the Netherlands.

14. The Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3, pmbl. (emphasis added) [hereinafter "Treaty of Rome" or the "EEC Treaty"]. The Treaty was signed March 25, 1957, and entered into force on January 1, 1958. For a history of integration, see PAUL CRAIG & GRÁININE DE BÚRCA, *EU LAW, TEXT, CASES, AND MATERIALS* 13–53 (3d ed. 2003) [hereinafter "CRAIG & DE BÚRCA"]; ERIKA SZYZCZAK & ADAM CYGAN, *UNDERSTANDING EU LAW* 1–143 (1st ed. 2005).

member European Union (EU),<sup>15</sup> has become a Goliath of a bureaucracy with complex and overlapping economic and regulatory responsibilities for over 495 million Europeans.<sup>16</sup>

The pulse of the EU is its Internal Market, which is the economic area within which Member States function as a single economic entity by facilitating the fundamental freedoms that govern internal movement from one Member State to another: free movement of people, goods, services, and capital.<sup>17</sup> Such a market simplifies life for consumers and businesses, stimulates competition, reduces prices, and widens choices by facilitating the circulation of goods and services and allowing citizens to travel, work, and live in any other EU Member State they choose.<sup>18</sup>

According to Mr. Charlie McCreevy, Commissioner of the Internal Market and Services Directorate-General (DG MARKT),<sup>19</sup> “[a]n efficient Internal Market is essential for a prosperous economic future, for our jobs and our living standards. The way the Internal Market works affects what we pay for goods and services and how we trade in them.”<sup>20</sup> The establishment of the Single Market<sup>21</sup> on January 1, 1993, has resulted in “2.5 million jobs and 877 billion euros of extra prosperity.”<sup>22</sup>

15. EU/EC as discussed in Leal-Arcas, *supra* note 1.

16. Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. Population statistics cited *infra* Table 2 and note 123.

17. A detailed discussion of the fundamental freedoms may be found in CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS* (1st ed. 2004).

18. EUROPA, European Commission, Internal Market, The EU Single Market, [http://ec.europa.eu/internal\\_market/index\\_en.htm](http://ec.europa.eu/internal_market/index_en.htm) (follow link “General Policy Framework”) (last visited Mar. 25, 2008); the Internal Market Mission, [http://ec.europa.eu/dgs/internal\\_market/mission\\_en.htm](http://ec.europa.eu/dgs/internal_market/mission_en.htm) (last visited June 8, 2008).

19. The European Commission’s operations and policies are coordinated among departments called Directorates-General (DGs). DG MARKT coordinates the Commission’s policy on the European Single Market “to ensure the free movement of people, goods, services and capital within the Union.” EUROPA, DG Internal Market & Services, [http://ec.europa.eu/dgs/internal\\_market/index\\_en.htm](http://ec.europa.eu/dgs/internal_market/index_en.htm) (last visited June 10, 2008). “Its central mission is to secure . . . greater European market integration and [remove] obstacles to the free movement of services and capital and to the freedom of establishment.” EUROPA, Commissioner Charlie McCreevy, [http://ec.europa.eu/commission\\_barroso/mccreevy/portfolio\\_en.htm](http://ec.europa.eu/commission_barroso/mccreevy/portfolio_en.htm) (last visited June 10, 2008). For a complete listing of all Commission DGs, see EUROPA, Directorates-General and Services of the Commission, [http://ec.europa.eu/dgs\\_en.htm](http://ec.europa.eu/dgs_en.htm) (last visited June 10, 2008).

20. Commissioner McCreevy Homepage, [http://ec.europa.eu/commission\\_barroso/mccreevy/index\\_en.htm](http://ec.europa.eu/commission_barroso/mccreevy/index_en.htm) (last visited June 4, 2008).

21. The “Single Market” was the phrase used to describe the “Common Market” in the pre-Single European Act stage of the EU. Following that Act, the term fell out of fashion and reference was then made to the “Internal Market” as currently defined in EC Treaty art. 14EC as “an area without internal frontiers” and incorporating the four freedoms. Another term which is often confused with the Internal and Single Markets is the “Common Market,” which is slightly wider in scope than the “Internal Market,” as it includes commercial policy. However, the ECJ seems not to have drawn

Competition is the key to Internal Market success. It protects the Market by facilitating economic prosperity through “peace, security and respect for rights.”<sup>23</sup> Competition challenges competitors to supply reasonably-priced products and services “which other people, other companies, and . . . nations want to buy.”<sup>24</sup> This is achieved through “innovation,” the process of researching and developing (R&D) goods and services. Research converts money into knowledge; innovation converts knowledge into products.<sup>25</sup>

Innovation thus becomes the linchpin of the Internal Market’s economic life-cycle; competition would not exist without it. The EU Presidency<sup>26</sup> has wisely focused on the interrelationship between innovation and competition. Innovation was a priority under the Finnish Presidency in 2006<sup>27</sup> and was an integrated theme in the *18-Month Programme of the German, Portuguese and Slovenian Presidencies*.<sup>28</sup>

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any distinction between the internal and common markets, possibly because both include the four freedoms as their central core. E-mail from A.J. Cochrane, Assoc. Lecturer, University of Derby, UK, (Feb. 7, 2008) (on file with author).

22. EUROPA, DG Internal Market & Services, [http://ec.europa.eu/dgs/internal\\_market/index\\_en.htm](http://ec.europa.eu/dgs/internal_market/index_en.htm) (last visited Mar. 27, 2008).

23. Neelie Kroes, European Comm’r for Competition, Building a Competitive Europe-Competition Policy and Relaunch of the Lisbon Strategy (Feb. 7, 2005), available at EUROPA Press Releases, <http://europa.eu/rapid/searchAction.do> [hereinafter “RAPID”] (search complete database, reference “SPEECH/05/78”).

24. *Id.*

25. Neelie Kroes, European Comm’r for Competition, Innovation from a Business Perspective: the State Aid Aspects (Nov. 17, 2005), available at RAPID, <http://europa.eu/rapid/searchAction.do> (search complete database, reference “SPEECH/05/703”).

26. Per EC Treaty art. 203EC, the Presidency of the Council of the European Union rotates every six months among Member State governments by a pre-agreed rotation decided until 2020. Each Presidency prepares an agenda and establishes priorities for its term. In accordance with a new procedure, Presidencies coordinate as “Trio Presidencies” or “troikas,” which refer to “the three Presidencies due to hold office during [a] given period” of succession, and the new Rules of Procedure that require them to develop, in coordination, eighteen-month work plans for their successive Presidency rotations. See Council Decision 2006/683, 2006 O.J. (L 285) 47 (Euratom), of 15 September 2006, adopting the Council’s Rules of Procedure, replacing Council Decision 2004/338, 2004 O.J. (L 106) 22 (Euratom) 22 March 2004. See also the Rules of Procedure as last amended, Council Decision 2006/34, 2006 O.J. (L 22) 32 (Euratom) of 23 January 2006. For background on Institutions, see CRAIG & DE BÚRCA, *supra* note 14, at 54, 66. The order of the Presidencies may be found in Council Decision 2007/5, 2007 O.J. (L 1) 11 (Euratom), of 1 January 2007, determining the order in which the office of President of the Council shall be held.

27. See Finland’s EU Presidency website, [http://www.eu2006.fi/en\\_GB/](http://www.eu2006.fi/en_GB/) or EUROPA, CORDIS, [http://cordis.europa.eu/finland/presidency/home\\_en.html](http://cordis.europa.eu/finland/presidency/home_en.html) (last visited June 8, 2008).

28. See GERMAN PRESIDENCY, EUROPE—SUCCEEDING TOGETHER: PRESIDENCY PROGRAMME, 1 JANUARY-30 JUNE 2007, [http://www.eu2007.de/includes/Downloads/Praesidentschaftsprogramm/EU\\_Presidency\\_Programme\\_final.pdf](http://www.eu2007.de/includes/Downloads/Praesidentschaftsprogramm/EU_Presidency_Programme_final.pdf); 18-Month Programme of the German, Portuguese and Slovenian Presidencies, [http://www.eu2007.pt/UE/VEN/Presidencia\\_Conselho/PriorPPUE](http://www.eu2007.pt/UE/VEN/Presidencia_Conselho/PriorPPUE) (follow “18 Month Programme” hyperlink); Portuguese Presidency of the Council: A Stronger Union for a Better World, July–December 2007, [http://www.eu2007.pt/UE/VEN/Presidencia\\_Conselho/PriorPPUE](http://www.eu2007.pt/UE/VEN/Presidencia_Conselho/PriorPPUE)



France will hold the next EU Presidency for six months beginning July 1, 2008.<sup>29</sup> It is expected to focus primarily on defense, security, external relations, and the needs of EU citizens.<sup>30</sup> France will work jointly with the Czech Republic and Sweden to establish a viable 18-Month Programme delineating the route on which the EU will embark between July 2008 and the end of 2009.<sup>31</sup>

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(follow “Priorities of the Portuguese Presidency (pdf format)” hyperlink); and the Portuguese Presidency website in general at [http://www.eu2007.pt/UE/vEN/Presidencia\\_Conselho/PriorPPUE/](http://www.eu2007.pt/UE/vEN/Presidencia_Conselho/PriorPPUE/) (last visited Mar. 28, 2008). See also EUbusiness, R&D and Innovation Service–Portuguese Presidency, <http://www.eubusiness.com/Rd/research-portugal.55/> (last visited June 10, 2008); Slovenian Presidency, <http://evropa.gov.si/en/> (last visited June 10, 2008); Programme and Priorities of the Slovenian Presidency, [http://www.eu2008.si/en/The\\_Council\\_Presidency/Priorities\\_Programmes/index.html](http://www.eu2008.si/en/The_Council_Presidency/Priorities_Programmes/index.html) (last visited June 10, 2008). Also see the Slovenian Presidency Program, which refers to “building an innovative and creative knowledge-based society,” as a leading priority under the launch of the new Lisbon Strategy Cycle. Slovenian Presidency Programme: Si.nergy for Europe, January–June 2008, 7, available at [http://www.eu2008.si/includes/Downloads/misc/program/Programme\\_en.pdf](http://www.eu2008.si/includes/Downloads/misc/program/Programme_en.pdf).

29. The French Presidency website will be fully operational around July 1, 2008. The French Presidency of the Council of the European Union 2008, [http://www.ue2008.fr/index\\_en.html](http://www.ue2008.fr/index_en.html) (last visited June 20, 2008).

30. Out of concern not to derail the Lisbon Treaty ratification, France attempted to keep a low profile with respect to its own 2008 Presidency objectives during the Slovenian Presidency. This strategy may have ultimately backfired as the small margin of victory by the Irish “no” camp was likely influenced by low voter turnout, which reportedly contributed to a rejection of the Treaty on June 12, 2008. Some felt that France intentionally withheld information on a defense “blueprint” so voters could not factor it into their voting decision. See Teresa Küchler, *Irish ‘No’ Camp Says Paris Hiding Plans for EU Defence*, June 11, 2008, available at <http://euobserver.com/9/26305> (last visited June 15, 2008).

This Article went to print before the French Presidency began, but as the rotation date nears, French priorities are being identified. See France Seeks to Revitalise European Defence, EURACTIV.COM, June 6, 2008, <http://www.euractiv.com/en/opinion/france-seeks-revitalise-european-defence/article-173103?Ref=RSS>; France Readies for “Heaviest Presidency in EU History,” EURACTIV.COM, June 2, 2008, <http://www.euractiv.com/en/opinion/france-readies-heaviest-presidency-eu-history/article-172884>. France Diplomatie reported the four French Presidency priorities as (1) energy-climate package and EU energy policy, (2) migration, (3) European security and defense, and (4) Common Agricultural Policy. French Ministry of Foreign and European Affairs, Conference of the Committee Chairmen of the European Parliament (Strasbourg, May 20, 2008), [http://www.diplomatie.gouv.fr/en/european-union\\_157/european-meetings\\_882/french-presidency-of-the-european-union-second-half-2008\\_6090/conference-of-the-committee-chairmen-of-the-european-parliament-20.05.08\\_11269.html](http://www.diplomatie.gouv.fr/en/european-union_157/european-meetings_882/french-presidency-of-the-european-union-second-half-2008_6090/conference-of-the-committee-chairmen-of-the-european-parliament-20.05.08_11269.html); OPEN EUROPE, BRIEFING NOTE: THE FRENCH EU PRESIDENCY 2008—WHAT TO EXPECT (Mar. 25, 2008), available at <http://www.openeurope.org.uk/research/frenchpresidency.pdf> (last visited June 10, 2008); *France Outlines EU Presidency Priorities*, EURACTIV.COM, Aug. 30, 2007, <http://www.euractiv.com/en/future-eu/france-outlines-eu-presidency-priorities/article-166313>; Honor Mahony, *France Steals Slovenia’s EU Presidency Limelight*, EUOBSERVER.COM, Jan. 14, 2008, <http://euobserver.com/9/25452>.

31. As of June 10, 2008, the troika’s program had not been officially released. Media sources identified troika priorities as “the development of the EU, the energy and climate policies, growth and employment, general economic issues, competitiveness, gender equality, research and innovations, health and consumers, culture, sustainable development, the environment, transport, agriculture and fishing, cohesion policy, freedom and security, and justice and external relations.” *Czechs, French, Swedes Agree on EU Presidency Programme*, ČESKÉ NOVINY, <http://www.ceskenoviny.cz/news/>

Innovation features prominently within the Seventh Framework Programme (FP7),<sup>32</sup> and is considered vital for successful implementation of the renewed Lisbon Strategy to place jobs and growth at the forefront of European political priorities.<sup>33</sup>

Industry is responsible for innovation's creative process<sup>34</sup> as it is more easily adaptable to shifting consumer desires. Conversely, removing barriers that discourage innovation is the responsibility of public authorities.<sup>35</sup> Industry assumes the financial risk inherent in R&D—the

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index\_view.php?id=314921. See also Rob Cameron, *Czech, French, Swedish Ministers Meet in Prague to Discuss Shared EU Agenda*, May 27, 2008, <http://www.radio.cz/en/article/104464> (last visited June 10, 2008). Most of these items will be addressed despite the Lisbon Treaty rejection.

32. See generally CORDIS, [http://cordis.europa.eu/fp7/home\\_en.html](http://cordis.europa.eu/fp7/home_en.html) (follow links to "Cooperation, Capacities, People and/or Ideas"). See also CORDIS, *Understand FP7, The Main Objectives of FP7: Specific Programmes*, [http://cordis.europa.eu/fp7/understand\\_en.html](http://cordis.europa.eu/fp7/understand_en.html). (last visited June 3, 2008); EUROPA, *Innovation Policy in Europe*, especially *Innovation Policy Framework* at [http://ec.europa.eu/enterprise/innovation/index\\_en.htm#1](http://ec.europa.eu/enterprise/innovation/index_en.htm#1); Commission Communication, *Towards an Increased Contribution from Standardisation to Innovation in Europe*, COM (2008) 133 final (Mar. 11, 2008), available at [http://ec.europa.eu/enterprise/standards\\_policy/standardisation\\_innovation/doc/com\\_2008\\_133\\_en.pdf](http://ec.europa.eu/enterprise/standards_policy/standardisation_innovation/doc/com_2008_133_en.pdf); *Commission Recommendation on the Management of Intellectual Property in Knowledge Transfer Activities, and Code of Practice for Universities and Other Public Research Organizations*, COM (2008) 1329 (Apr. 10, 2008), available at [http://ec.europa.eu/invest-in-research/pdf/ip\\_recommendation\\_en.pdf](http://ec.europa.eu/invest-in-research/pdf/ip_recommendation_en.pdf).

33. See, e.g., Commission Communication, *Implementing the Renewed Lisbon Strategy for Growth and Jobs: "A Year of Delivery,"* COM (2006) 816 (Dec. 12, 2006), available at EUROPA, [http://ec.europa.eu/growthandjobs/pdf/1206\\_annual\\_report\\_en.pdf](http://ec.europa.eu/growthandjobs/pdf/1206_annual_report_en.pdf) (annex available at [http://ec.europa.eu/growthandjobs/pdf/1206\\_annual\\_report\\_annexe\\_en.pdf](http://ec.europa.eu/growthandjobs/pdf/1206_annual_report_annexe_en.pdf)). One must not underestimate the utility and importance of innovation to EU operations and future policy. See EUROPA Information Society, *Mastering ICTs [Information and Communication Technologies] to Promote Innovation*, [http://ec.europa.eu/information\\_society/research/index\\_en.htm](http://ec.europa.eu/information_society/research/index_en.htm) ("[W]hile the ICT sector is itself worth 6–8% of the EU's GDP, ICTs are much more important than that figure suggests, playing a key role in everything from promoting innovation throughout the economy to meeting the demographic challenge of an aging society."). See EUROPEAN COMMISSION INFORMATION SOCIETY AND MEDIA DIRECTORATE-GENERAL, *THE FUTURE OF THE INTERNET: A COMPENDIUM OF EUROPEAN PROJECTS ON ICT RESEARCH SUPPORTED BY THE EU 7TH FRAMEWORK PROGRAMME FOR RTD* (May 28, 2008); available at [http://ec.europa.eu/enterprise/newsroom/cf/itemlongdetail.cfm?item\\_id=1537](http://ec.europa.eu/enterprise/newsroom/cf/itemlongdetail.cfm?item_id=1537) (last visited June 3, 2008) (presenting seventy public-private partnership projects—worth nearly €300 million of EU research investment, with an additional €200 million from academia and industry—addressing the key challenges for the development of the Future Internet). See also Memorandum, *Lisbon Strategy for Growth and Jobs: Frequently Asked Questions—Background* (Dec. 10, 2007); available at RAPID, <http://europa.eu/rapid/searchAction.do> (search complete database, reference "MEMO/07/557").

34. See generally Commission Communication, *Putting Knowledge into Practice: A Broad-Based Innovation Strategy for the EU*, COM (2006) 502 final (Sept. 13, 2006). See also Progress Report (Mar. 2008) on the Broad-Based Innovation Strategy, available at [http://ec.europa.eu/enterprise/innovation/doc/bbi\\_strategy\\_progress\\_report\\_march\\_2008.pdf](http://ec.europa.eu/enterprise/innovation/doc/bbi_strategy_progress_report_march_2008.pdf).

35. *Id.* at 12. The critical role played by public authorities in removing barriers is not to be overlooked when factoring in the "take-up" of new products to market. Initiatives to promote new technology must also balance and support more traditional innovation. Note the establishment of the new European Institute of Innovation and Technology (EIT) on March 11, 2008. The EIT's recently activated website can be viewed at EUROPA, [http://ec.europa.eu/eit/mission\\_en.htm](http://ec.europa.eu/eit/mission_en.htm). For explanatory background, see *Unlocking Europe's Potential for Innovation: EP Vote Gives Green Light to the European Institute of Innovation and Technology (EIT)* (Mar. 11, 2008), available at RAPID,

production of tempting products and services without any guaranteed return on the investment cost that must be expended in the development of innovation.

Consumers perform a role as well. In fact, they are the ultimate “producers” of competition. Consumer preferences and acquisition choices stimulate innovation. Thus “acquisition” is the objective for both sides, and a clear benchmark by which to measure innovative success. From the industrial perspective, acquisition is an objective. Attracting, convincing (conceivably the point at which acquisition of a good or service occurs), and retaining customers become not only key objectives but pillars that strengthen the competitive environment and create the economic incentive to innovate.

EU Member States are insatiable consumers acquiring their many goods and services in great and growing part through public procurement. Public procurement as a process is meant to ensure that many different entities of all sizes receive equal treatment during the tender process to supply goods and services. Procurement itself is based on fundamental principles of competition<sup>36</sup> and it is a key driver of EU innovation.<sup>37</sup> An example of the important status that the Commission bestows on the relationship between innovation and public procurement is the Commission’s newly minted 2007 *Guide On Dealing with Innovative Solutions in Public Procurement, 10 Elements of Good Practice*,<sup>38</sup> which is basically a guide comprising good practices focusing on the integration of technology requirements into tendering procedures. Since public procurement represents over thirty percent of Member States’ budget expenditures and has as its objectives the efficient acquisition of supplies, services, and public works “on the best possible terms,”<sup>39</sup> “public

<http://europa.eu/rapid/searchAction.do> (search complete database, reference “IP/08/414,”) and Memorandum, The EIT: Frequently Asked Questions (FAQs) (Mar. 11, 2008), *available at* [RAPID](http://europa.eu/rapid/searchAction.do), <http://europa.eu/rapid/searchAction.do> (search complete database, reference “MEMO/08/153”). “The Community contribution to the EIT will amount to €308.7 million for the 2008–2013 period.” European Institute of Innovation and Technology, Frequently Asked Questions on the EIT, at FAQ #5, *available at* [http://ec.europa.eu/eit/faq\\_en.htm](http://ec.europa.eu/eit/faq_en.htm).

36. EUROPA, *Public Procurement: Introduction*, <http://europa.eu/scadplus/leg/en/lvb/l22007.htm>.

37. COM (2006) 502, *supra* note 34, at 11–13, 17, which recognizes procurement as an innovation stimulant and a particularly high political priority of the Lisbon Strategy for Growth and Jobs.

38. PRO INNO EUROPE, *GUIDE ON DEALING WITH INNOVATIVE SOLUTIONS IN PUBLIC PROCUREMENT, 10 ELEMENTS OF GOOD PRACTICE (2007)* (Commission Staff Working Document, 2007) [hereinafter “The 2007 Guide”], *available at* [http://www.proinno-europe.eu/doc/procurement\\_manuscript.pdf](http://www.proinno-europe.eu/doc/procurement_manuscript.pdf).

39. MARTIN TRYBUS, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

purchasers must become ‘intelligent customers’ who plan what to buy, how to buy it and who will buy it.”<sup>40</sup> The Guide will facilitate the process.

The Commission continues to reinforce the notion of “[p]ublic procurement [as] a key-driver for innovation in Europe.”<sup>41</sup> In May 2008, a public consultation was launched “on the establishment of procurement networks to stimulate innovation in key areas identified under the Lead Market Initiative.”<sup>42</sup>

The aforementioned objectives for strengthening procurement are realistic provided that the procurement process is characterized by integrity. Procurement integrity is lacking, however, when Member States conspire to create a closed procurement environment by guarding their vested economic or political interests and restricting access to procurement opportunities, thus avoiding competition.

Closed procurement environments reward local producers by favoring them in procurement awards and rewarding them with the business this generates. Such a special status gives local producers preferred access to a system that does not require them to compete or abide by rules of fairness and transparency of procedure required of bidders who play by the book in an open environment. Such preferential treatment creates a disincentive for those preferred parties who cease to innovate, invite, or compete in foreign tenders. It thus stunts the process, restricting natural market development. Without any market incentives, prices exceed competitive levels.<sup>43</sup> A healthy competitive environment prevents the entrenchment of vested interests by increasing available choices, reducing prices, facilitating

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(OECD), NEW SIGMA STUDIES ON PUBLIC PROCUREMENT IN THE EU OF 27 (Update Mar. 12, 2006), <http://www.oecd.org/dataoecd/4/6/36361218.pdf> [hereinafter “OECD/SIGMA”] (last visited June 3, 2008).

40. COM (2006) 502, *supra* note 34, at 11. *See also* The 2007 Guide, *supra* note 38, at 9.

41. *See* PRO INNO Europe, a new initiative of the Directorate General Enterprise and Industry intended to become the focal point for innovation policy analysis, learning and development in Europe, <http://www.proinno-europe.eu/index.cfm?fuseaction=nwev.NewsReader&news=2155&lang=EN&ParentID=90&topicID=239>.

42. *See* European Commission Directorate-General for Enterprise and Industry, Establishing Public Procurement Networks in Support of the Lead Market Initiative (May 2008), *available at* [http://ec.europa.eu/enterprise/leadmarket/doc/lmi\\_consultation\\_final22may2008.pdf](http://ec.europa.eu/enterprise/leadmarket/doc/lmi_consultation_final22may2008.pdf).

43. Innovation and competition convergences are discussed in innumerable sources. *See generally id.*; *supra* note 33; EUROPEAN COMMISSION, A REPORT ON THE FUNCTION OF PUBLIC PROCUREMENT MARKETS IN THE EU: BENEFITS FROM THE APPLICATION OF EU DIRECTIVES AND CHALLENGES FOR THE FUTURE (EC) EC 6 (Feb. 3, 2004) [hereinafter “2004 PR”], EUROPA, [http://ec.europa.eu/internal\\_market/publicprocurement/does/public-proc-market-final-report\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/does/public-proc-market-final-report_en.pdf); *Amended Proposal for a Decision of the European Parliament and the Council Concerning the 7th Framework Programme of the European Community for Research, Technological Development and Demonstration Activities (2007–2013)*, at 25, COM (2006) 364 final (June 28, 2006).

innovation, and creating competitors. “Without competitors, there is no competition. End of story.”<sup>44</sup>

EU procurement has not been viewed as cost-effective, value-based, or transparent.<sup>45</sup> Historically, corruption and domestic favoritism triggered multiple governance problems and shielded redundant, inefficient, and obsolete industries from the oversight of EU competition authorities, a situation hardly conducive to sustainable economic prosperity.<sup>46</sup> The resulting economic distortion held the market hostage to discriminatory and nationalistic behavior, obstructed liberalization, increased the cost of procurement, and constructively discouraged innovation. Non-competitive tenders stunted the development of European firms at home—even though these firms were otherwise competitive on world markets.<sup>47</sup>

Member States indulged and exploited national biases in letting tenders and granting awards in order to block foreigners’ access to local contracting opportunities, thus impeding trade.<sup>48</sup> They abused the Treaty by taking advantage of provisions such as Article 30EC, which permits “prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security.”<sup>49</sup> Its use resulted in the circumvention of free movement principles notwithstanding that “[s]uch prohibitions or restrictions shall not,

44. Memorandum, Questions and Answers—Order of the President of the Court of First Instance in Case T-201/04 R, *Microsoft Corp. v. European Commission* (Dec. 22, 2004), available at RAPID, <http://europa.eu/rapid/searchAction.do> (search complete database, reference “MEMO/04/305”).

45. Sue Arrowsmith, *The Past and Future Evolution of EC Procurement Law: From Framework to Common Code?* 35 PUB. CONT. L.J. 337, 357–58 (2006). Transparency in procurement encompasses publicity for opportunities, procedural steps, rules, award and selection criteria, decision making, and the means to verify enforcement. *Id.* Transparency in procurement is also said to encompass establishing stable, predictable procurement procedures subject to external oversight and control. Konkurrensverket [Swedish Competition Authority], *Competition in Sweden 2004*, 88, available at [http://www.konkurrensverket.se/t/IframePage\\_1687.aspx](http://www.konkurrensverket.se/t/IframePage_1687.aspx).

46. Corruption is often mentioned in public procurement contexts. See 2004 legislation discussion *infra* Part III. Organized crime and corruption within the context of state failures has long been considered a threat to European security and defense interests. See, e.g., UK House of Commons (UKHC), EUROPEAN SECURITY AND DEVELOPMENTS SINCE 2003 12–13 (June 8, 2006), available at <http://www.parliament.uk/commons/lib/research/rp2006/rp06-032.pdf>. See also Regina Wilson, Dominic Scott & Mark Pyman, Transparency International (UK), *The Extent of Single Sourcing and Attendant Corruption Risk in Defence Procurement: A First Look*, ‘Public Procurement,’ Conference presentation at the University of Nottingham (June 19–20, 2006), available at [http://www.transparency.org/news\\_room/in\\_focus/2006/defence\\_sector](http://www.transparency.org/news_room/in_focus/2006/defence_sector) (scroll down to “Links and Further Reading”). Note the reference to corruption in the new Defence Directive *supra* note 8, Explanatory Memorandum, ¶ 41, at 17.

47. *Supra* note 36.

48. Arrowsmith, *supra* note 45, at 339.

49. EC Treaty art. 30.

however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”<sup>50</sup>

In the 1990s, the Commission initiated improvements to counter these weaknesses. However, replacing the *status quo* with a transparent and competitive procurement regime was not a scenario warmly embraced by Member States; in fact, they resisted.

This was particularly true in defense procurement, where derogations to Internal Market rules were invoked with impunity under Article 296 based on vague associations with essential security interests. Valuable procurements were awarded subject to national contract authorities’ preferences to do business with privileged, pre-selected entities.<sup>51</sup> Vast sums of euros moved outside Internal Market controls—in blatant contravention of the Treaty—producing a parallel defense market by cloaking improper practices through declarations that an acquisition or activity was essential to national security.<sup>52</sup>

In 2004, after “a decade of extensive technological and commercial development” and improvements in providing public services,<sup>53</sup> Council Directives 2004/17/EC<sup>54</sup> and 2004/18/EC<sup>55</sup> were adopted to modify and

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50. See comment *infra* note 385. “[R]ules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions,” Case 8/74, *Procureur du Roi v. Dassonville* 1974 E.C.R. 837, ¶ 5; Case C-367/89, *Criminal Proceedings Against Aimé Richardt and Les Accessoires scientifiques SNC*, 1991 E.C.R. I-4621; see also *id.* ¶¶ 19–26 and operative part. See generally *id.*, Opinion of Mr. Advocate General Jacobs delivered on 8 May 1991, as well as the Judgment of the Court of 4 October 1991.

51. See Wilson, *supra* note 46, at 4.

52. Defense will be discussed *infra* Parts IX–X.

53. OECD/SIGMA, *supra* note 39.

54. Council Directive 2004/17, *Coordinating the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Services Sectors*, 2004 O.J. (L 134) 1 (EC) [hereinafter “2004/17/EC”].

55. Council Directive 2004/18, *On the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts*, 2004 O.J. (L 134) 114 (EC) [hereinafter “2004/18/EC”]. Both 2004/18/EC and 2004/17/EC were subsequently amended with procurement integrity in mind. See Council Directive 2005/51, *Amending Annex XX to 2004/17/EC and Annex VIII to 2004/18/EC on Public Procurement, Concerning the Format for Publication of Notices Intended for Official Publications of the European Communities* 2005 O.J. (L 257) 127 (EC); Council Directive 2005/75, 2005 O.J. (L 323) 55 (EC), of the European Parliament and of the Council (correcting 2004/18/EC on the coordination of procedures for the Award of Public Works Contracts, Public Supply Contracts, and Public Service Contracts); Commission Regulation 2083/2005, *Amending 2004/17/EC and 2004/18/EC of the European Parliament and of the Council in Respect to Their Application Thresholds for the Procedures for the Award of Contracts* 2005 O.J. (L 333) 28 (EC) (and 2006 O.J. (L 321) 381); Commission Regulation 1422/2007, *Amending 2004/17/EC and 2004/18/EC of the European Parliament and of the Council in Respect to Their Application Thresholds for the Procedures for the Award of Contracts*, 2007 O.J. (L 317) 34 (EC), available at EUROPA, <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2007:317:SOM:EN:HTML> (last visited June 10, 2008) [hereinafter “Threshold Regulation”]; Information from European Union Institutions and Bodies 2007

simplify the legal framework for procurement<sup>56</sup> and to offer scope for innovation-oriented tendering.<sup>57</sup> Defense procurement was specifically included in the Internal Market agenda under Article 10 of Directive 2004/18/EC, subject to the application of Article 296.<sup>58</sup> Mandatory transparency measures were added, requiring advertising of procurement notices above certain thresholds. The ECJ received clearer authority. Internet technology would be increasingly used, reducing procurement costs by, *inter alia*, improving regulatory conditions and easing administrative procedures, another renewed Lisbon goal.<sup>59</sup> A mechanism was needed to provide more oversight and compensate parties harmed by unfair awards. To effect this, a public procurement Remedies Directive<sup>60</sup> entered into force on January 9, 2008, to improve the effectiveness of review procedures concerning the awarding of public contracts. Member States have until December 20, 2009, to transpose it into national law.<sup>61</sup>

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O.J. (C 301) 1 of 13 December 2007 (Corresponding Values of the Thresholds of Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council); as corrected on 20 December 2007 in 2007 O.J. (C 310) 37 by Corrigendum to Corresponding Values of the Thresholds of Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council; and Council Directive 2006/97/2006 O.J. (L 363) 107 (EC), Adapting Certain Directives in the Field of Free Movement of Goods, by Reason of the Accession of Bulgaria and Romania. A particularly noteworthy move towards strengthening transparency and facilitating procurement—in particular, electronic procurement—was Commission Regulation 213/2008, 2008 O.J. (L 74) 1, Amending Regulation (EC) No. 2195/2002 of the European Parliament and of the Council on the Common Procurement Vocabulary (CPV) and 2004/17/EC and 2004/18/EC of the European Parliament and of the Council on Public Procurement Procedures, as Regards the Revision of the CPV [hereinafter “CPV Regulation”], available at EUROPA <http://eur-lex.europa.eu/LexUrlServ/LexUrlServ.do?uri-obj:L:2008:074:0001:0375:EN:PDF>.

56. *Id.*

57. COM (2006) 502, *supra* note 34, at 11.

58. 2004/18/EC, *supra* note 55, art. 10. Article 14 of the Directive is also relevant but the focus herein is Article 10. *See infra* note 336.

59. *See* COM (2006) 816, *supra* note 33, at 5–6, 10–11. *See also A Strategic Review of Better Regulation in the European Union*, at 5 COM (2006) 689 final (Nov. 14, 2006).

60. European Parliament & Council Directive 2007/66/EC, Amending Council Directives 89/665/EEC and 92/13/EEC with Regard to Improving the Effectiveness of Review Procedures Concerning the Award of Public Contracts. O.J. (L 335) 31.

61. A detailed discussion of the history of the Remedies Directive is outside the scope of this Article, however, it has two main features: (1) it provides for a “standstill period” of at least ten days to be observed before a contract can be finalized, and (2) it grants authority to national courts to set aside tender awards that did not respect applicable procurement procedures. *Id.* The entire legislative history of the Remedies Directive can be reviewed at the website of the European Parliament’s Legislative Observatory, <http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=2&procnum=COD/2006/0066>. *See also* EUROPA, Revision of the Public Procurement Remedies Directives, [http://ec.europa.eu/internal\\_market/publicprocurement/remedies/remedies\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/remedies/remedies_en.htm) (last visited June 10, 2008); Public Procurement: Commission Welcomes Adoption of Directive Improving Rights of Rejected Bidders (Nov. 15, 2007), available at RAPID, <http://europa.eu/rapid/searchAction.do> (search complete database, reference “IP/07/1700”) (last visited June 4, 2008).

The 2004 legislation is in force and improvements are already evident. Initiatives—such as the 2006 Interpretative Communication on the Application of Article 296<sup>62</sup> and the adoption of a Commission Regulation on a Common Procurement Vocabulary on November 28, 2007<sup>63</sup>—continue to emerge. These, along with the proposed Defence Directive, suggest that a roadmap for developing initiatives in this area is a work-in-progress, and the path to success involves addressing procurement as a process, formalizing a general vocabulary, and then developing specific initiatives to strengthen cross-border competition throughout the economic sectors in which the procurement regime will operate.

## II. THE LEGAL BASIS

The legal basis for procurement currently includes the Treaty, ECJ case law, and the 2004 Public Procurement Directives and subsequent amendments. Procurement's primary legal basis rests on fundamental principles of free movement codified in Article 12EC,<sup>64</sup> which prohibits discrimination on grounds of nationality, a fundamental freedom.<sup>65</sup> While procurement discrimination is not *per se* prohibited, Member State industries receive Treaty protection from discrimination and other barriers.<sup>66</sup> In addition, Article 28EC<sup>67</sup> prohibits restrictions on imports and all charges having equivalent effect, Article 43EC<sup>68</sup> allows freedom of establishment, and Article 49EC<sup>69</sup> prohibits discrimination or restrictions in services.<sup>70</sup>

The ECJ confirmed in *Fabricom SA v. État belge*,<sup>71</sup> that equal treatment lies at the heart of the Procurement Directives.<sup>72</sup> Gregory S. Hayken observed that equal treatment principles protect competition “by creating a framework in which a European contractor can compete for

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62. IC296, *supra* note 5.

63. See CPV Regulation, *supra* note 55.

64. EC Treaty art. 12.

65. *Id.*

66. Gregory S. Hayken, *Comparative Study: The Evolution of Organisational Conflicts of Interest Law in Europe and the United States*, P.P.L.R., 2006, 3, 137–50, 142–43; Arrowsmith, *supra* note 45, at 339.

67. EC Treaty art. 28.

68. EC Treaty art. 43.

69. EC Treaty art. 49.

70. Arrowsmith, *supra* note 45, at 339–40. See also Case C-324/98, *Telaustria Verlags GmbH & Telefonadress GmbH v. Telekom Austria AG*, 2000 E.C.R. I-10745, summary, ¶ 60, operative part ¶ 2.

71. *Joined Cases C-21 & 34/03*, 2005 E.C.R. I-1559 (Mar. 3, 2005).

72. *Id.* ¶ 26; see also Case C-243/89, *Commission v. Kingdom of Denmark* (“Storebaelt”) 1993 E.C.R. 3353, ¶ 33.



work in a neighboring [Member State] without fear of discrimination and without being subject to unjustified restrictions on access.”<sup>73</sup> He persuasively suggests that equal treatment must apply within the context of procurement, and that this descends directly from the 1957 Treaty’s original goal of economic unity.<sup>74</sup>

For decades after 1957, the procurement regime lacked oversight. Prior to the enactment of procurement legislation in 1971, only 2% of public procurements were awarded outside the tender-issuing Member State.<sup>75</sup> The figure rose to 10% by 1998, but currently, when the tradable nature of procured goods is considered, cross-border import penetration in public procurement markets appears similar to inter-industry import penetration overall.<sup>76</sup> The legislation underwent multiple revisions over the next twenty-five years<sup>77</sup> as the EU strived to attract participants to a competitive tendering framework. Yet by 1998, public procurement did not meet expectations.<sup>78</sup> The Commission vowed to simplify the legal framework and bring the process into the electronic age.<sup>79</sup>

Throughout the 1990s, the Commission’s aim behind the original legislation was to create a framework in which Member States could autonomously operate using their own procurement rules. The trend however, has shifted away from fragmented Member State autonomy toward a common system.<sup>80</sup> Efforts continued to amend the public works, supplies, and services Directives,<sup>81</sup> and telecommunications and utilities Directives<sup>82</sup> to obtain clearer procedural guidance.<sup>83</sup> In 2000, the

73. Hayken, *supra* note 66, at 143.

74. *Id.* at 141.

75. Defence Transfer Directive, *supra* note 9.

76. E-mail from Mr. R. Wakeling, European Commission, to author (Nov. 21, 2006) (on file with author). See also UK HOUSE OF LORDS (UKHL), Current Developments in European Defence Policy (First Report of Session 2006–2007) 10 (2007), <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldcom/17/17.pdf>.

77. Arrowsmith, *supra* note 45, at 340.

78. Commission, Internal Market Scoreboard, Single Market: First Scoreboard Highlights Strengths and Weaknesses, ed. 1 (Nov. 1997), available at RAPID, <http://europa.eu/rapid/search/Action.do> (search complete database, reference “IP/97/1017”).

79. *Public Procurement in the EU*, at 1, 7, COM (1998) 143 final (Mar. 11, 1998). It appears that the Commission is in fact moving toward this objective as illustrated by the recent adoption of the CVP Regulation, *supra* note 55, on 28 November 2007.

80. Arrowsmith, *supra* note 45, at 338. See generally *id.* at 352–53.

81. Council Directive 92/50, Relating to the Coordination of Procedures for the Award of Public Service Contracts 1992 O.J. (L 209) 1 (EEC); Council Directive 93/36, Coordinating Procedures for the Award of Public Supply Contracts 1993 O.J. (L 199) 1 (EEC); Council Directive 93/37, Concerning the Coordination of Procedures for the Award of Public Works Contracts 1993 O.J. (L 199) 54 (EEC); European Parliament and Council Directive 97/52, 1997 O.J. (L 328) 1 (EC), 97/52/EC amended Directives 92/50, 93/36 and 93/37.

82. Council Directive 93/38, Coordinating the Procurement Procedures of Entities Operating in

Commission proposed a consolidation of then-existing multiple secondary legislation, which finally occurred in 2004 after four years of legislative squabbling.<sup>84</sup>

### III. THE 2004 PUBLIC PROCUREMENT DIRECTIVES

On April 30, 2004, procurement was officially reduced to two controlling laws: Directives 2004/17 and 2004/18 (the 2004 Directives).<sup>85</sup> Though implementation was scheduled for January 31, 2006, compliance remains incomplete.<sup>86</sup>

The 2004 legislation sought to increase competition through transparency and non-discrimination in procurement practices.<sup>87</sup> It aimed to achieve better value-for-money through a system rooted in free movement of goods and services, the removal of barriers, simplified procedures, well-publicized procurement opportunities, and awards based on economic criteria.

The 2004 Directives incorporated the Commission's 1996 Green Paper on Public Procurement<sup>88</sup> and the 1998 Commission Communication.<sup>89</sup> They were also integral to the Commission's 2000 Work Programme, which pledged to modernize legislation to complete the Internal Market and implement economic reform.<sup>90</sup>

The 2004 legislation intended to consolidate, simplify, and clarify existing Directives; improve procurement administration by emphasizing non-discrimination and electronic procurement mechanisms;<sup>91</sup> set forth

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the Water, Energy, Transport and Telecommunications Sectors 1993 O.J. (L 199) 84 (EEC); European Parliament and Council Directive 98/4, 1998 O.J. (L 101) 1 (EC), amending Directive 93/38.

83. For the Directives' history until the 2004 modernization, see SUE ARROWSMITH, *THE LAW OF PUBLIC AND UTILITIES PROCUREMENT* (2d ed. 2005).

84. Sue Arrowsmith, *An Assessment of the New Legislative Package on Public Procurement*, 41 *COMMON MKT. L. REV.* 1277, 1278–80 (2004).

85. *See supra* notes 54–55.

86. As of February 28, 2008, the status of implementation measures of the Member States regarding Directives 2004/17, 2004/18, and 2005/51 is that all the Member States have notified implementation measures for all the above Directives. However, the notifications of Portugal for each of the Directives are still under examination of the Commission's services as are the notifications of Belgium for Directives 2004/17 and 2004/18. E-mail from Jari Kallio, European Commission, Directorate-General for Internal Market & Services, to author (Feb. 28, 2008) (on file with author).

87. 2004/18/EC, *supra* note 55, pmb. § 2, arts. 2 and 3; 2004/17/EC, *supra* note 54, pmb. § 9 and art. 10.

88. *Commission Green Paper, Public Procurement in the European Union: Exploring the Way Forward*, COM (1996) 583 final (Nov. 27, 1996).

89. *See supra* note 79.

90. Christopher H. Bovis, *The New Public Procurement Regime of the European Union: A Critical Analysis of Policy, Law and Jurisprudence*, 30 *EUR. L. REV.* 607, 607 (2005).

91. Electronic mechanisms are mentioned throughout the 2004 Directives. *See, e.g.*, 2004/18/EC,

different award procedures;<sup>92</sup> introduce a competitive dialogue procedure between public authorities and bidders, allowing more flexibility to address contract conditions prior to tender;<sup>93</sup> improve transparency (by ensuring contract activities and awards are conducted pursuant to objective criteria);<sup>94</sup> and publish offers and successful awards<sup>95</sup> so entities could review successful bids to improve their own future tenders. Transparency would reduce corruption<sup>96</sup> by discouraging organized crime.

Knowledgeable commentators have previously addressed the mechanics of the 2004 Directives, expressing concern that legislative reforms will not achieve simplification due to poorly drafted “clarifying” measures and complex provisions, which will delay the establishment of legal certainty.<sup>97</sup> Within the context of flexibility, the growth and importance of public-private partnerships<sup>98</sup> is discussed, as is the competitive dialogue, which permits procuring entities and those tendering to collaborate on certain aspects of contract requirements. For example, Sue Arrowsmith has concluded that flexibility is illusory; the reforms are merely tighter restrictions on current allowances that will, in practice, constrain Member States and move the system closer to common rules.<sup>99</sup> Christopher H. Bovis predicted that the competitive dialogue would only facilitate confusion, “compromising the competitiveness and integrity of the procedure”<sup>100</sup> thus leaving the process vulnerable to the very manipulation it is supposed to prevent.

The “dynamic purchasing system,” introduced to streamline procurement of standard purchases, did not impress Arrowsmith, who

*supra* note 55, pmbl. §§ 12–15, 35, 37–38, and arts. 33, 35–36; 2004/17/EC, *supra* note 54, §§ 20–23, 46–47, pmbl. and arts. 5–6, 11.

92. A discussion of the procedures (open, restricted, and negotiated) is outside the scope of this Article.

93. For award procedures, see generally Bovis, *supra* note 90, especially at 613–17.

94. See, e.g., 2004/18/EC, *supra* note 55, pmbl. §§ 40, 46; 2004/17/EC, *supra* note 54, pmbl. §§ 41, 55; and art. 53.

95. 2004/17/EC, *supra* note 54; 2004/18/EC, *supra* note 56, at ch. VI.

96. 2004/18/EC, *supra* note 55, pmbl. § 43, and art. 45; 2004/17/EC, *supra* note 54, pmbl. § 54.

97. Arrowsmith, *supra* note 45, at 345; Bovis, *supra* note 90, at 629.

98. “IPPP are undertakings jointly held by public and private partners and are usually set up to provide services for the public, in particular at the local level.” Public Procurement: Commission Issues Guidance on Setting up Institutionalised Public-Private Partnerships (Feb. 18, 2008), available at RAPID, <http://europa.eu/rapid/searchAction.do> (search complete database, reference “IP/08/252”). On Feb. 5, 2008, an Interpretative Communication was adopted on the founding of Institutionalised Public-Private Partnerships (IPPP), reflecting “the Commission’s commitment to provide legal guidance in the area of services of general interest as expressed in the Communication on services of general interest, including social services of general interest of 20 November 2007.” Current rules subject PPPs to varying Member State interpretations.

99. Arrowsmith, *supra* note 45, at 359–65.

100. Bovis, *supra* note 90, at 614.

thought it procedurally cumbersome and likely to reduce rather than improve flexibility,<sup>101</sup> so it would not be frequently used.<sup>102</sup> Nor was Arrowsmith enthusiastic about e-procurement, predicting that Member States would have problems regulating electronic controls, which would adversely affect competition due to heavy compliance burdens for complex technical requirements.<sup>103</sup> Phillip Rees considered e-procurement beneficial, and though he agreed with Arrowsmith that serious problems with data integrity and security remain unresolved, his overall forecast was more optimistic.<sup>104</sup>

The upside of e-procurement is that it will revolutionize the entire process, permit efficient advertising of procurement and awards, facilitate data collection, and reduce transaction costs. A major downside is that the changeover to electronic systems that require high-tech upkeep is expensive. Thus FP7 will address integration and standardization of technology that could benefit procurement, especially e-procurement.<sup>105</sup> Solutions, however, will be costly.

Whatever the cost, it is both necessary and worthwhile. Hayken's thesis that research is industry-driven and will bond the EU to the private sector as institutions increasingly rely on it for technology solutions<sup>106</sup> is realistic; it is economically pragmatic to leverage industry research whenever possible. Research, innovation, competition, public-private partnerships, procurement regulation, and e-procurement are essential to complete procurement modernization. Security and data issues will eventually be resolved. Therefore, the downsides of e-procurement will not outweigh its long-term capacity to enhance access, procedural

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101. Arrowsmith, *supra* note 45, at 361–62.

102. Sue Arrowsmith, *Dynamic Purchasing Systems Under the New EC Procurement Directives—A Not So Dynamic Concept*, P.P.L.R., 2006, 1, 16–29. See *id.* at 18, 28–30.

103. Arrowsmith, *supra* note 45, at 360.

104. *Id.* See also Phillip Rees, *Once the E-procurement Process is Mastered, All Other E-contracting Will Be a Breeze*, C.T.L.R. 2006, 12(1), 1–4.

105. EUROPA, CORDIS, <http://cordis.europa.eu/en/home.html> (last visited June 6, 2008). Recent e-procurement initiatives are noted in Cyprus, Finland, Hungary and Slovakia. See COM (2006) 186, *supra* note 33, Annex at 33. Once again, it is clear that the new CPV Regulation, *supra* note 55, is a movement toward standardization that will benefit the Internal Market and facilitate the use of e-procurement. See European Commission, *Electronic Public Procurement*, [http://ec.europa.eu/internal\\_market/publicprocurement/e-procurement\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/e-procurement_en.htm) (scroll down to “Feasibility Studies”).

106. Hayken, *supra* note 66, at 149. See also *id.* at 147–48.

flexibility, data collection, and transparency. It will improve the regime overall.<sup>107</sup>

#### IV. A NOTE ON THRESHOLDS

The 2004 Directives were meant to apply to public contracts above certain thresholds, as shown in Table 1.<sup>108</sup> A broader scope is intended, however.

TABLE 1: THRESHOLDS EFFECTIVE JANUARY 1, 2008

<b>Procurement Directive Thresholds</b>	<b>Public Works</b>	<b>Supply Contracts (two thresholds depending on whether the contracting authority is a non-central or central government authority, respectively)</b>	<b>Public Services Contracts (two thresholds depending on whether the contracting authority is a non-central or central government authority, respectively)</b>
Public Entities	€5,150,000 (2008) <sup>109</sup>	€133,000 (2008) <sup>110</sup> €206,000 (2008)	€133,000 (2008) <sup>111</sup> €206,000 (2008)
Utilities	same	€412,000 (2008) <sup>112</sup>	€412,000 (2008) <sup>113</sup>

Source: European Commission

107. In fact, anecdotal evidence already points to increasing reliance on e-procurement, and the improvement of quantity and quality of information over the past year from continual monitoring of the Commission's SIMAP website, Gateway to European Public Procurement, which "provides access to most important information about public procurement in Europe," [http://simap.europa.eu/index\\_en.html](http://simap.europa.eu/index_en.html) (last visited June 6, 2008). See more on SIMAP *infra*, at p. 397 and *supra* note 136.

108. The Table depicts new thresholds entered into force from January 1, 2008. See Threshold Regulation as amended, *supra* note 55.

109. The 2007 threshold was €5,278,000. *Id.* art. 2(a).

110. In 2008, thresholds decreased from €137,000 and €211,000 respectively from 2007 levels, depending on the contracting authority. *Id.* arts. 1(a) and 1(b).

111. *Id.*

112. The 2008 threshold reflects a decrease from €422,000 in 2007. *Id.* art. 1(a).

113. *Id.*

In August 2006, the Commission released an Interpretative Communication on low value contracts,<sup>114</sup> which represent the majority of EU procurements (over ninety percent in some Member States<sup>115</sup>). The Communication sets forth that the ECJ's standard for awarding public contracts is derived from the Treaty, and Member States are on notice that they may not circumnavigate transparency and non-discrimination principles by using contracts below the Directives' established thresholds.<sup>116</sup>

Therefore, while the 2004 legislation was adopted to improve transparency in procurement, close loopholes that had allowed discriminatory practices, and regulate procedures for awarding *major* public contracts in Member States,<sup>117</sup> the ECJ will monitor lower-value contracts and take action—regardless of amount—on suspicion that large contracts have been intentionally fragmented in order to avoid thresholds. Moreover, the threshold for contract amounts decreased as of January 1, 2008.<sup>118</sup>

In summary, the legal basis for public procurement remains complex and must be considered subject to its dual legal levels: national law and the 2004 Directives.<sup>119</sup> Member States may only promulgate national procurement laws to the extent that the Directives are not violated.<sup>120</sup> Siding with Arrowsmith, the 2004 Directives may not offer immediate relief in the form of simplicity and legal certainty in the procurement regime. Furthermore, additional procurement strengthening measures are necessary to implement the Lisbon Strategy and meet other EU objectives.<sup>121</sup> However, ECJ oversight will facilitate procedural predictability, even if the result moves the process more toward a Community approach.

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114. Commission Interpretative Communication, Community Law Applicable to Contract Awards Not or Not Fully Subject to the Provisions of the Public Procurement Directives, 2006 O.J. (C 179) 2.

115. *Public Procurement: Commission Issues Guidance on How to Award Low-Value Contracts Fairly* (July 24, 2006), available at RAPID, <http://europa.eu/rapid/searchAction.do> (search complete database, reference "IP/06/1053").

116. See *supra* note 114, at 179/3.

117. See Hayken, *supra* note 66, at 143.

118. See *supra* notes 108–13 and accompanying text.

119. Hayken, *supra* note 66, at 143.

120. *Id.*

121. COM (2006) 502, *supra* note 34, at 12; see COM (2006) 816, *supra* note 33, at 6, 10 (referencing "smart procurement"), Annex at 27, 33.

## V. THE STAKES

Annually, public procurement sends billions of euros surging through the EU economy. However, precise figures remain elusive, and are likely higher than those reflected in statistical reports. For illustrative purposes, Table 2 is included below to highlight EU economic and procurement stakes.

TABLE 2: ECONOMIC INDICATORS

Procurement Indicators	1994	1996	2002	2004	2005	2006	2007
# of EU Member States <sup>122</sup>	12	15	15	25	25	25	27
Population (millions) <sup>123</sup>	348	373	380	459	461	464	495
GDP (ECU or Euros) at current market prices <sup>124</sup>	6.55 trillion (ECU)	6.77 trillion (ECU)	€9.35 trillion	€10.45 trillion	€10.85 trillion	€11.52 trillion	€12.3 trillion
% GDP attributable to procurement awards by utilities <sup>125</sup>	11.2	11	16	16	16	16.3	16.3 <sup>(1)</sup>

122. The twelve Member States in 1994 were Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom. Austria, Finland, and Sweden joined by 1996. Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia joined in 2004. Romania and Bulgaria joined January 1, 2007.

123. See EUROPA, [http://europa.eu/abc/history/1990-1999/index\\_en.htm](http://europa.eu/abc/history/1990-1999/index_en.htm) (last visited June 6, 2008). 1994 population figures, Organisation for Economic Co-operation and Development (OECD), <http://www.oecd.org/dataoecd/62/38/35267227.pdf>; 1996–2007 figures, EUROPA’s Eurostat population tables, <http://epp.eurostat.ec.europa.eu> (follow “Population and Social Conditions” hyperlink; then follow “Tables” hyperlink; then follow “Population” hyperlink; then follow “Total Population” hyperlink); Press Release, Eurostat, EU and Euro Area Enlargement on 1 January 2007 (Dec. 1, 2006), available at RAPID, <http://europa.eu/rapid/searchAction.do> (search complete database, reference “STAT/06/167”) (last visited June 6, 2008).

124. Green Paper, *supra* note 88 (see 1994 & 1996 GDP data). Remaining data from Eurostat 2006–2007 Yearbook, <http://epp.eurostat.ec.europa.eu> (follow link “Eurostat Yearbook” hyperlink; then follow “The Economy” hyperlink; then follow “National Accounts” hyperlink; then follow “GDP at Current Prices” hyperlink), and Press Release, Eurostat’s Euro-Indicators, Second Estimate for the Third Quarter of 2006 (Jan. 11, 2007), RAPID, <http://europa.eu/rapid/searchAction.do> (search complete database reference “STAT/07/5”) (reporting EU25 & EU27 Q3 GDP rose 0.6% from Q2). According to Euro-Indicators Press Release, First Estimates for the Third Quarter of 2007 (Nov. 30, 2007), available at RAPID, <http://europa.eu/rapid/searchAction.do> (search complete database, reference “STAT/07/164”), EU27 GDP grew by 0.8% from the previous quarter in 2007. “Compared with the third quarter of 2006, seasonally adjusted GDP rose by 2.7% in the euro area and by 2.9% in the EU27, after +2.5% and +2.8% respectively for the previous quarter.” *Id.* Comparing GDP changes between the Euro area and the EU27 is outside the scope of this Article. These figures are meant only for illustrative purposes to show growth trends in the value of procurement.

125. D. Redonnet & N. Bohan, *E.U. Procurement Legislation: Does the Emperor Have Clothes? An Examination of the New Empirical Evidence*, P.P.L.R. 1997, 4, 141–73, at 141; COM (98) 143, *supra* note 79, at 1. OECD/SIGMA, *Sigma Policy Brief No. 3: Public Procurement* (Dec. 1997), <http://www.sigmaweb.org/dataoecd/47/20/35070324.htm>, estimated Member States’ procurement at 25–30% of public expenditure. Per 2004 PR, *supra* note 43, at 4, 16.3% was a stable figure for eight

Procurement Indicators	1994	1996	2002	2004	2005	2006	2007
Public procurement advertised in the Official Journal (as a % of total public procurement and as a % of GDP) <sup>126</sup>	1.27	1.53	2.61	2.69 (EU15) 2.65 (EU25)	2.93	3.27	Not avail.
Monetary value of procurement	.72 trillion (ECU)	1.08 trillion (ECU)	€1.50 trillion	€1.67 trillion	€1.74 trillion	€1.88 trillion	€2.00 trillion <sup>(f)</sup>

(f) = Data forecasted from sources: Various (e.g., OECD, Eurostat)

Over thirty percent of Member State public expenditures are allocated to purchase public necessities.<sup>127</sup> Public expenditure therefore represents considerable economic clout, which will only strengthen as new Member States' economies become more mature and the States themselves become more integrated within the Internal Market.<sup>128</sup> The 2004 Directives are already useful guidance for these new Member States as they develop their individual systems and discharge their Treaty obligations concerning public procurement. Lithuania, for example, already implemented new measures in 2006 using public procurement as a catalyst for innovation.<sup>129</sup>

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years and is still used. Some EUROPA webpages have replaced 16% with 16.3%. See, e.g., [http://europa.eu/publicprocurement/index\\_en.htm](http://europa.eu/publicprocurement/index_en.htm) (last visited June 6, 2008); [http://ec.europa.eu/internal\\_market/publicprocurement/index\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/index_en.htm) (last visited June 6, 2008). Therefore, 16.3% is used in Table 2 for 2006, and for 2007 forecasting. A discussion of individual Member State procurement is outside the scope of this Article, but see SIMAP website, *National Procurement Databases and Tenders Electronic Daily* (TED—see more on TED, *infra* at p. 397, and *supra* note 136), [http://simap.europa.eu/supplier/national-procurement-databases\\_en.html](http://simap.europa.eu/supplier/national-procurement-databases_en.html) (last visited June 6, 2008). See also SIGMA Paper No. 40, *Central Public Procurement Structures and Capacity in Member States of the European Union*, GOV/SIGMA (2007) 4 (Mar. 30, 2007); SIGMA Paper No. 41, *Public Procurement Review and Remedies Systems in the European Union*, GOV/SIGMA 5 (2007) (Apr. 6, 2007).

126. See Eurostat, <http://epp.eurostat.ec.europa.eu> (follow “Economy and finance” hyperlink; then follow “Data” hyperlink; then follow “Government Statistics” hyperlink; then follow “Other Government Indicators” hyperlink; then follow “Value of Public Procurement Advertised (as a % of GDP)” hyperlink). Note: Enlargement from EU15 to EU25 occurred mid-year on May 1, 2004. See GDP 2006 Statistics Through 3Q 2007, <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=0&language=en&pcode=na010> (last visited June 4, 2008).

127. TRYBUS, *supra* note 39, at 1. The 30% allocation figure has remained constant since 1997. The EU27 is currently being studied.

128. While the economic impact resulting from activity in the new Member States is unknown (especially concerning collective security and defense activities), it is noteworthy that they are moving quickly to join the Eurozone. Slovenia introduced the euro on January 1, 2007; Cyprus and Malta adopted the currency on January 1, 2008. Slovakia is expected to join the Eurozone on Jan. 1, 2009. See EUROPA [http://ec.europa.eu/economy\\_finance/the\\_euro/index\\_en.htm?cs\\_mid=2946](http://ec.europa.eu/economy_finance/the_euro/index_en.htm?cs_mid=2946) (last visited June 20, 2008). See Commission Communication, *Sixth Report on the Practical Preparations for the Future Enlargement of the Euro Area*, COM (2007) 756 final (Nov. 27, 2007).

129. COM (2006) 816, *supra* note 33, Annex at 28.



With rising EU GDP, economic efficiency will depend in part on a fair and transparent procurement framework to spread commercial opportunities among the widest range of entities. Procurement announcements, tenders, awards, and sanctions must be conducted consistent with free movement principles to encourage transparency. Without transparency, taxpayers' losses are substantial.

Hayken recognized that European agencies will depend on the private sector for contemporary solutions "in today's technology-driven economy, where expertise and cutting-edge technology is often found more cheaply, more advanced, and in abundance in the commercial market" and that they will "take advantage of the private sector's resources."<sup>130</sup> He further credits the Directives' use of anti-discrimination principles to transform a loose association into an economic union.<sup>131</sup> Contracting entities must be encouraged to work cross-border, dealing with different governments to generate economic interdependency and allow Europe to declare successful unification.<sup>132</sup>

## VI. CROSS-BORDER PROCUREMENT

The significance of and need for cross-border public procurement legislation was apparent in the mid-1990s, when 110,000 contracting entities were letting contracts go above procurement thresholds without regulatory oversight.<sup>133</sup> This figure is surely higher today, as markets are being pushed open and the EU Institutions are expanding their oversight with respect to the procurement process regardless of thresholds. Given new member accessions, EU GDP growth, the increase in procurement monitoring and activity, the Commission's recent defense procurement Interpretative Communication,<sup>134</sup> and proposed Defence Directives, as well as recent ECJ rulings with regard to thresholds,<sup>135</sup> Member States would be imprudent to disregard the guidance offered by the 2004 Directives, regardless of the intended procurement activity or the tender amount that will be proposed.

130. Hayken, *supra* note 66, at 149. *See also* COM (2006) 502, *supra* note 34, at 16.

131. Hayken, *supra* note 66, at 149.

132. *Id.* Hayken predicted that the status quo will guide the short-term due to the difficulty of identifying new unbiased contractors, especially in sophisticated or technical procurement contexts. *Id.* *See also* Defence Director, *Sustainable Procurement Task Force, Procuring the Future*, 4-7 (2005) [hereinafter "Defence Director"].

133. Redonnet, *supra* note 125, at 141.

134. IC296, *supra* note 5.

135. Commission Interpretative Communication, *supra* note 114.

Recent initiatives are clearly producing benefits. Table 2 shows that contract award notices (above thresholds) are more frequently published. Other initiatives, such as the Commission's SIMAP Project,<sup>136</sup> are developing the information infrastructure to support effective European public procurement by encouraging best practices in using electronic technology for procurement procedures. SIMAP's aim is to provide accurate information on EU procurement opportunities and ensure the widest distribution among potential suppliers. The Project will eventually encompass the full spectrum of the procurement process.

E-technology represents the future of EU procurement and increasing reliance on electronic procedures is evident. Consider that procurement notices are no longer available in printed format. The Tenders Electronic Daily (TED) is now the source for electronic versions of notices published in the Supplement to the Official Journal (O.J. S.) offering current procurement information on various types of EU procurement contracts.<sup>137</sup> In addition, the European Public Procurement Network (PPN) offers a cooperative network of experts who promote problem-solving in cross-border cases relating to public procurement and assist European companies with cross-border procurement procedures.<sup>138</sup>

All aforementioned initiatives signal undeniable progress. The adoption of the 2004 Directives was credited with increased cross-border competition resulting in price convergence and price reduction.<sup>139</sup> Public authorities now pay at least thirty percent less for goods and services.<sup>140</sup>

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136. A detailed description of SIMAP is outside the scope of this Article. In summary, SIMAP is the Commission's "Gateway to European Public Procurement." The SIMAP "portal" was created to facilitate the procurement process electronically, is updated regularly, and may be accessed free of charge. It contains links to a full range of useful information for prospective bidders, including the latest European legislation on public procurement; codes and thresholds used in public procurement; official standard forms for sending notices to be published in the Supplement to the Official Journal (O.J. S.) as laid down in the European Directives; and links to national procurement databases, Tenders Electronic Daily (TED) (where tender notices are published), "e-notices" used to prepare public procurement announcements for publication in the Official Journal of the European Union, and "e-senders" to facilitate the submission of tender announcements. SIMAP, [http://simap.europa.eu/index\\_en.html](http://simap.europa.eu/index_en.html) (last visited June 6, 2008).

137. TED, [http://simap.europa.eu/supplier/opportunities-in-europe\\_en.html](http://simap.europa.eu/supplier/opportunities-in-europe_en.html) (follow "TED website" hyperlink) (last visited June 6, 2008).

138. PPN (UK) Home, <http://publicprocurementnetwork.org>. PPN members are Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. See <http://publicprocurementnetwork.org/c0.htm> (last visited June 10, 2008). The Commission, Macedonia, Montenegro, Serbia, the European Investment Bank, and the OECD are observers. *Id.*

139. 2004 PR, *supra* note 43, at 2.

140. *Id.* at 2, 15, 24.

Considering that the study from which the savings figure was taken predated the 2004 and 2007 enlargements, and the fact that implementation of the 2004 legislative package is barely underway, further gains are easily envisaged.

It will take time to gather and analyze viable market data to determine its impact on the Internal Market. One significant factor is that not all Member States have accurate procurement statistics, either historical or current, to report. In 2006, for example, Sweden was still using data from 1998 and acknowledged that it had “no fully comprehensive statistics on public purchasing.”<sup>141</sup>

Another factor is that some procurement stereotypes are credibly challenged. For example, in a 2004 survey, UK businesses reported their cross-border procurement experiences. Surprisingly, discrimination was not considered a public procurement problem; it was too difficult to prove.<sup>142</sup> Where it did occur, it was unlikely to be challenged because tendering firms were more concerned with maintaining lasting relationships with public authorities.<sup>143</sup> In addition, it was difficult to distinguish discrimination from normal problems inherent in doing business abroad.<sup>144</sup> Discrimination was confused with cultural factors such as consumer preferences, which “no amount of *regulatory* harmonization will change.”<sup>145</sup> Such confusion produces “gray areas” favoring local suppliers due to: close historical relations between the government and the supplier, false competition to drive down bidding costs when there is no intention to award contracts to a foreign supplier, splitting contracts into smaller tenders to avoid thresholds, and unique issues of defense.<sup>146</sup>

Other problems concern conflicts between the 2004 legislation and national laws. Sweden,<sup>147</sup> which supports procurement liberalization and based its Public Procurement Act on the 2004 Directives, is examining competitive changes to its procurement regime and is taking action in cases in which certain accepted national practices contravened the

141. Konkurrensverket, *supra* note 45, at 88.

142. UK OFFICE OF GOVERNMENT COMMERCE, INVESTIGATING UK BUSINESS EXPERIENCES OF COMPETING FOR PUBLIC CONTRACTS IN OTHER EU COUNTRIES 23 (Nov. 2004) (*prepared by Alan Wood*) [hereinafter “Wood”].

143. *Id.*

144. *Id.* at 24.

145. *Id.* at 21.

146. *Id.* at 25–29. For a discussion of issues unique to the defense sector, see *infra* Part IX.

147. Sweden represents a good example, especially given its position as a top arms producer. See Frequently Asked Questions—New Commission Initiatives on More Open and Efficient Defence Procurement (Dec. 6, 2005), available at RAPID, <http://europa.eu/rapid/searchAction.do> (search complete database, reference “MEMO/05/467”).

Directives.<sup>148</sup> For example, Sweden allows public authorities to award contracts to their own production entities in situations similar to internal purchases—not technically legal under the 2004 Directives. The situation, comparable to an interrupted procurement, might result in damages for unsuccessful bidders. The Swedish Supreme Court then denied the tender firm the right to sue for costs of bid preparations, while the ECJ contrarily provides a cause of action.<sup>149</sup> Thus, Sweden could not bring its procurement system in line with the EU's until its Procurement Act was amended.

Sweden resolved this inconsistency in 2007 when it successfully transposed 2004/17/EC and 2004/18/EC into two Swedish laws.<sup>150</sup> Now, under Swedish procurement laws effective January 1, 2008, an unsuccessful tenderer has the right to sue for damages.<sup>151</sup> From September 1, 2007, Sweden placed its Competition Authority, rather than its Public Procurement Board, in charge of overseeing the application of the Public Procurement Act, and adopted a new strategy: “Welfare through well-functioning markets.”<sup>152</sup> The strategy addresses the issue of remedies and makes it clear that the Community path is the only one intended for Sweden.<sup>153</sup> It will be interesting to see how Sweden will apply its new laws in light of its 2007 Competition Report released January 2008, stating that with respect to Swedish Procurement, “[t]hings are moving in the wrong direction.”<sup>154</sup>

Notwithstanding the negative findings of this report, it is illustrative of the success of the 2004 liberalization—especially with respect to

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148. Konkursverket, note 45, at 88.

149. *Id.* at 87–91, 93–94 and 109. Case C-92/00, *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH v. Stadt Wien*, 2002 E.C.R. I-05553, summary ¶ 2. *See also id.* ¶¶ 42, 48, 55, 64, 68, operative parts 1–3.

150. Lag om offentlig upphandling (Public sector) (Svensk författningssamling [SFS] 2007:1091) (Swed.); Lag om upphandling inom områdena vatten, energi, transporter och posttjänster (Svensk författningssamling [SFS] 2007:1092) (Swed.).

151. Under procurement law, but NOT Swedish competition law. *Id.* Personal Communication with Ammar Khan, Föredragande, Avdelning för offentlig upphandling (Feb. 13, 2008), regarding Lag (2007:1091) and Lag (2007:1092).

152. The Strategy of the Swedish Competition Authority and Its Direction for Procurement Issue 1 (Sept. 2007) Dnr 488/2007, available at [http://www.kkv.se/upload/Filer/ENG/Publications/strategidok\\_eng.pdf](http://www.kkv.se/upload/Filer/ENG/Publications/strategidok_eng.pdf).

153. *Id.* § 2.3 (providing for “means to demand compensatory damages via the public court.”). *See also id.* § 2.4.

154. Press Release, Swedish Competition Authority, Swedish Competition Authority on Public Procurement: “Things Are Moving in the Wrong Direction” (Jan. 9, 2008), <http://www.kkv.se> (follow “Press” hyperlink; then follow “Press releases” hyperlink). *See also* Konkursverkets rapportserie 2007:4, 2008-01-09 Kohkurrensen & Svenge 2007 (available only in Swedish), [http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/rap\\_2007-4.pdf](http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/rap_2007-4.pdf).

transparency—in that countries like Sweden are not only scrutinizing their procurement regimes to identify and remove anti-competitive barriers and other obstacles, but they are also willing to publicize negative reports expeditiously.

#### VII. DIRECT OR INDIRECT PROCUREMENT—THE DILEMMA OF OFFSETS

Cross-border procurement is either “direct,” meaning that firms in one Member State bid for contracts in another, or “indirect,” meaning that an entity in one Member State bids for contracts *through* another entity—such as a subsidiary—that is already established in the country in which the bid is taking place.<sup>155</sup>

Historically, indirect procurement has been far more successful than direct procurement. This is especially true in the defense sector, where successful direct procurements are often secured using “offset” arrangements, which makes it more politically acceptable for a country to purchase sensitive and costly goods from a foreign supplier. Though a detailed discussion of offsets is not intended herein,<sup>156</sup> offsets are an important consideration with respect to their economic and social implications in procurement, as well as their more direct application as a competition obstacle in creating an open market with respect to defense procurement.<sup>157</sup>

The role of offsets is being reconsidered in Europe—by the Commission, the EDA, and the industry. The Commission has addressed them within the context of Article 296,<sup>158</sup> and in the new Defence Package.<sup>159</sup> In addition, the EDA has recently completed a comprehensive report on offsets.<sup>160</sup> The United States is also concerned, as indicated in its own governmental report on offsets. Thus, one must be mindful of the

155. 2004 PR, *supra* note 43, at 8.

156. The intention is to flag the offset issue and identify current authority and recent research on the issue.

157. *See generally Commission Green Paper on Defence Procurement*, COM (2004) 608 final (Sept. 23, 2004) [hereinafter “*Green Paper on Defence Procurement*”]. *See also id.* § 2.3, at 5, § 3.2, at 7. The Commission preferred the idea of gradual elimination of offsets when discussing a new legal instrument. *Id.* at 11. The 2007 Defence Communication states that “the ultimate aim is to create the market conditions, and the European DTIB structure, in which the practice will no longer be needed.” 2007 Defence Communication, *supra* note 7, at 7.

158. IC296, *supra* note 5, at 8. *See also infra* note 345.

159. 2007 Defence Communication, *supra* note 7, at 7.

160. *See generally* E. ANDERS ERIKSSON ET AL., FINAL REPORT OF 06-DIM-022, STUDY ON THE EFFECTS OF OFFSETS ON THE DEVELOPMENT OF A EUROPEAN DEFENCE INDUSTRY AND MARKET (July 12, 2007) [hereinafter “EDA Offset Report”] (report funded by the EDA).

importance of offsets within the context of U.S.-EU defense relations.<sup>161</sup> This issue is far from settled.

Briefly, offsets are contractual conditions that link a foreign supplier to an economic condition that benefits the domestic industry of the prospective purchaser. They take many forms. They can be related to investments, requiring a foreign supplier to invest a certain percentage of the contract amount in the purchasing country; they can be tied to production, requiring the foreign entity to produce or assemble the product in the purchasing nation using a local subsidiary or a local subcontractor.<sup>162</sup> Offsets can also be swap agreements, in which the parties agree to make a specified amount of purchases from each other's suppliers, or they can be a pre-condition, a "pre-offset" requiring an investment to be made before a purchase agreement is concluded.<sup>163</sup>

While one could argue that there are social benefits to domestic markets with offsets, the problem is that they mask the economic impact of direct procurements, and dilute transparency, especially when one considers that the value of an offset can be equal to or greater than one hundred percent of a contract's order value. This creates a certain level of market distortion (or the appearance thereof).<sup>164</sup>

Without offsets, direct procurement is not as successful as indirect procurement, as offset research indicates that the monetary value of offset agreements can be high. Though some have argued that these amounts are exaggerated,<sup>165</sup> there are many examples to suggest that the amounts are in fact realistic. Recall the 1995 British Army procurement for the Apache AH Mk 1 Helicopter, a modified version of the WAH-64 Westland Apache Longbow Helicopters used by the U.S. Army. The AH Mk 1 Programme was a project worth billions of pounds. The first helicopters entered into service in 2000, and a reported "50% of the components and

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161. See generally U.S. DEPARTMENT OF COMMERCE, BUREAU OF INDUSTRY AND SECURITY, OFFICE OF STRATEGIC INDUSTRIES AND ECONOMIC SECURITY, OFFSETS IN DEFENCE TRADE (Dec. 2007) (Twelfth Study Conducted Pursuant to Section 309 of the Defence Production Act of 1950, as amended); Appendix H: *Interagency Team Progress Report on Consultation with Foreign Nations on Limiting the Adverse Effects of Offsets in Defence Procurement*. See also *id.* at 139.

162. Geneva Centre for the Democratic Control of Armed Forces (DCAF), *Parliament's Role in Defence Procurement* 5 (Sept. 2006).

163. *Id.* See also EDA Offset Report, *supra* note 160. While the authors state in their summary that that the high amount of offsets is somewhat exaggerated, they admit that their offset data was "patchy and partly inconsistent," *id.* at 3, underscoring the difficulty in obtaining data on this issue (and making it difficult to know to what extent offset amounts may be exaggerated) even when one knows where to look for it. Regardless, the fact that offsets influence procurement is undisputed and an important economic issue.

164. *Green Paper on Defence Procurement*, *supra* note 157, at 5.

165. EDA Offset Report, *supra* note 160, at 23.

ground support systems were to be built under license in the UK.”<sup>166</sup> Even though the number of units was later reduced to 67,<sup>167</sup> the economic impact is still significant. This underscores that the issue of offsets requires careful consideration if the procurement regime, especially with respect to cross-border procurements, is to be improved.

In a 2004 report, the Commission considered cross-border procurement to be inadequate.<sup>168</sup> However, notwithstanding that the indicators used in that report were gathered in 2002, they were sufficient to draw helpful conclusions. Fifty-four percent of all surveyed firms bid exclusively in their home markets; 46% of the surveyed firms participated in cross-border procurement.<sup>169</sup> Most firms bid through a subsidiary. Looking at the 46% active cross-border figures: 15% conducted direct procurement at home and abroad (without a subsidiary); 9% conducted domestic and foreign procurement directly and indirectly; 9% bid domestically and abroad using a subsidiary; 2% bid only on foreign contracts, directly or through a subsidiary; and 11% were foreign subsidiaries bidding exclusively in their domestic locale.<sup>170</sup> Therefore, the use of subsidiaries was decisively a good strategy.<sup>171</sup>

The relationship between local market integration and successful cross-border public procurement is apparent, and local integration is necessary for many reasons. These include cultural and consumer preferences, which cannot be ignored when devising market strategies. Local business practices and language must also be considered, studied, and respected. Offsets must be examined and, if offered, must be arranged with respect to these variables. Yet overall, it appears that integration is most efficiently accomplished by establishing a local subsidiary, or through joint-ventures, distribution arrangements, or subcontracting to an established domestic firm.<sup>172</sup>

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166. UK Army Website, Attack Helicopter FAQ, <http://www2.army.mod.uk/aht/index.htm> (last visited June 10, 2008) [hereinafter “UK Army FAQ”]; UK Army Homepage, [http://www2.army.mod.uk/aht/faq\\_s.htm](http://www2.army.mod.uk/aht/faq_s.htm) (last visited June 10, 2008).

167. UK Army FAQ, *supra* note 166.

168. 2004 PR, *supra* note 43, at 9.

169. *Id.* at 11.

170. *Id.*

171. However, one must still be mindful of the role of offsets when evaluating the utility of subsidiaries.

172. Wood, *supra* note 142, at 47–51; 2004 PR, *supra* note 43, at 9.

## VIII. COMMENTARY

The 2004 Directives' influence on cross-border procurement should reward the taxpayer handsomely as their cost savings are potentially enormous. In 2004, estimates indicated that if Member States saved 10% of procurement expenditures, some State deficits would become surpluses, and not a single Eurozone Member State would run a deficit breaking 3%. Ten percent was actually considered a conservative savings.<sup>173</sup> In fact, the UK expects to save £21.5 billion annually by 2007-2008 through efficient public sector spending.<sup>174</sup>

Yet, Alan Wood provides strong evidence that the 2004 Directives are not a panacea since many undertakings did not find procurement rules to be overly problematic. Respondents to Wood's survey referred to the rules as "enablers," and though helpful, they were not "a magic solution for achieving a unified EU marketplace."<sup>175</sup> Therefore, one can logically support the premise that change will come from other sources, perhaps less from the new procurement regime and more through litigation and jurisprudence.<sup>176</sup> However, that is not to say that the Commission will be idle with regard to promoting change intended to influence and upgrade the process. Quite the contrary. A clear example of this was the 2007 Procurement Guide, which aimed at promoting procurement as an innovation driver.<sup>177</sup>

The Treaty's fundamental freedoms thus become that much more relevant to the overall goal of achieving a competitive and unified Internal Market. Members of industry believe that improvements to the public procurement regime are most likely to occur by encouraging sound business strategies rather than specifically-targeted procurement initiatives. Efforts should therefore include developing best business practices, cultivating political will,<sup>178</sup> and strengthening industrial policy,

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173. 2004 PR, *supra* note 43, at 5–6 n.6 (note that statistics from DG Internal Market were from 2002).

174. UK Office of Government Commerce (OGC), Procurement, <http://www.ogc.gov.uk/procurement.asp> (last visited June 6, 2008).

175. Wood, *supra* note 142, at 17–20.

176. Bovis, *supra* note 90, at 631.

177. COM (2006) 502, *supra* note 34, at 12, 17; COM (2006) 816 Annex, *supra* note 33, at 27. *See also* The 2007 Guide, *supra* note 38. For more discussion of the 2007 Procurement Guide, see *supra* pp. 382–83. Many initiatives are mentioned throughout this Article. The Defence Package reflects movement toward a stronger procurement regime. Activities such as the public consultation currently underway via the Commission's Innovation Policy are also indicative of greater attention. *See* European Commission, Public Procurement, [http://ec.europa.eu/internal\\_market/public\\_procurement/index\\_en.htm](http://ec.europa.eu/internal_market/public_procurement/index_en.htm).

178. Wood, *supra* note 142, at 31.



especially where industries rely significantly on support from sub-contractors and small and medium enterprises (SMEs).<sup>179</sup> The key to building cross-border competition is to align with a target market, establish foothold strategies to infiltrate, and integrate local markets by establishing domestic presence through, *inter alia*, subsidiaries.<sup>180</sup> This is especially true in the unique context of defense, where successful cross-border competition requires both an understanding of the historical aspects of procurement and sensitive national sovereignty issues concerning defense and national security.

### IX. THE UNIQUE CONTEXT OF DEFENSE

Historically, the EU was established as an economic entity, but Member State national security remains fundamentally entwined with Treaty commercial objectives and cannot be disregarded.<sup>181</sup> The Treaty on European Union (TEU) established a Common Foreign and Security Policy (CFSP), “which might in time lead to a common defence.”<sup>182</sup> Removing European defense from the U.S.-dominated “NATO monopoly,”<sup>183</sup> however, was a long-debated process due to Member States’ unwillingness to cede defense sovereignty.<sup>184</sup>

At the 1999 European Council, Member States officially announced that the EU would have “the necessary means and capabilities” for a common European security and defense policy to take “autonomous action, backed up by credible military forces, the means to decide to use them, and a readiness to do so, in order to respond to international crises”

179. SMEs are outside the scope of this Article, but feature prominently in innovation/procurement issues. The Commission seeks to improve SME access to procurement opportunities and ease administrative burdens that plague SMEs and limit their Internal Market participation. See COM (2006) 816, *supra* note 33, at 3–4, 6, 10, and Annex at 21, 23, 27, 33, 36, 37–38; COM (2006) 689, *supra* note 59. See generally *id.* at 7.

180. COM (2006) 816, *supra* note 33, Annex at 34–35.

181. Martin Trybus, *Case Comment on the Application of the E.C. Treaty to Armament*, 25 E.L. REV. 663, 663 (2002).

182. The Treaty on European Union art. B, Feb. 7, 1992, 1992 O.J. (C 191) 1, 31 I.L.M. 253 [hereinafter “TEU”]. Detailed discussion of CFSP is outside the scope of this Article. Note that the TEU will be amended if the Lisbon Treaty is ratified. See Lisbon Treaty, *supra* note 1, art. 1.

183. NATO stands for North Atlantic Treaty Organization. European Union Institute for Security Studies (EUISS), *ESDP: An Overview 1* (Apr. 16, 2004) (prepared by Jean-Yves Haine), [http://www.eupt-kosovo.eu/training/material/docs/esdp/reading\\_material/ESDP\\_an\\_overview\\_by\\_JY\\_Haine\\_ISS.pdf](http://www.eupt-kosovo.eu/training/material/docs/esdp/reading_material/ESDP_an_overview_by_JY_Haine_ISS.pdf) (last visited June 7, 2008).

184. ESDP has actually been in “gestation” for fifty years. See generally DEFENDING EUROPE: THE EU, NATO AND THE QUEST FOR EUROPEAN AUTONOMY 221 (Jolyon Howarth & John T.S. Keeler eds., 2003) (ESDP definition). See also Andrew Cox, *The Future of European Defence Policy: The Case for a Centralised Procurement Agency*, P.P.L.R. 1994, 2, 65–86, 76.

without prejudice to actions by NATO.<sup>185</sup> With that, the European defense *identity* became “a European security and defence *policy*” (ESDP).<sup>186</sup>

An ESDP requires a competitive defense industry,<sup>187</sup> to be established through a European Defence Equipment Market (EDEM) to strengthen industrial competitiveness, allocate defense resources efficiently, and develop military capabilities.<sup>188</sup> EDEM was complementary to EU Internal Market needs, “including the *Lisbon targets*” and a common approach to dynamic industry “to sustain and increase its prosperity while meeting its wider social, environmental and international ambitions.”<sup>189</sup> A sustainable and dynamic EDEM required effective procurement mechanisms to facilitate cross-border commercial and economic opportunities.<sup>190</sup>

Further, EDEM would allow national governments to procure necessities to meet physical protection requirements and pursue the national interest of the State both internally and in relation to their Treaty responsibilities to protect the Community.<sup>191</sup> Although a majority of Europeans support a common defense policy,<sup>192</sup> Member State governments have historically failed to develop competitive defense

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185. Joint Declaration on European Defense, issued at the British-French Summit, St. Malo, December 3–4, 1998, ¶ 2, available at <http://www.atlanticcommunity.org/Saint-Malo%20Declaration%20Text.html>. For background on the development of security and defense policy, see Press Release, European Council, European Security and Defence Policy (ESDP), Declaration of the European Council on Strengthening the Common European Policy on Security and Defence (June 3, 1999), [http://www.basicint.org/europe/ESDP/0699-PR\\_EUdefpol.htm](http://www.basicint.org/europe/ESDP/0699-PR_EUdefpol.htm) (last visited June 7, 2008).

186. Detailed discussion of ESDP is outside the scope of this Article. See generally Haine, *supra* note 183, at 1–4. Though technically speaking, the European defense *identity* was a NATO model while ESDP was the EU equivalent. NATO Handbook (2001), available at <http://www.nato.int/docu/handbook/2001/hb0401.htm> (last visited June 6, 2008).

187. EUROPA, DG Enterprise and Industry, Defence Industries (May 2007), [http://ec.europa.eu/enterprise/defence/index\\_en.htm](http://ec.europa.eu/enterprise/defence/index_en.htm) (last visited Apr. 3, 2008).

188. Commission Communication, *The Challenges Facing the European Defence-Related Industry: A Contribution for Action at European Level*, 4 COM (96) 10 final (Jan. 24, 1996). See also Aris Georgopoulos, *The Commission's Green Paper on Defence Procurement*, P.P.L.R. 2005, 2, NA34-38, 34.

189. *European Defence—Industrial and Market Issues Towards an EU Defence Equipment Policy*, COM (2003) 113 final 7 (Mar. 11, 2003) (emphasis added).

190. EUROPEAN UNION INST. FOR SECURITIES STUDIES (EUISS), Occasional Paper 57, *THE DEMOCRATIC LEGITIMACY OF EUROPEAN SECURITY AND DEFENCE POLICY* 3, 11–16 (Apr. 2005) (prepared by Wolfgang Wagner).

191. Trybus, *supra* note 181.

192. Eurobarometer, Support for Common Foreign and Security Policy (CFSP) Is Reinforced, [http://ec.europa.eu/public\\_opinion/archives/notes/csf\\_pesc\\_papr03\\_en.pdf](http://ec.europa.eu/public_opinion/archives/notes/csf_pesc_papr03_en.pdf) (last visited June 10, 2008).

procurement,<sup>193</sup> an interesting contrast between what citizens want and what their governments will accept.<sup>194</sup>

Defense procurement refers *lato sensu* to acquisition by defense sector authorities of goods and services needed to perform their duties, ranging from paperclips, furniture, and cleaning services, to tanks, submarines, and aircraft.<sup>195</sup> *Stricto sensu*, it is the acquisition of armaments: “hard defense” items intended strictly for war-like purposes.<sup>196</sup> Dual-use items, in contrast, are goods, software, and technology with both civilian and military applications.<sup>197</sup>

While “hard defense” items are easily identified with respect to their potential use, new technology is far more complicated; much of the innovation produced today can be manufactured and designated as dual-use items.<sup>198</sup> In the context of technology associated with defense procurement, this dual nature creates problems for Member States, especially concerning the application of Article 296.<sup>199</sup> Therefore, the path to EDEM is constantly muddied by overlapping security, defense, and socio-economic factors, including competition objectives, maintaining security of supply,<sup>200</sup> and the drive to achieve technological advantage over competitors as authorities consider “the wider diffusion of military and some commercial technologies in the name of national defence.”<sup>201</sup>

193. COM (2003) 113, *supra* note 189, at 3.

194. The UK increased web communications in 2007 and will further improve public outreach, believing both are useful tools to monitor public interest on defense matters. UKHC, DEFENCE COMMITTEE, THE WORK OF THE COMMITTEE IN 2005 AND 2006 (Fifth Report of Session 2006–2007) H.C. 233, 15, 22 (Jan. 22, 2007). Furthermore, the report mentions the UKHC’s intention to review NATO’s role in “UK and European defence, and whether NATO has a viable long-term future.” *Id.* at 21.

195. Dr. Aris Georgopoulos, Cicero Foundation, Lecturer in European Law at the University of Dundee, European Defence Procurement Integration: How to Handle Article 296 EC (Dec. 2005).

196. *Id.*

197. COM (2003) 113, *supra* note 189, at 15 (citing Setting up a Community Regime for the Control of Exports of Dual-Use Items and Technology, Regulation 1334/2000, art. 2, 2000 O.J. (L 159) 1).

198. European Commission, DG Enterprise and Industry, Intra-Community Transfers of Defence Products: Final Report of the Study, Assessment of Community Initiatives Related to Intra-community Transfers of Defence Products 11 (2005) [hereinafter “UNISYS”] (final report released Feb. 2007).

199. For a discussion of the application of Article 296, see *infra* Parts XI–XIII.

200. The supply chain is critical to EDEM, but security of supply is outside the scope of this Article. The EDA Code of Best Practice in the Supply Chain was approved May 15, 2006, to improve transparency and competitive procurement opportunities, when Article 296 is invoked, at the second- and third-tier sub-contracting levels. Aris Georgopoulos, *The EDA, The New Code of Best Practice in the Supply Chain*, P.P.L.R. 2006, 5, NA145-149, 148.

201. CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (CSIS), EUROPEAN DEFENSE INTEGRATION: BRIDGING THE GAP BETWEEN STRATEGY AND CAPABILITIES 74 (Oct. 2005). See also Wagner *supra* note 190, at 11; Eurobarometer, *supra* note 192. Some sources suggest that European support for CFSP/ESDP is stronger in contexts of conflict-prevention, mediation, and humanitarian

## X. THE ECONOMICS OF DEFENSE

In the larger picture, “[w]orld military expenditure is estimated to have been \$1339 billion in 2007—a real-terms increase of 6 per cent over 2006 [\$1204 billion] and of 45 per cent since 1998.”<sup>202</sup>

Cumulatively, EU Member States comprise the second largest military force in the world, with 2.4 million troops and civilians.<sup>203</sup> Consequently, EU operational and procurement needs are enormous and long-lasting in the defense sector. Note, for example, that “[e]quipment often consists of new systems which incorporate both military and civilian technologies . . . [with] long life cycle[s]: the time between the expression of an operational need and the end of a system’s life may be as long as 50 years.”<sup>204</sup> Thus it is not difficult to see that a well-functioning defense economy with “spin-

aid—social, not defense—contexts). EUROPEAN UNION @ UNITED NATIONS, KEEPING THE PEACE AND PREVENTING CONFLICT (May 1, 2004), available at [http://www.europa-eu-un.org/documents/infopack/en/EU-UNBrochure-5\\_en.pdf](http://www.europa-eu-un.org/documents/infopack/en/EU-UNBrochure-5_en.pdf) (last visited June 29, 2008). For more information on conflict prevention, see *id.* at 5 and Jim Cloos, *EU-UN Co-operation on Crisis Management*, ESDP Newsletter #3, Jan. 2007, at 15, available at [http://consilium.europa.eu/uedocs/cmsUpload/ESDP\\_3\\_final.pdf](http://consilium.europa.eu/uedocs/cmsUpload/ESDP_3_final.pdf) (concentrating “on crisis management, one of the most important and promising areas of EU-UN co-operation”). See generally Wagner, *supra* note 190 (concerning public support of ESDP).

202. Stockholm International Peace Research Institute (SIPRI), *Recent Trends in Military Expenditure*, [http://www.sipri.org/contents/milap/milex/mex\\_trends.html](http://www.sipri.org/contents/milap/milex/mex_trends.html); Petter Stålenheim, Catalina Perdomo & Elisabeth Sköns, SIPRI, SIPRI YEARBOOK 2008: ARMAMENTS, DISARMAMENT AND INTERNATIONAL SECURITY (2008), at 10, available at <http://www.sipri.org/contents/editors/YB08> (download “Yearbook summary” and follow link to “5. Military expenditure”) (last visited June 10, 2008) [hereinafter “SIPRIYB2008”]. In 2007, “[t]he USA’s military spending accounted for 45 per cent of the world total . . . followed by the UK, China, France and Japan, with 4–5 per cent each.” *Id.* Note that from 2006 to 2007, China surpassed France and Japan. Compare *id.* with Petter Stålenheim, Catalina Perdomo & Elisabeth Sköns, SIPRI, SIPRI YEARBOOK 2007: ARMAMENTS, DISARMAMENT AND INTERNATIONAL SECURITY, (2007) at 11, available at <http://yearbook2007.sipri.org/> (download “Yearbook summary”). “China has increased its military spending threefold in real terms during the past decade. However, due to its rapid economic growth, the economic burden of military spending is still moderate, at 2.1 per cent of GDP.” SIPRIYB2008 at 11. In 2007 15 countries with the highest military expenditure accounted for 83 percent of total world military expenditure. *Id.*

Military spending is rising rapidly in the South Caucasus . . . [and] [t]he number of countries that increased their military spending in 2007 was higher than in recent years. The factors driving increases in world military spending include countries’ foreign policy objectives, real or perceived threats, armed conflict and policies to contribute to multilateral peacekeeping operations, combined with the availability of economic resources.

*Id.*

203. EUROPA, European Defence Agency (EDA), <http://www.eda.europa.eu/Default.aspx> (follow “Defence Facts” hyperlink) (last visited June 7, 2008), European Defence Expenditures for 2005 [hereinafter “EDE2005-20/11/2006”], National Defence Expenditures for 2005 [hereinafter “NDE2005-24/01/2007”], European Defence Expenditures for 2006 [hereinafter “EDE2006-19/11/2007”], and National Defence Expenditures for 2006 [hereinafter “NDE2006-21/12/2007”].

204. *Green Paper on Defence Procurement*, *supra* note 157, at 5.

off? benefits of technology development, employment, and exports would lend a significant boost toward Lisbon Strategy goals.<sup>205</sup>

Tracking European defense spending for purposes of establishing a baseline for budgetary projections and defense and security needs is far more complicated in light of the dynamic nature of the EU's institutional framework, and the concept of economic unity which joins together EU Member State economies. Tracking defense spending trends is a recent occurrence. In fact, the EDA's comprehensive data on defense expenditures for its participating Member States, published for 2006, was only the second such collection.<sup>206</sup> Slowly, the various stakeholders are gathering the tools that will be necessary and useful for the future, and data collection is a critical starting point to ensure the availability of consistent, reliable, and accessible defense expenditure figures.

The EDA, though providing a caveat to the reliability of its defense statistics, reported that in 2005 the 24 EDA participating Member States (pMS) spent €193 billion on defense, constituting 1.81% of their combined €10.6 trillion economies.<sup>207</sup> In 2006, two additional Member States became EDA participants. The total defense expenditures for 2006 in those 26 EDA participating Member States<sup>208</sup> was reported at €201 billion, 1.78% of the GDP of their combined €11.3 trillion economies, and 3.80% of defense expenditure as a percentage of government expenditure.<sup>209</sup>

Furthermore, the top six defense spenders among EDA participants in 2006 were (in rank order): the UK (€47.31 billion), France (€43.46 billion), Germany (€30.36 billion), Italy (€26.63 billion), Spain (€11.51 billion), and the Netherlands (€8.15 billion).<sup>210</sup> In 2006, total defense procurement was estimated at €29.1 billion.<sup>211</sup> The top EDA defense-procuring countries (in rank order) were: the UK (€7.513 billion) France

205. See Commission Communication, *Security Research: The Next Steps*, at 3, 7, 10 COM (2004) 590 final (Sept. 7, 2004).

206. EDA, *supra* note 203.

207. EDE2005-20/11/2006 and NDE2005-24/01/2007, *supra* note 203.

208. All Member States except Denmark are EDA pMSs (participating Member States). See EDA, <http://www.eda.europa.eu/Default.aspx> (last visited June 10, 2008).

209. NDE2006-21/12/2007, *supra* note 203, at 3–5 (Tables: European Defence Spending in 2006, European Defence Expenditure as a Percentage of GDP in 2006, and European Defence Expenditure as a Percentage of Total Government Expenditure in 2006).

210. *Id.* at 3 (Table: European Defence Spending in 2006).

211. EDE2006-19/11/2007, *supra* note 203, at 7 (Table: Collaboration-Defence Equipment Procurement).

(€6.321 billion), Germany (€3.698 billion), Spain (€2.343 billion), Italy (€2.099 billion), and Greece (€1.5 billion).<sup>212</sup>

Though these figures are meant to be illustrative only—and disregarding any statistical variations in reporting—the defense market’s value to the EU economy is highly significant and growing. Yet it is important to consider that most European defense economic activities occur in six major arms-producing countries: the UK, France, Germany, Italy, Spain, and Sweden, which accounted for 85% of EU defense spending and 90% of EU industrial capability.<sup>213</sup> All but Sweden are among the world’s top fifteen defense spenders.<sup>214</sup> The UK ranked second after the United States, accounting for 5% of global military spending.<sup>215</sup>

In the UK for example, defense generates “high-value employment, technology innovation and exports.”<sup>216</sup> In 2006, the defense sector accounted for nearly £16 billion of expenditures and employed 310,000 persons.<sup>217</sup> It represented 3% of the UK’s manufacturing output.<sup>218</sup> “The

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212. NDE2006-21/12/2007, *supra* note 203, at 11 (Table: European Defence Equipment Procurement in 2006).

213. Commission Communication, *Results of the Consultation Launched by the Green Paper on Defence Procurement and on the Future Commission Initiatives*, COM (2005) 626 final 2 (Dec. 6, 2005); Frequently Asked Questions, *supra* note 147; see NDE2006-21/12/2007, *supra* note 203. Although it is important to note which countries have the highest levels of defense expenditure but do not rank as the highest in terms of arms production, as indicated at *supra* notes 209 and 210 and accompanying text. The new Defence Communication reconfirms, as of its release in December 2007, that “[a]lthough defence production is concentrated in six Member States (Germany, Spain, France, Italy, Sweden and the United Kingdom), companies producing ancillary equipment and systems can be found all over Europe. However, on average, Member States spend almost 85% of their equipment budget domestically.” COM (2007) 764 final, *supra* note 7, at 4.

214. Stockholm International Peace Research Institute (SIPRI), *The 15 Major Spender Countries in 2007*, [http://www.sipri.org/contents/milap/milex/mex\\_major\\_spenders.pdf](http://www.sipri.org/contents/milap/milex/mex_major_spenders.pdf) (last visited June 10, 2008) (listing the fifteen countries with the highest military expenditure in 2007).

215. *Id.* See also UK Defence Statistics (UKDS) 2007, <http://www.dasa.mod.uk/natstats/ukds/2007/c1/sec5intro.html> (last visited June 6, 2008).

216. UK MINISTRY OF DEFENCE (UKMOD), *DEFENCE INDUSTRIAL POLICY (2002) (Paper No. 5)*, at 7.

217. UKDS, *UK Defence Statistics 2007 (2007)*, <http://www.dasa.mod.uk/natstats/ukds/2007/ukds.html> (follow hyperlinks to “Chapter 1, Finance”, then “Introduction,” and “Industry and Employment—Notes and Key Trends”). “In 2006/07, the MOD spent some [£] 16.0 billion with UK Industry.” *Id.* at Intro. “Estimated employment in UK industry and commerce dependent on MOD expenditure and defence exports remained constant at around 310,000.” *Id.* at Industry and Employment—Notes and Key Trends. For more detailed employment statistics, see *id.* and follow the link to “Chapter 1”, then “Table 1.10—Estimated UK Employment Dependent on MOD Expenditure and Defence Exports” (last visited June 6, 2008). See also UKMoD, *Defence Contracts Bulletin*, <http://www.contracts.mod.uk/introduction/index.shtml> (stating that “[the UK]MoD spends over £16 billion annually on a wide range of products and services, making it the number one customer for UK industry,” and that “[i]n 2006, the MoD placed over 27,000 contracts in order to satisfy the requirements of its worldwide operations and the needs of its 250,000 service personnel”).

218. Defence Director, *supra* note 132, at 4. The statistics here are for illustrative purposes only. The numbers vary among sources reviewed. This source states that in 2004, the industry employed

UK's defence manufacturing sector alone generates annual exports worth around £5 billion and sustains an estimated 50,000 jobs.<sup>219</sup> Defense equipment procurement in 2005–2006 accounted for £5.9 billion.<sup>220</sup> In December 2006, the UK's Defence Procurement Agency (DPA) reportedly managed 500 equipment projects valued at £75 billion.<sup>221</sup> The European aerospace and defense sector, which covers over 2,000 aeronautics, space, and defense companies; 80,000 related Member State suppliers; and over 600,000 employees, reported turnover exceeding €110 billion.<sup>222</sup> While the majority of European defense spending officially occurs in six Member States, free movement assures that an untracked multitude of SMEs and sub-contractors generate business throughout the EU. Their contributions should become evident as e-tracking methods become more integrated and reliable, and if cross-border subsidiaries and procurement partnerships become more the norm.

At present, however, European defense is still characterized by huge economic and political inefficiencies. Among the political inefficiencies is corruption. Several analyses noted that defense is especially vulnerable to corruption due to excessive secrecy of its technical and commercial aspects under national security justifications. A 2002 study attributed 50% of all bribery complaints to the defense sector,<sup>223</sup> making it the second most corrupt international sector after public works/construction.<sup>224</sup>

340,000, and defense exports from the UK were \$8.2 billion (USD)—second only to the United States. See also Lord Bach, Parliamentary Under Sec. of State, UKMoD, Defence Contracts Bulletin Feature Report, *Defence Globalisation Presents Opportunity for UK* (Oct. 8, 2003), available at <http://www.contracts.mod.uk/dc/pdfs/V1e24/LordBachfeature.pdf> (last visited June 29, 2008).

219. Press Release, UK Trade & Investment (UKTI), New UK Trade & Investment Defence & Security Organisation (Apr. 1, 2008), available at <http://www.newsroom.uktradeinvest.gov.uk/index.asp?PageID=2&PressReleaseID=944> (last visited June 29, 2008) (“UKTI is the UK Government’s international business development organisation, supporting businesses seeking to establish in the UK and helping UK companies grow internationally.”).

220. UKHC, DEFENCE COMMITTEE, DEFENCE PROCUREMENT 2006: FIRST REPORT OF SESSION 2006–07, 5 (Dec. 8, 2006), available at <http://www.parliament.the-stationery-office.co.uk/pa/cm200607/cmselect/cmdfence/56/56.pdf>. See also DEFENCE PROCUREMENT AGENCY, ANNUAL REPORT AND ACCOUNTS 2005–06, H.C. (2005–06) 1164, 21.

221. DEFENCE PROCUREMENT AGENCY, *supra* note 220. In April 2007, the Defence Procurement Agency and the Defence Logistics Organisation merged to form Defence Equipment and Support (DE&S) with a staff of “29,000 and a budget of £16 billion—43% of the [UK] defence budget.” UKHC, DEFENCE COMMITTEE, DEFENCE EQUIPMENT 2008, TENTH REPORT OF SESSION 2007–08, 3 (Mar. 11, 2008), available at <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmdfence/295/295.pdf> (last visited June 29, 2008). See generally *id.* for current information on UK procurement programs and trends.

222. AEROSPACE AND DEFENCE INDUSTRIES ASSOCIATION OF EUROPE (ASD), ANNUAL REVIEW 2005, 8, <http://asd-europe.org> (follow “Publications” hyperlink) (last visited Apr. 5, 2008).

223. TRADE PROMOTION CO-ORDINATING COMMITTEE, THE NATIONAL EXPORT STRATEGY: WORKING FOR AMERICA 11 (2000), <http://ita.doc.gov/media/nesonline.pdf> (last visited Apr. 5, 2008).

224. Transparency Int’l (TI), Bribe Payers Index 2002, [http://www.transparency.org/global\\_](http://www.transparency.org/global_)

Bribery is responsible for wasteful military expenditure<sup>225</sup> accounting for approximately 15% of total weapons acquisition spending.<sup>226</sup> It also compromises procurement integrity and makes citizens suspicious about procurement activity. One of every two citizens believes that corruption influences procurement awards.<sup>227</sup> Fifty-four percent of citizens attribute most corruption to organized crime.<sup>228</sup> Seventy-six percent of citizens believe cross-border and organized crime should be addressed by enhancing policies at the EU-level.<sup>229</sup> As the distribution of goods is directly linked to defense policy—defense protects economic infrastructure as necessary for free movement of goods and services<sup>230</sup>—EU initiatives targeting corruption will have a positive impact on the larger economy.

Key among the economic inefficiencies of the defense sector are protectionist industrial policies such as subjective Member State declarations of sole-source contracting needs and seemingly boundless extensions of “national interests” in questionable defense deals. A prime example is the 2006 agreement between UK defense giant BAE Systems and Saudi Arabia for the Saudi purchase of seventy-two Tornado and

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priorities/public\_contracting/key\_sectors/arms\_trade (follow “2002 Bribe Payers Index” hyperlink; then follow “bpi 2002” hyperlink; then follow “complete report BPI 2002” hyperlink) (last visited June 10, 2008). It is still a contemporary headliner globally. See Ran Dagoni, *Bribery Probe Jeopardizes \$2b India Defense Deal*, GLOBES ONLINE (June 5, 2008), available at <http://www.globes.co.il/serveen/globes/docview.asp?did=1000349184&fid=942>, and the recent scandals involving BAE Systems (discussed *infra* notes 231–40 and accompanying text). See also David Gow, *EADS Recovery Blown off Course*, GUARDIAN.CO.UK, Apr. 3, 2008, <http://www.guardian.co.uk/business/2008/apr/03/theairlineindustry1>; Nicola Clark & Katrin Bennhold, *Charges of Insider Trading at EADS Stir Outrage*, INT’L HERALD TRIBUNE ONLINE, Oct. 4, 2007, <http://www.ihf.com/articles/2007/10/04/business/eads.php>.

225. See generally Sanjeev Gupta, Luz de Mello & Raju Sharan, *Corruption and Military Spending* (International Monetary Fund (IMF) Working Paper No. 00/23, 2000).

226. *Id.* at 4 & n.6. In 2006, two anti-corruption initiatives were noteworthy. First, the Defence Manufacturers Association (DMA) and the Society of British Aerospace Companies (SBAC) formed the UK Defence Industries Anti-Corruption Forum. See Joint Press Release, DMA-SBAC, UK Defence Industry Makes Commitment to Anti-Corruption Objectives (July 13, 2006), available at [http://www.sbac.co.uk/community/cms/content/preview/news\\_item\\_view.asp?i=11436&t=0](http://www.sbac.co.uk/community/cms/content/preview/news_item_view.asp?i=11436&t=0) (last visited June 10, 2008). Second, ASD created an international industry working group to cover European defense companies’ national defense associations. See Press Release, ASD, European Aerospace and Defence Industry Takes the Fight Against Competition to the Next Level (July 14, 2006).

227. Eurobarometer, *Opinions on Organised, Cross-Border Crime and Corruption* 8 (Mar. 2006) (special Eurobarometer), [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_245\\_sum\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_245_sum_en.pdf) (last visited June 10, 2008).

228. *Id.* at 12.

229. *Id.*

230. See ASSEMBLY OF WESTERN EUROPEAN UNION, SECURITY RESEARCH IN EUROPE—REPLY TO THE ANNUAL REPORT OF THE COUNCIL 5 (June 19, 2006) (Document A/1931).



thirty Hawk warplanes worth an estimated £43 billion to BAE.<sup>231</sup> UK fraud investigators from Britain's Serious Fraud Office (SFO) were looking into allegations of bribery and slush-fund spending on the project—including alleged luxury car perks—meant to facilitate the deal.<sup>232</sup> However, in December 2006, the SFO Director halted the investigation claiming that the non-competitive and secretive deal was vital to UK national interests<sup>233</sup> (notwithstanding its curious circumstances). At the time, Tony Blair justified the closure of the case, stating that an investigation “would lead to . . . the complete wreckage of a relationship that is of fundamental importance of [sic] the security of this country, to the state of the Middle East, and to our relationship with countries in the Middle East.”<sup>234</sup> Yet reports suggested some measure of credibility to allegations that the agreement, dating back to 1985 in its various phases, resulted in an alleged £1 billion of kickbacks to Saudi Prince Bander, a former Ambassador to the United States.<sup>235</sup>

Yet the case continues. The termination of the BAE investigation attracted international public attention, proving that even a sovereign declaration of “national interest” to prevent “wreckage of a relationship”<sup>236</sup> was insufficient to shield a suspect defense procurement from public accountability.

The OECD's Working Group on Bribery, the United States Department of Justice, and the British courts are now investigating the circumstances of Al Yamamah,<sup>237</sup> so, ironically, the United States has input into the scope of “national interests” in EU defense procurement.<sup>238</sup> On April 10,

231. David Leigh & Rob Evans, *BAE Accused of Secretly Paying £1bn to Saudi Prince*, THE GUARDIAN, June 7, 2007, available at <http://guardian.co.uk/world/2007/jun/07/bae1>. The deal, known as the Al Yamamah arms deal, had several phases and dated back to 1985. *Id.* BAE is the “third largest global defence company.” BAE Systems, Fact Sheets, <http://www.baesystems.com/Newsroom/FactSheets/index.htm>.

232. Numerous sources have reported the history and details of Al Yamamah. *See, e.g.*, UNICORN (United Against Corruption), BAE and the Al Yamamah Arms Contract with Saudi Arabia, <http://www.againstcorruption.org/briberycase.asp?id=781>.

233. *See* UK Serious Fraud Office (SFO) [http://www.sfo.gov.uk/publications/2006\\_2007/sectionone\\_02.asp](http://www.sfo.gov.uk/publications/2006_2007/sectionone_02.asp) (scroll down to “BAe Systems plc”).

234. *Blair: BAE Investigation Would Have ‘Wrecked’ UK*, POLITICS.CO.UK, June 13, 2007, available at [http://www.politics.co.uk/news/foreign-policy/middle-east/middle-east/blair-bae-investigation-would-have-wrecked-uk-\\$474784.htm](http://www.politics.co.uk/news/foreign-policy/middle-east/middle-east/blair-bae-investigation-would-have-wrecked-uk-$474784.htm) (last visited June 6, 2008).

235. *Id.* *See* UNICORN, *supra* note 232.

236. *See supra* note 234.

237. OECD, OECD to Conduct a Further Examination of UK Efforts Against Bribery, Mar. 14, 2007, <http://www.oecd.org> (follow “News Releases” hyperlink) (last visited Apr. 5, 2008).

238. *See* Associated Press, *BAE Says U.S. is Investigating Dealings with Saudi Arabia*, INT'L HERALD TRIBUNE, June 26, 2007; BBC News, *US to Probe BAE Over Corruption*, June 26, 2007, available at <http://news.bbc.co.uk/2/hi/business/6239918.stm> (last visited Apr. 5, 2008); *Court to*

2008, the UK High Court ruled that “the Serious Fraud Office (SFO) acted unlawfully by dropping the corruption inquiry.”<sup>239</sup> The issue has been appealed to the House of Lords, Britain’s highest court.<sup>240</sup> Right or wrong, the incident flags the political subjectivity with which the limits of “national interests” are determined. The public outcry over the matter demonstrates that the citizen is becoming more influential and demands for accountability will be recognized.

Other defense inefficiencies are glaring. The EDA estimated that in 2006, European countries spent 55% of their total defense expenditures on personnel and 21.6% on operations and maintenance, a category that includes crisis management operations, known to consume huge defense budgetary resources.<sup>241</sup> With investment at 19.4% in 2006, and only 4% in an “Other” expenditures category from which to shift any funds to capability development, there is limited potential to increase investment.<sup>242</sup>

Thus, although the head of EDA and High Representative for Common Foreign and Security Policy (CFSP), Javier Solana, as well as the EDA Steering Board have been supportive of collaborative ways to encourage members to spend more, spend better, and spend together on defense, it is difficult to “translate these words into deeds.”<sup>243</sup>

However, in November 2007, the EDA established benchmarks as a preliminary step towards increasing levels of defense spending and encouraging collaborative spending initiatives.<sup>244</sup> The results will be

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*Study BAE Fraud Decision*, BBC.COM, Nov. 9, 2007, available at <http://news.bbc.co.uk/2/hi/business/7086997.stm> (last visited June 10, 2008).

239. *UK Wrong to Halt Saudi Arms Probe*, BBC.COM, Apr. 10, 2008, <http://news.bbc.co.uk/2/hi/business/7339231.stm>.

240. For the current status, see various recent articles at UNICORN, *supra* note 232.

241. EUROPEAN DEFENCE AGENCY, EDA BULLETIN 7 (Jan. 2008) (issue 7) [hereinafter “EDA 2008 Bulletin”].

242. *Id.*

243. *Id.* at 7. These popular and oft-cited comments were originally attributed to a speech given by Javier Solana, Javier Solana, EU High Representative for the Common Foreign & Security Policy & Head of EDA, Speech at the EDA R&T Conference, Research and Technology: An Imperative for European Defence (Brussels, Feb. 9, 2006) [hereinafter “Solana Speech”].

244. EDA Bulletin, *supra* note 241, at 3. There are some examples of collaborative spending such as the A400M Programme, whereby eight European air forces cooperated for a new generation military airlifter. However, this has recently been delayed again. See Airbus Military, A Partnership Without Precedent, <http://www.airbusmilitary.com/commitment.html> (last visited June 7, 2008). See also Airbus Military Press News, <http://www.airbusmilitary.com/press.html>, from which one can get a clear idea of the logistical difficulties and huge expense inherent in such a collaboration. See Airbus Military, A Single-Phase Programme, <http://www.airbusmilitary.com/programme.html> (last visited June 7, 2008) for an interactive diagram of the strategic work-share among the eight participants. It is also worth noting that in the UK House of Lords, Lord Hamilton of Epsom cited the historic disaster associated with collaborative procurement projects, stating that the Eurofighter Typhoon was plagued by notorious cost overruns and delays. European Union Committee 34th Report of Session 2006–2007,

monitored on a collective basis, and not based on results in individual Member States. Therefore, the odds that the participating states will, as a group, reach the benchmarks are considerably higher.

TABLE 3: EDA DEFENSE SPENDING BENCHMARKS TO BOOST THE EU'S MILITARY COHERENCE

EDA initiative	Benchmark % to attain by EDA Members	% spent in 2006 by EDA Members
Defense R&T <sup>245</sup>	2% of total defense expenditure	1.2%
European collaborative R&T	20% of defense R&T expenditure	10%
Equipment procurement	20% of total defense expenditure	19%
European collaborative equipment procurement.	35% of equipment procurement	21%

Source: EDA November 2007<sup>246</sup>

Then of course there are inefficiencies prevalent at NATO, where exorbitant sums are also spent on defense personnel. The cost of personnel in proportion to the total NATO defense budgets has been staggering: on average, from 2005 through 2007, NATO's European members spent over 55% of their annual defense budgets on personnel.<sup>247</sup> Belgium, Italy,

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*Current Developments in European Defence Policy*, HL Paper 161, 2 (Q8) (Aug. 6, 2007) [hereinafter "HL Paper 161"]. While Lord Drayson agreed to some extent, he reminded the Committee that the Eurofighter Typhoon went operational in July 2007, so he considered it a success, stating that cost cannot be the sole factor in collaborative associations: "[T]he nature of the threats that we face and the complexity and scale on costs of the technological solutions to meet them necessitate these collaborations." *Id.* at 3 (Q8). See also comments, *infra* note 311. For more official references to the A400M status, see HC 295, *supra* note 221, at 41–43, for evidence, e.g., from Q107 and throughout on the A400M issues. This entire report contains excellent discussion on multiple defense projects and issues.

245. R&D and R&T are not the same. "R&D: Any R&D programmes up to the point where expenditure for production of equipment starts to be incurred. R&T (Subset of R&D): expenditure for basic research, applied research and technology demonstration for defence purposes." See EDA, *European Defence Expenditure in 2006*, <http://www.eda.europa.eu/genericitem.aspx?area=35&id=286> (see "European Defence Expenditure Data—Reform").

246. EDA Bulletin, *supra* note 241, at 8.

247. NATO-Russia Compendium of Financial and Economic Data Relating to Defence, Table 5: Distribution of Total Defence Expenditures by Category (Dec. 20, 2007), <http://www.nato.int/docu/pr/2007/p07-141.pdf> (last visited Apr. 5, 2008).

Greece and Portugal spent over 70%.<sup>248</sup> Luxembourg had previously been in this group, but its spending on personnel decreased from 75.3% in 2005, to 60.9% in 2007,<sup>249</sup> still an extraordinary sum. Regarding equipment expenditures, NATO's European Members spent 15 to 18% during the same 2005–2007 time-frame,<sup>250</sup> reflecting near-stagnant spending levels on hard defense needs.<sup>251</sup>

The negative impact of these factors is apparent from defense spending figures from the EDA showing that in 2005, of an estimated €193 billion spent by twenty-four participating Member States on defense, only 4.7% was spent on research and development and only 13.7% was spent on defense procurement.<sup>252</sup> In 2006, the (now) twenty-six participating Member States' defense spending rose to an estimated €201 billion, with R&D at 4.8%, and defense equipment procurement at 14.6%.<sup>253</sup>

As a percentage of GDP, defense spending was flat since 1995, having decreased from a pre-Cold War 3.5% to currently less than 2% in nominal terms, and even more in real purchasing value.<sup>254</sup> From 2005 to 2006, defense spending declined 0.6% from €192.9 billion to €191.7 billion,<sup>255</sup> but rose by €8 billion in 2006<sup>256</sup>—still insufficient given that current levels of defense spending do not represent an adequate and viable commitment to ameliorating the situation. Experts suggest national defense budgets should reallocate 25% to research and new weapons acquisition, and no more than 40% to personnel.<sup>257</sup> Such reallocation would represent defense commitments, increase procurement activity, and bolster the market.<sup>258</sup>

Unfortunately, the prognosis for massive reallocation is bleak and EDEM will remain in flux without a necessary financial boost. However, Member States will not increase defense budgets at the expense of looming socio-economic crises, such as the care of their aging populations<sup>259</sup> or high levels of unemployment. Any effort to put defense

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248. *Id.*

249. *Id.*

250. *Id.*

251. See EDE2005-20/11/2006, *supra* note 203.

252. *Id.* at Table: Defence Spending Breakdown in 2005. The statistics reflect the importance of defense to the EU economy. Improvements to defense industry market functionality, especially concerning transparency issues and common procurement policy, will produce legal certainty—a necessity to attract private investment.

253. EDE2006-19/11/2007, *supra* note 203, at 4 (Table: Defence Investment in 2006).

254. CSIS, *supra* note 201, at 21.

255. EDE2005-20/11/2006, *supra* note 203 at Table: European Defence Expenditure: 2005–2006.

256. EDE2005-19/11/2007, *supra* note 203.

257. CSIS, *supra* note 201, at 9.

258. *Id.* at 30–32.

259. *Id.* at 23.

spending ahead of that which is required to maintain the EU citizens' strong social safety net would be highly unpopular politically, as evidenced by Ireland's recent Lisbon Treaty "no" vote of June 12, 2008, which was attributed in part to the implied prospect of Ireland having to contribute more towards defense objectives.<sup>260</sup> Such efforts could even trigger violence.<sup>261</sup>

Yet the present situation neither enhances Lisbon objectives, nor addresses EU defense vulnerabilities. Therefore, Member States must make tough choices to reallocate funding and find ways to commit to ESDP; embrace their defense responsibilities; and improve their R&D capacities through industrial consolidation partnering and transparent, accessible, and non-discriminatory cross-border procurement.

## XI. ARTICLE 296: PROTECTING ESSENTIAL SECURITY INTERESTS

Defense contracts now fall within the Internal Market under Article 10 of Directive 2004/18, "subject to Article 296."<sup>262</sup> Pursuant to Article 296(1)(a), a Member State transaction may derogate from Single Market

260. See Küchler, *supra* note 30.

261. In Europe, targeting a reduction in social benefits in order to raise defense R&D is risky. Considerable clout is yielded by EU citizens who benefit from generous social protections. Consider that approximately 100,000 people out of 500,000 million were able to obstruct the Lisbon Treaty's ratification. "[O]fficial figures . . . revealed that 53.4% of voters had rejected the document, while 46.6% voted in favour—a difference of 109,164 voters." Henry McDonald & Allegra Stratton, *Irish Voters Reject EU Treaty*, GUARDIAN ONLINE, June 13, 2008, <http://www.guardian.co.uk/world/2008/jun/13/ireland?gusrc=rss&feed=networkfront>. Consider the French, who in 2007 experienced widespread violence and sustained billions in economic damage as a result of labor strikes, when the government attempted to reduce retirement benefits for public employees in 2007. The previous year, in 2006, riots resulted from a new labor law concerning the *Contrat Première Embauche* (CPE), Law No. 2006-396 of Mar. 31, 2006, Journal Officiel de la République Française [J.O.] [Official Gazette of France] (French youth labor law including terms defining the First Employment Contract, "contrat première embauche" (CPE)). The law granted employers more flexibility to hire and fire employees under age 26. Country-wide protests resulted in an end to the law, thus reflecting that society was more inclined to protect non-productive, non-motivated, or incompetent young workers. See, e.g., Molly Moore, *French Students Hit Streets to Protest New Labor Law*, WASH. POST, Mar. 17, 2006, at A13, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/16/AR2006031601908.html> (last visited Apr. 5, 2008); Bernard Salanié, *The Riots in France: An Economist's View*, SOCIAL SCIENCE RESEARCH COUNCIL, June 11, 2006, available at <http://riotsfrance.ssrc.org/Salanie/> (last visited Apr. 5, 2008).

262. See Arrowsmith, *supra* note 45, at 369–70. See generally Martin Trybus, *Defence Procurement: The New Public Sector Directive and Beyond*, P.P.L.R. 2004, 4, 198–210, for a discussion of the Directives prior to 2004/18/EC with respect to defense, the subsequent shift in scope with 2004/18/EC, problems with Internal Market coverage, and interpretation concerning defense items. It is important at this juncture to monitor the new Defence Package, see *supra* notes 8 and 9, as it moves through the EU's legislative Co-Decision process, see *supra* note 12, however, at this point it is premature to consider it authoritative over defense contracts to the same extent as Article 10 of 2004/18/EC.

disclosure requirements if such disclosure would be contrary to “the essential interests of its security.”<sup>263</sup> Article 296(1)(b) permits necessary measures to protect “the essential interests of its security” connected to “production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.”<sup>264</sup>

The Treaty always recognized special commercial aspects of armaments and defense. In 1957, it specifically included Article 296 to balance Treaty commercial objectives with Member State security interests concerning armaments exports, defense industrial mergers, defense procurement, state aid, and defense competition.<sup>265</sup> Article 296 was intended to protect Member States’ legitimate security interests based on objective evaluation criteria. However, inconsistent interpretation has allowed Member States to invoke it at will, resulting in the exclusion of an estimated fifty percent of procurements from cross-border competition rules.<sup>266</sup> Thus Article 296 has become a matter of considerable contention to Competition and Industry authorities.

In 1958, the Council composed a list (the List) to define the scope of Article 296(1)(b). The List identified fifteen categories of hard defense equipment to which it would apply. The List included, *inter alia*, traditional warfare equipment, such as: rifles, bombs, ammunition, tanks, explosives, aircraft, and electronic equipment.<sup>267</sup>

The List was never officially published in the Official Journal and has never been revised,<sup>268</sup> so it had questionable value as a tool for interpreting the Treaty.<sup>269</sup> Modern political influences, innovations in technology, and EDEM initiatives dictated its review in light of the changing nature of security and defense.

The “manpower-intensive, platform-heavy and predictable doctrine” conflicts of the 1950s are outdated; current conflicts require “sophisticated, rapid and precise military solutions.”<sup>270</sup> Arguably, the

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263. EC Treaty, art. 296(1)(a).

264. EC Treaty, art. 296(1)(b).

265. Trybus, *supra* note 181, at 663.

266. See CSIS, EUROPEAN DEFENSE INTEGRATION: BRIDGING THE GAP BETWEEN STRATEGY AND CAPABILITIES, CONFERENCE REPORT 10 (Oct. 12, 2005), available at [http://www.forum-europe.com/publication/SoD\\_CSISNDAEuropeanDefenceIntegration.pdf](http://www.forum-europe.com/publication/SoD_CSISNDAEuropeanDefenceIntegration.pdf) (last visited June 10, 2008). See also EDA Press Release, *supra* note 3.

267. Council Decision 298/58 of 15 April 1958 (not published).

268. The Council has authority to do so under Article 296(2). EC Treaty, art. 296(2).

269. *Green Paper on Defence Procurement*, *supra* note 157, at 5–7.

270. UKMoD, DEFENCE INDUSTRIAL POLICY, *supra* note 216, at 7.

changing world order and rapid advances associated with contemporary defense could not have been foreseen in 1958. Thus, the question of the List's applicability to contemporary equipment procurement is a valid one.

The List has been both controversial and confusing. Although it is circulating in the public domain, some Member States have treated it confidentially while others distributed it openly.<sup>271</sup> It was published in academic journals, but the extreme translation variations among authors resulted in the circulation of many inconsistent versions. These distribution inconsistencies allowed for commonplace abuses since Article 296 exemptions could be easily taken for equipment not meant to be exempted.<sup>272</sup> Though the Council eventually released the List in 2001,<sup>273</sup> it was neither complete, compared to others in the public domain, nor was it an official publication. It was not, therefore, considered authoritative.<sup>274</sup>

The utility of today's defense and security equipment needs must be queried. Consider General Sir Rupert Smith's discussion of the "art" of war and of the evolution from industrial (i.e., traditional) warfare to a new paradigm of "war amongst the people."<sup>275</sup> Traditional war no longer exists. Today's battles have no defined battlefields and no "armies;" they take place anywhere, anytime.<sup>276</sup> The problem, however, is that politicians and generals continue to configure their forces along conventional lines, which is not effective and will not produce a victory.<sup>277</sup>

Smith does not, however, specifically support changing warfare's traditional tools. His logic is thought-provoking as he suggests changes to strategies and the characterization of the utility of war's tools against psychological concepts like terrorism.<sup>278</sup> Delving into the measure of force, he reminds his audience that even with the most advanced technology, it is ultimately a human who operates the systems, platforms, and weapons.<sup>279</sup> He feels that the defense community must understand the shifting paradigm of force. He advocates a "revolution in our thinking,"

271. Martin Trybus, *The List of Hard Defence Products Under Article 296 EC*, P.P.L.R. 2003, 2, NA15-21.

272. *Id.*

273. Response to Written Question E-1324/01 by Bart Staes (Verts/ALE) to the Council, O.J. (C 364) E, 85-86 (Dec. 20, 2001) (Order 255/58 of 12/04/1958).

274. Trybus, *supra* note 271. *See also* UNISYS, *supra* note 198, at 8-11.

275. RUPERT SMITH, *THE UTILITY OF FORCE: THE ART OF WAR IN THE MODERN WORLD 5* (2005) [hereinafter "Smith"].

276. *Id.* at 3-6. *See also* Rupert Smith, Personal Presentation at the Residence Palace in Brussels (Jan. 19, 2006) (book launch for *THE UTILITY OF FORCE*).

277. Smith, *supra* note 276, at 6.

278. *Id.* at 270-71.

279. *Id.* at 241-42. *See also id.* chs. 5-8, Conclusion.

that “force” must be considered a political, and not just military, phenomenon.<sup>280</sup>

Until recently, procurement needs were also based on industrial warfare logic—an identifiable threat, to be matched in order to be defeated.<sup>281</sup> Yet this is no longer the case. It is unlikely that a strategic shift to diplomatic and political activism, such as military support to humanitarian crises—not historically a military strong-suit—could address contemporary warfare’s purposes without solutions more reliant on technology, competition, and dual-use procurements than heretofore.<sup>282</sup>

Returning to the List, it is questionable whether the List can cover such a fundamental strategic shift guided by human subjectivity. On one hand, using the List in 2008 to guide Article 296 derogations initially appears to be a misapplication of seemingly stale guidance. Were nations to identify sensitive technologies currently protecting Smith’s virtual borders, Member State security could be compromised. On the other hand, siding with Martin Trybus, the List remains current because its general language can easily accommodate new defense technologies, as well as Smith’s new paradigm. The Council must also go further; though Trybus acknowledges that the List’s 2001 semi-disclosure has diminished Article 296 abuses, good governance demands that an official List be published to halt a “bizarre erosion of secrecy.”<sup>283</sup>

One can understand why the application of Article 296 has been problematic. Member States as “Creators and Lords of the Treaties,” vehemently opposed Community jurisdiction over any matter remotely connected to defense.<sup>284</sup> Article 296 allowed Member States to give preference to domestic suppliers, avoid competition, and even protect unprofitable firms, keeping them artificially alive by state aid at the expense of more profitable EU-wide undertakings.<sup>285</sup> The need for change has been emphasized by innumerable authorities as justification for targeted initiatives among defense-sector stakeholders.<sup>286</sup> Though ECJ

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280. *Id.* at 375.

281. *See id.* at 212–13.

282. This is one area in which the EU has a positive story to tell—its civilian crisis management capability is better able to address Rupert Smith’s war amongst the people because it brings together skills that tackle the causes of conflict.

283. Trybus, *supra* note 271, NA21. Note too that the approval of the Defence Directive would be a major step towards halting the “erosion.” Defence Directive, *supra* note 8, art I.

284. Trybus, *supra* note 181, at 664.

285. EUROPEAN PARLIAMENT, THE COST OF NON-EUROPE IN THE AREA OF SECURITY AND DEFENCE 7 (June 19, 2006), [http://www.conversion-center.org/publications/other/study\\_for\\_ep/bicc\\_study\\_for\\_ep.pdf](http://www.conversion-center.org/publications/other/study_for_ep/bicc_study_for_ep.pdf) (last visited Apr. 5, 2008).

286. *See, e.g.*, Security and Defence Agenda (SDA), [www.securitydefenceagenda.org](http://www.securitydefenceagenda.org) (last visited



case law existed,<sup>287</sup> the overly generous interpretation of “essential interests” fueled the debate and featured prominently in the 2006 Interpretative Communication on Article 296.<sup>288</sup>

Article 296’s application has changed little over the years. With weak political will towards a common application, Member States readily invoked it, arguing that existing export and intellectual property protections were inadequate to protect sensitive technologies. The resulting national monopolies and domestic industrial protection structures were presented as the only means to ensure national security of supply.

Although defense-industrial mergers and joint procurement programs are increasing, national procurement bias continues to hamper EDEM, and Europeans reap few economic advantages from their national defense markets.<sup>289</sup> In addition, the *juste retour* workshare approach—in which countries invest in multinational programs only to the extent they receive workshare equal to the amount of the investment—fragments programs politically, causing cost, schedule, and coordination problems.<sup>290</sup> Directive 2004/18/EC narrowed the potential scope of bias somewhat; however, it

Apr. 5, 2008). *See id.* at “Activities” and “Publications” for 2005–2006 and reports of speakers from defense sectors of the EU, both national and international levels, who advocated for defense change and the necessity of partnership between DG-Competition and EDEM stakeholders.

287. *See, e.g.*, Case C-414/97, *Commission v. Spain*, 1999 E.C.R. I-5585; Case C-222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 1986 E.C.R. 1651.

288. For a discussion of this Interpretative Communication, see *infra* Parts XII–XIII.

289. BAE has been increasingly buying into the U.S. market, arguably turning its back on the European market. In 2007, it purchased Armor Holdings, which is known for production of vehicle armor systems, military helicopter seating systems, aircraft and land vehicle safety systems, and a broad range of protective equipment for military personnel. Armor Holdings—BAE Systems, <http://production.investis.com/armorholdings/> (last visited June 10, 2008). The BAE strategy paid off. In December 2007, an agreement was announced between BAE and the U.S. Military to modify the Bradley Fighting Vehicle, a deal worth \$709 million. Press Release, BAE Systems, BAE Systems Awarded \$709.4 Million Contract to Reset Bradley Fighting Vehicles (Dec. 6, 2007), [http://www.baesystems.com/Newsroom/NewsReleases/2007/autoGen\\_10711616107.html](http://www.baesystems.com/Newsroom/NewsReleases/2007/autoGen_10711616107.html) (last visited June 10, 2008). Other lucrative contracts quickly followed. *See, e.g.*, the following BAE Systems press releases, all available at BAE Newsroom, <http://www.baesystems.com/Newsroom/NewsReleases/index.htm> (last visited June 10, 2008): BAE Systems Awarded First F-35 Production Contract, (Jan. 16, 2008); BAE Systems Awarded \$42 Million Air Force Contract for Updated Air Planning System (Jan. 31, 2008); BAE Systems Awarded \$28 Million U.S. Air Force Contract to Provide Radar Warning Receivers for C-130j Transports (Jan. 30, 2008); BAE Systems Wins \$242 Million U.S. Navy Enterprise Platform Integration Contract to Support New Construction Ships (Feb. 14, 2008); BAE Systems Receives \$132 Million U.S. Army Production Contract for Medium Mine Protected Vehicles (Apr. 2 2008); BAE Systems Receives \$1.65 Billion Contract for Family of Medium Tactical Vehicles (June 3, 2008).

290. CSIS, *supra* note 201, at 72 n.4, 74–75; *Green Paper on Defence Procurement*, *supra* note 157, at 4, 8.

still did not adequately address defense needs as it was not intended as a “suitable instrument for the procurement of armaments.”<sup>291</sup>

Defense tendering procedures are ill-defined and inappropriate for sensitive technology or research contracts.<sup>292</sup> Security of information is an example in which open tendering procedures, requiring publication in the Official Journal, could compromise confidentiality requirements. Alternatively, award selection criteria based solely on technical, economical, and financial aspects are ill-suited to defense contracts. Issues concerning security of supply, confidentiality, and emergency situations have not been adequately addressed. Finally, “the rules on technical specifications, time limits, and follow-up contracts have also been inappropriate.”<sup>293</sup> Such inadequacies have sustained a dysfunctional defense market unable to fully realize EDEM, largely because strong guidance for Article 296 has been unavailable.

The major procurement problem with reference to Article 296 lies in addressing dual-use items in the context of essentiality. Tank procurements would be undeniably “essential” to any Member State and easily excluded under Article 296 since a tank’s usage outside a defense context is unlikely. Yet other examples are not as clear, so the question of “essential” procurements does not invite a uniform response.

Consider “essential” within the productive capacity limitations of Cyprus which imports virtually all defense needs, and thus invites a broader consideration of “essential” under Article 296.<sup>294</sup> Furthermore, some equipment may be used differently for defense versus security contexts. In addition, terrorists now attack with non-traditional means which were not previously considered weapons.<sup>295</sup> Thus it is necessary to carefully consider the equipment to be used and the context in which it is to be used. The interoperability of EU forces would also be enhanced if

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291. Trybus, *supra* note 262, at 203.

292. Tendering procedures are outside the scope of this Article, however the negotiated procedure *with* prior publication is considered the best method for defense procurement. The use of the negotiated procedure *without* prior publication is used when the defense interest concerns security of information, security of supply, or complex cases requiring a tested reliable contractor. *See* SPANISH MINISTRY OF DEFENCE ANSWERS TO GREEN PAPER, DEFENCE PROCUREMENT 3 (Mar. 14, 2005) [http://forum.europa.eu.int/Public/irc/markt/markt\\_consultations/library](http://forum.europa.eu.int/Public/irc/markt/markt_consultations/library) (follow “Public Procurement” hyperlink; then follow “Defence Procurement” hyperlink; then follow “Member states and third countries” hyperlink; then follow “Spain” hyperlink) (last visited Apr. 5, 2008) [hereinafter “SPANISH MOD ANSWERS”].

293. COM (2005) 626, *supra* note 213, at 5.

294. Tiny Cyprus’s defense expenditure per capita in 2006 was higher than Germany’s—in fact, it was higher than that of over half of EDA pMSs. *See* NDE2006-21/12/2007, *supra* note 203, at 6 (Table: European Defence Expenditure Per Capita in 2006).

295. UNISYS, *supra* note 198, at 11.

they cooperated more fully or were willing to buy each other's equipment.<sup>296</sup>

Changes to Europe's defense procurement regime are evolving to address unique attributes of sovereign security and deficient public procurement procedures. Mechanisms to manage hard defense procurements are being created and strengthened at a rapid pace.

The European Defence Agency was created in 2004<sup>297</sup> to handle procurements where Article 296 has a clear application. While a detailed EDA discussion is outside the scope of this Article,<sup>298</sup> its four tasks are noteworthy:<sup>299</sup> to develop defense capabilities in crisis management,<sup>300</sup> to promote and enhance European armaments cooperation,<sup>301</sup> to establish EDEM,<sup>302</sup> and to enhance research.<sup>303</sup> Overall, it will facilitate EU defense by providing contractual services for collaborative research projects through the identification of common military requirements. EDA procedures are meant to complement EDEM transparency initiatives and open up tender opportunities throughout Europe.

One specific EDA defense procurement initiative worth mention is the Voluntary Code of Conduct (CoC) in Defence Procurement signed in November 2005 to integrate Europe's defense industry.<sup>304</sup> It is a non-binding agreement among signatory members of the EDA to effect procurements based on transparency.<sup>305</sup> The subscribing EDA Member States (sMS)<sup>306</sup> will offer fair and equal cross-border defense procurement

296. The Lisbon Treaty, *supra* note 1, would expand certain responsibilities such as the Petersberg Tasks, described *infra* note 463, to more dangerous missions. Survivability of the troops is increasingly important and would be aided by higher interoperability and cooperation.

297. See Council Joint Action 2004/551/CFSP, on the Establishment of the European Defence Agency, 2004 O.J. (L 245).

298. For EDA historical development, see Martin Trybus, *The New European Defence Agency: A Contribution to a Common European Security and Defence Policy and a Challenge to the Acquis?* 43 COMMON MKT. L. REV. 667 (2006), and Aris Georgopoulos, *Defence Procurement and EU Law*, 20 E.L. REV. 559, 559–64 (2005). For a comprehensive and updated discussion of the EDA, see generally Stacy Ferraro, *The European Defence Agency: Facilitating Defence Reform or Forming Fortress Europe?*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 549 (2007).

299. Council Joint Action, *supra* note 297, art. 5.

300. *Id.* art. 5(3)(3.1).

301. *Id.* art. 5(3)(3.2).

302. *Id.* art. 5(3)(3.3).

303. *Id.* art. 5(3)(3.4).

304. EDA, The Code of Conduct on Defence Procurement, <http://www.eda.europa.eu/genericitem.aspx?area=Organisation&id=154> (last visited June 8, 2008).

305. *Id.*

306. According to the EDA website as of April 2008, all EU Member States except Bulgaria and Romania have committed to the CoC, though they may join at a later date. Denmark, a general ESDP opt-out, is not an EDA pMS. EDA, The Code of Conduct on Defence Procurement, <http://www.eda>.

opportunities by publishing tenders on the EDA's new Electronic Bulletin Board (EBB) from July 1, 2006. This will facilitate a cross-border EDEM using e-technology to gather procurement data and monitor justifications for Article 296 derogations.<sup>307</sup>

In November 2007, the EDA released a one year status report on the Code of Conduct. The report reflects a healthy monitoring system, increased transparency, and a growth in government contract opportunities:

As of 1st September 2007, 15 of the 24 sMS have published more than 227 contract opportunities with a total value cautiously estimated at around €10 billion Euros . . . 26 Contract Award Notices with competition for a total value of €156M, two being to suppliers in other European countries and 16 awarded to small and medium enterprises. While the numbers are still to [sic] low to draw conclusions, we would expect more cross-border awards, but it should be noted that, there is, on the other hand, still limited cross-border bidding by industry.<sup>308</sup>

Such mechanisms are valuable market tools to establish Article 296 precedent in parallel with initiatives to monitor and maximize defense spending. Unless specifically excluded, subscribing Member States' contracts above one million euros that fall within Article 296 must be open to cross-border procurement.

## XII. THE IRONY OF 296

This Article, however, considers defense procurement when the conditions for the application of Article 296 are unclear. In the early days of the EEC, a protective exemption for national defense or security procurements may have seemed logical, in fact necessary. Emerging from war, nations justifiably protected their vulnerable economies by resisting multilateral defense procurement. The drive to create and protect domestic employment and economic growth was no less an incentive to apply Article 296 broadly. However, the exemption must be reappraised, especially in light of dual-use technological innovations and a shifting

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[europa.eu/genericitem.aspx?area=organisation&id=154](http://europa.eu/genericitem.aspx?area=organisation&id=154) (follow "Code of Conduct" hyperlink; then follow "Key Facts" hyperlink) (last visited June 8, 2008).

307. For parliamentary commentary on UK perception of EDA and EBB, see UKHL, Current Developments in European Defence Policy, *supra* note 76, at 5–10.

308. EDA, *A Successful First Year of Operation of the Code of Conduct on Defence Procurement* (Nov. 2007), <http://www.eda.europa.eu/EbbNewsLetter/> (last visited Apr. 5, 2008).

emphasis on interoperability. To these ends, FP7 will address the extent to which private-to-public technology transfer of dual-use intellectual property rights in an “essential interest” context can remain with companies pursuant to a defense or security-related procurement.

The dual-use context raises interesting examples. Consider the level of sophistication and development costs of technology initiatives, such as secure communication that could assist both military forces as well as civilian police faced with global terrorism, or Armed Robotic Vehicles that provide safer explosive ordnance disposal capabilities.<sup>309</sup> Moreover, software development for military Communications, Command, Control, Intelligence (C3I or, with the addition of Computers, C4I) is essential to win wars. It must be protected. General Thomas Power once said, “Communications is synonymous with command. If I don’t have communications, the only weapon I have is my desk—I can’t throw it very far, and it’s not very lethal.”<sup>310</sup>

ESDP success requires getting technology from concept to battlefield, a process that has become so sophisticated and expensive that development is most affordable when sourced internationally through joint procurement arrangements. Fundamental technological advancements today are rarely achieved by one state alone due to development cost factors. Buyers want the best technology and value-for-money, the latter of which is more about quality than about acquisition at the cheapest price. Ironically, such a system makes confidentiality vulnerable in a public procurement context.

Airbus is a leading example of Europe’s technological competitiveness, which if properly leveraged can erode over-dependence on domestic defense. Yet, it appears that present defense decisions have been taken with an overwhelming dearth of insight into the economic realities of technological innovation, amid inconsistent and shifting levels of political will. While the finalization of a multinational agreement sounds progressive, the reality of execution is fraught with logistical and financial problems,<sup>311</sup> seriously impacting burden-sharing agreements.

Consider the Airbus A400M, Europe’s largest military project, which has been plagued by ongoing delays—on top of those announced in October 2007—at a cost of billions of euros.<sup>312</sup>

309. See Ian Kemp, *Robot Wars*, ARMADA INT’L, Aug./Sept. 2005, <http://www.armada.ch/05-4/article-full.cfm> (last visited Apr. 5, 2008).

310. *Power on the Side*, TIME, Feb. 16, 1959, available at [www.time.com/time/magazine/article/0,9171,894207-2,00.html](http://www.time.com/time/magazine/article/0,9171,894207-2,00.html) (last visited June 10, 2008).

311. See Airbus Military, *supra* note 244. See also *supra* Part X.

312. Airbus Military, *supra* note 244. Though static testing on the structure has begun, delays will continue. See *EADS Starts Static Testing of a Complete A400M Structure* (Mar. 13, 2008),

While it can be argued that the collaborative process is the only way to shoulder the huge expenses associated with huge defense development projects, when one of the original parties withdraws, the implications for remaining nations can be serious. The UK's withdrawal from the TRIGAT anti-tank missile program, for example, resulted in massive losses to the UK and delays in program delivery, as time and resources were spent trying to keep the industrial alliance together.<sup>313</sup> There was also the Maritime Frigate—Project Horizon, from which the UK withdrew.<sup>314</sup> This was mentioned with reference to effective CFSP, that:

[M]erger of European defence industries is an essential underpinning for an effective CFSP is valid but one that carries dangers. The failure of the *Horizon* frigate project after three years of negotiations provides a pessimistic portent of things to come, especially since this follows hot on the heels of the controversial acquisition by BAe of GEC's Marconi defence interests which allegedly set back the prospects for a European Aerospace Industry. The EU is therefore faced with two choices: either seek economies of scale through co-development within Europe or through transatlantic fora or; second, rely increasingly on the US for the next generation of hi-tech weapons.<sup>315</sup>

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[http://www.eads.net/1024/en/pressdb/pressdb/EADS/20080313\\_eads\\_a400m\\_static\\_tests.html](http://www.eads.net/1024/en/pressdb/pressdb/EADS/20080313_eads_a400m_static_tests.html). The company could face financial penalties. *EADS Chief Says "Execution Risks" Remain on New Aircraft Programs A380, A400M*, INT'L HERALD TRIBUNE ONLINE, May 26, 2008, <http://www.iht.com/articles/ap/2008/05/26/business/EU-FIN-Netherlands-EADS.php> (stating that delays have cost €1.2 – 1.4 billion (up to US\$2 billion) in penalties and charges). See also *EADS Tells European Arms Agency It Will Delay First Airbus A400M Flight—Report*, FORBES.COM, June 4, 2008, <http://www.forbes.com/afxnewslimited/feeds/afx/2008/06/04/afx5078334.html> (last visited June 6, 2008). See *CORRECTED—Germany Says Considers [sic] Fines for A400M Delays*, REUTERSUK, Jan. 7, 2008, [http://uk.reuters.com/article/UK\\_SMALLCAPSRPT/idUKBAT00200920080107](http://uk.reuters.com/article/UK_SMALLCAPSRPT/idUKBAT00200920080107) (last visited Apr. 5, 2008); *EADS CEO Dismisses Fears on Orders, A400M Delay*, REUTERSUK, Jan. 7, 2008, <http://www.reuters.com/article/companyNews/idUSPAC00907320080107> (last visited Apr. 5, 2008).

313. UKHL, Defence Committee, 3 Consolidated Departmental Resource Accounts (Second Report of Session 2006–2007), <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmdefence/57/5706.htm> (last visited Apr. 5, 2008). See also Lord Hamilton's comments, *supra* note 244 (describing the disasters of collaborative procurement and citing to the UK's pullout from the Eurofighter and the TRIGAT).

314. The UKMoD issued a summary of lessons learned from collaborative defense procurement ventures. See UKMoD, SELECTComm. on Defence, Tenth Report, Written Evidence, *available at* <http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmdefence/528/528we11.htm> (scroll down to "Lessons Learned from Project Horizon").

315. DR. SIMON DUKE, FROM AMSTERDAM TO KOSOVO: LESSONS FOR THE FUTURE OF CFSP 12 (citing Alexander Nicoll, *National Differences Scupper Frigate Project*, FIN. TIMES, Apr. 28, 1999 at 1), *available at* [www.eipa.eu/files/repository/eipascope/scop99\\_2\\_1.pdf](http://www.eipa.eu/files/repository/eipascope/scop99_2_1.pdf).

If one contrasts the American and European research cultures, one sees that in the United States, technology trends move from the military to the civilian sector,<sup>316</sup> where research costs are often underwritten by the government and later recouped by contractors as permitted through cooperative agreements. Developers exploit technology thereafter, subject to contractual restrictions. This arrangement facilitates the creation of cutting-edge defense technology—thus achieving cutting-edge defense—while feeding technology to downstream civilian applications.

In contrast, European defense research funding remains fragmented and unfocused—abetted by Article 296. It is as if Jean-Baptiste Colbert, Louis XIV's Finance Minister, still influences the European mindset, prescribing a neo-mercantilist defense structure, which attempts to retain maximum production within the sovereignty of the State. The modern realities of overlaps—such as high development costs and rapid technological obsolescence—require that protectionist defense procurement mechanisms yield to the realities of economies of scale, and the need to amortize per copy R&D.

The irony of Article 296 is this: it legitimates antiquated thinking that domestically derived technology provides the best defense capability. This is a naïve strategy: no European country can assume full competence in all technologies; Member State pockets are simply not deep enough.

A contemporary example is ITER,<sup>317</sup> the joint international nuclear fusion energy development project signed November 21, 2006, by China, the EU, India, Japan, Korea, Russia, and the United States. The estimated project cost of €12 billion represented “a victory over the strategies of supremacy that so marked the last century. The victory of humanity's interest as a whole.”<sup>318</sup>

This epic project has implications for energy, defense, and security that transcend any border and underscore the benefits and investment opportunities available through economic partnering, at the EU or global level. It appears that ITER already enjoys a reputation for collaborative success. The EU has recently established a website for “The European Joint Undertaking for ITER and the Development of Fusion Energy—

316. The Internet and GPS are two commonplace examples.

317. “ITER” means “the way” in Latin. A former usage, International Thermonuclear Experimental Reactor, has been discontinued, but see The ITER Project, [http://www.iter.org/a/index\\_nav\\_1.htm](http://www.iter.org/a/index_nav_1.htm) (last visited Apr. 5, 2008).

318. Jacques Chirac, President of the French Republic, ITER Signing Speech (Nov. 21, 2006), [http://fire.pppf.gov/iter\\_sign\\_Chirac\\_112106.pdf](http://fire.pppf.gov/iter_sign_Chirac_112106.pdf) (last visited Apr. 5, 2008). The ITER Organization was legally established November 7, 2007. See ITER, [http://www.iter.org/a/index\\_nav\\_6.htm](http://www.iter.org/a/index_nav_6.htm) (follow “ITER Headquarters Agreement Signed” hyperlink) (last visited Apr. 5, 2008).

‘Fusion for Energy,’<sup>319</sup> which reflects a number of recent developments. On January 31, 2008, “Fusion for Energy published its first two Calls for Expression of Interest on behalf of ITER addressed to specialized companies: one for Cabling and Jacketing of TF Conductor Performance Samples, and one for Tritium Transport Packages.”<sup>320</sup>

For EU defense, the common goal is EDEM, which some say cannot be established until Article 296 is abolished.<sup>321</sup> Perhaps it could be argued that, practically speaking, Article 296 has become merely an artifact of a transitional period and must now be relegated to the footnotes of EU history. Certainly it is counter-intuitive in light of the Lisbon Agenda’s goal to create the most competitive and dynamic knowledge-based economy in the world by 2010. Yet, it is difficult to balance that argument with the inconsistent signals from the UK-Saudi example,<sup>322</sup> or the recent €93 million “strategic military purchase” of Army trucks by the Czech military awarded non-competitively to Tatra.<sup>323</sup> If Article 296 is invoked, and a justification is supplied, who is the first-level judge and where is the objective assessment? What is clear is that use of Article 296 must be refined and confined.

### XIII. THE INTERPRETATIVE COMMUNICATION ON ARTICLE 296

Member States have long dodged Treaty oversight of defense procurement because of ill-defined criteria for Article 296 applications, and because previous procurement frameworks did not address unique defense procurement characteristics. Procurement rules were easily ignored, even when Article 296 was clearly inapplicable. In 2005, a Commission Communication on future initiatives in defense procurement proposed: (1) an Interpretative Communication on Article 296, and (2) a new defense Directive adapted to the specificities of the defense sector concerning the application of Article 296.<sup>324</sup>

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319. See generally Fusion for Energy, <http://fusionforenergy.europa.eu/> (last visited Apr. 6, 2008).

320. *Id.* (under heading “First Calls for Expression of Interest Launched on behalf of ITER”).

321. EUROPEAN PARLIAMENT, *supra* note 285, at 41.

322. See *supra* notes 231–40.

323. *Czechs Order New Army Trucks*, DEFENSENEWS.COM, Dec. 15, 2006, available at <http://www.defensenews.com/story.php?F=2426538&C=europe>. See also Czech Republic Ministry of Defence, *Contract for TATRA Trucks Signed* (Dec. 15, 2006), <http://www.army.cz/scripts/detail.php?id=8401>.

324. COM (2005) 626, *supra* note 213, at 9–10. See generally *Green Paper on Defence Procurement*, *supra* note 157.



On December 7, 2006, the Commission released its promised Interpretative Communication on Article 296<sup>325</sup> to balance defense and security against fundamental community principles and objectives, to prevent misuse and to ensure that Treaty derogations are limited exceptions in which essential security interests are truly at stake.<sup>326</sup>

The Communication confirmed the authority of ECJ case law in matters of defense procurement.<sup>327</sup> The Court will decide whether derogations have been properly invoked,<sup>328</sup> an effect that has crossed community pillars and strengthened Bovis's prediction that procurement will become a litigator's paradise.<sup>329</sup>

Looking first at the Communication's reinforcement of *Commission v. Spain*,<sup>330</sup> which disallowed tax exemptions requested under Article 296 by holding that Spain's intended use went beyond the narrow scope intended by the provision<sup>331</sup> that Article 296 will "*deal with exceptional and clearly defined cases*;" therefore, the field of interpretation will be narrow.<sup>332</sup> This language, however, is uninspiring and offers no clarity for narrowing the interpretation.

The key feature is that the Communication opens the List's field of application to "the evolving character of technology and procurement."<sup>333</sup> The generic language extends the List to "future developments," and extends Article 296(1)(b) to the "procurement of services and works directly related to the goods included in the [1958] list, as well as modern, capability-focused acquisition methods. . . ."<sup>334</sup> Exemptions would be permitted for items designed, developed, and produced specifically for

325. IC296, *supra* note 5. See also Frequently Asked Questions on Interpretative Communication on Defence Procurement (Dec. 7, 2006), available at RAPID, <http://europa.eu/rapid/searchAction.do> (search complete database, reference "MEMO/06/468"); Public Procurement: New Commission Guidelines on Defence Contracts (Dec. 7, 2006), available at RAPID, <http://europa.eu/rapid/searchAction.do> (search complete database, reference "IP/06/1703"); Press Release, EDA, EDA Welcomes European Commission Clarification on EU Defence Procurement (Dec. 7, 2006), <http://www.eda.europa.eu/newsitem.aspx?id=55> (last visited Apr. 6, 2008).

326. IC296, *supra* note 5, at 5.

327. *Id.* at 4.

328. *Id.* at 3.

329. See Bovis, *supra* note 90, at 63. The TEU, *supra* note 182, created the European Union based on a three-pillar policy model: Pillar I—the European Communities, Pillar II—Common Foreign and Security Policy (CFSP), and Pillar III—Police and Judicial Cooperation in Criminal Matters. *Id.* Titles I, V, VI. Article 47 TEU protects the ECJ's right to preserve the *acquis communautaire* in relation to policy Pillars II and III.

330. C-414/97, 1999 E.C.R. I-5585.

331. *Id.* at summary, ¶¶ 21–24.

332. See IC296, *supra* note 5, at 5 (quoting C-414/97, *Comm'n v. Spain*, 1999 E.C.R. I-5585).

333. *Id.*

334. *Id.*

military purposes,<sup>335</sup> yet tenders for non-military security purposes, by contrast, are excluded under Article 14<sup>336</sup> of 2004/18/EC.<sup>337</sup> Dual-use goods will be covered by Article 296(1)(a) if there is a question of national security information.<sup>338</sup> Once again however, the protection accorded does not clarify distinctions between security and defense needs.

The Commission and the ECJ intend to halt automatic application of Article 296.<sup>339</sup> Returning to *Spain*, the days of implied or unsubstantiated reference to national interests to avoid competitive procurement are over. Article 298EC is the check-and-balance for “unfettered” application of Article 296.<sup>340</sup> *Spain* therefore remains good law,<sup>341</sup> and will be enforced as justifications for derogations must now be clearly articulated.

Perhaps it could be argued that the Interpretative Communication could have gone further to define Article 296 in relation to the List. Yet siding with *Trybus*, this is unnecessary. The reaffirmation of ECJ case law acknowledges that Article 296 has been a runaway train that must be stopped. The broad language of the List easily covers future developments of defense equipment,<sup>342</sup> and its contemporary application is thus confirmed. “National” interests (such as the tax in *Spain*) and “essential” interests relating to security are quite different. The Commission warns Member States not to abuse their flexibility when defining their essential interests for purposes of justifying Treaty exemptions; merely designating equipment as military in character and presuming eligibility for the exemption will not suffice.<sup>343</sup> The ECJ will hold Member States accountable for attempting to go beyond the limits of the derogation.<sup>344</sup>

Member States and the Commission have acknowledged public opinion and seek common convergence of multiple national security regimes

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335. Case T-26/01, *Fiocchi Munizioni SpA v. Comm'n*, 2003 E.C.R. II-3951, ¶¶ 59, 61.

336. Article 14 stipulates:

This Directive shall not apply to public contracts when they are declared to be secret, when their performance must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned, or when the protection of the essential interests of that Member State so requires.

2004/18/EC, *supra* note 55, art. 14.

337. IC296, *supra* note 5, at 6 n.10.

338. *Id.*

339. *Id.* at 6 n.11 and accompanying text (citing Case C-273/97, *Sirdar v. The Army Board and Sec'y of State for Defence*, 1999 E.C.R. I-7403, ¶¶ 15–16; Case C-285/98, *Kreil v. Bundesrepublik Deutschland*, 2000 E.C.R. I-69, ¶ 16; Case C-186/01, *Dory v. Bundesrepublik Deutschland*, 2003 E.C.R. I-2479, ¶¶ 30–31).

340. *Id.* at 6.

341. *Id.* at 7 (citing Case C-414/97, *Commission v. Spain*, 1999 E.C.R. I-5585, ¶ 22 n.14).

342. *Trybus*, *supra* note 271.

343. IC296, *supra* note 5, at 7.

344. *Id.* at 7 n.16 (citing *Spain*, ¶ 22).

toward an ESDP. The Commission advises Member States to consider: (1) the “essential” security interest concerned, (2) the connection between the security interest and the procurement, and (3) the unique reasons that a specific tender should occur outside the Procurement Directive.<sup>345</sup>

The Communication also mentions offsets, warning that offsets are a possible indirect market distortion<sup>346</sup>—a curious inclusion. Certainly, Member States are wise to consider offsets, for example, when they may preserve an element of the industrial base. However, the Communication’s reference to offsets offered no new insight that might persuade offsets’ critics that they are anything other than a real distortion potential and an act of political fiat with arguable economic logic.

The final part of the Communication admonishes Member States that the Commission expects cooperation with Article 296 compliance investigations.<sup>347</sup> Again, the pillars overlap as the Commission reasserts itself as guardian of the Treaty, and reminds Member States that, “defense” subject matter notwithstanding, they will be required to provide specific information on defense tenders and requests for exemption from the Procurement Directive.<sup>348</sup>

The Communication is weakest in addressing measures to be taken for non-compliance. To examine possible remedies or bring the case before the ECJ<sup>349</sup> offers nothing new. That the Commission will consider the specific sensitivity of the sector when evaluating infringements is also an intangible that will be difficult to interpret and apply. In some ways, given

345. *Id.* at 8.

346. *Id.* See also comments, *supra* Part VII. The Commission’s Press Release for the 2007 Defence Package had this to say about offsets:

Offsets are a complex issue. They are politically controversial, economically questionable and legally problematic.

Offsets usually entail discrimination by their very nature and therefore stand in direct contrast to the Treaty. Consequently, the procurement Directive can neither allow nor regulate them. On the other hand, offset practices differ so much that any attempt to forbid them explicitly in the Directive would face serious definition problems. It is therefore preferable to leave it up to Member States to make sure that possible offset requirements stay in line with the rules of the Directive and the Treaty.

This is particularly important since offsets, in particular civil offsets, are legally problematic also when they are required for contracts which are exempted under Article 296. Offsets are thus an issue which goes beyond the Directive and must be dealt with in a broader context.

Press Release, Commission Proposes Enhancing Openness and Transparency in EU Defence Markets (Dec. 5, 2007), available at RAPID, <http://europa.eu/rapid/searchAction.do> (search complete database, reference “MEMO/07/547”) [hereinafter “MEMO/07/547”].

347. IC296, *supra* note 5, at 8–9; MEMO/07/547, *supra* note 346.

348. *Id.* at 8–9 (Case 82/03, *Comm’n v. Italian Republic*, 2004 E.C.R. I-6635, ¶ 15).

349. IC296, *supra* note 5, at 9.

the pre-release publicity, the new Interpretative Communication was disappointing for its lack of clarity and assertiveness. Nonetheless, it provided valuable guidance and will have positive consequences in reducing automatic exclusions and increasing procurement and dual-use dialogue. It serves as a reminder to the Member States that the ECJ will play a vital role, even in non-ceded sovereign areas. It also provided a window into the Commission's intentions for its newest defense initiative—the Defence Package of 2007.

#### XIV. THE 2007 DEFENCE PACKAGE—A FEW KEY POINTS

In addition to the Interpretative Communication discussed in the previous section, in December 2007, the Commission delivered on its other promised initiative and tabled a Defence Package, which contains, *inter alia*, a proposal for the promised Defence Directive referred to in the Commission Communication of 2005.<sup>350</sup>

While a discussion of the entire Package is outside the scope of this Article (and it is pre-mature to analyze and judge the impact of the Package and the specific Directives proposed since they are still in the early stages of co-decision<sup>351</sup>—a process which could take several years), it is important to mention the stated purpose of the two proposed Directives and to mention the key provisions set forth with respect to procurement. It is also important to note concerns with respect to the legislation so that the Package may be evaluated critically and in the most informed manner.

Overall, the Package represents the Commission's and the Member States' earnest first steps towards a new approach to correct deficiencies in EU defense procurement. The Communication speaks to "the special character of the industry and its unique relationship with governments," while pointing out that there are many untapped opportunities to ensure that Member States receive value for money, along with efficient and effective capabilities to support ESDP.<sup>352</sup> It offers the Package as one policy "to improve the functioning of the internal market for defence products . . . ."<sup>353</sup> It also intends for the new legislation to "contribute to the progressive establishment of a European Defence Equipment Market

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350. COM (2005) 626, *supra* note 213, at 7–10.

351. See *supra* notes 6, 12 and accompanying text.

352. 2007 Defence Communication, *supra* note 7, at 3.

353. *Id.* at 6.

(EDEM); where suppliers established in one Member State can serve, without restrictions, all Member States.”<sup>354</sup>

The aim of the two Directives as set forth in the 2007 Defence Communication is described as follows:

The proposal for a directive on intra-EU transfers of defence products will facilitate transfers by eliminating unnecessary paperwork. EU Governments procuring from suppliers established in another Member State will see their security of supply improved. By significantly reducing licence application costs, and by allowing system integrators to open their supply chains in more predictable conditions, the new rules will increase opportunities for competitive Small and Medium-sized Enterprises (SMEs) to supply components or sub-systems thereby contributing to making the European market more dynamic.

The proposed Directive on defence procurement will enhance openness and competitiveness of defence markets in the EU taking into account specific features, such as security of supply and security of information. It will reduce the regulatory patchwork in this field. It will increase competition and transparency and so aid SMEs to find, and bid for, sub-contracts. By providing new rules applicable to the procurement of arms, munitions and war material and to certain sensitive non-military security items, this initiative should further limit the use of Article 296 to exceptional cases as stipulated by the Court of Justice and build upon earlier steps taken by the Commission [COM (2006) 779] and the EDA to encourage greater openness of defence markets.<sup>355</sup>

While the entire Package represents an important milestone, it is the Defence Procurement Directive that is paramount as it is meant to open procurement opportunities and become an instrument covering procurement of sensitive items. Its use over time will establish transactional reliability, a measure of guidance, and a framework within which Member States can guard their essential security interests—using rules that consider specific defense needs such as security of information and the need for flexible procurement mechanisms<sup>356</sup>—while still observing the market principles of the Treaty.

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354. *Id.*

355. *Id.*

356. Defence Directive, *supra* note 8, at 3.

The 2007 Defence Directive has three key provisions. The first covers contracting procedures, which are outside the scope of this Article but are mentioned anyway.<sup>357</sup>

[T]he negotiated procedure with publication of a contract notice is authorised without the need for specific justification in order to allow the flexibility required to award sensitive defence and security contracts. The restricted procedure and the competitive dialogue may also be used. The open procedure, however, which involves distributing the specifications to any economic operator that wants to see them, was felt to be inappropriate in view of the confidentiality and security of information requirements attached to these contracts.<sup>358</sup>

The second deals with security of supply: “[T]he specific needs of the Member States with respect to security of supply for sensitive public contracts in the fields of defence and security justify specific provisions, in terms of both contractual requirements and the criteria for selecting candidates.”<sup>359</sup>

The third deals with security of information: “[S]imilarly, the often confidential nature of the information relating to sensitive public defence and security contracts calls for safeguards applying to the award procedure itself, the criteria for selecting candidates and the contractual requirements imposed by the contracting authorities.”<sup>360</sup>

It is clear that the Commission seeks to rectify deficiencies of 2004/18/EC by creating legislation that is suited to the needs of security and defense, while taking care not to tread on the Member States’ sovereignty. However, there are still some important issues that may preclude a speedy co-decision in favor of the legislation.

Yet important stakeholders are still skeptical of the Directive and intend to lobby diligently as the legislation moves through the EU approval process.

The UK House of Commons questioned “whether the benefits of the Directive are outweighed” by such concerns as: (1) the deletion of the “security and secrecy” exemption; (2) how to prevent the ECJ from crossing the line into determining essentials for Member State national security; (3) the deletion of the national security exemption; (4) the

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357. See *supra* Part III. See also *supra* notes 90, 292.

358. Defence Directive, *supra* note 8, at 7. See also *id.* at 36–39, ch. IV, arts. 17–20.

359. *Id.* at 7. See also *id.* at 35, ch. III, art. 15.

360. *Id.* at 7. See also *id.* at 34–35, ch. III, art. 14.

erosion of the use of certain Treaty provisions (covering the legitimate use of Articles 30, 39, 46, and 55) over time; and (5) whether it is premature to include security and the lack of a solid definition for “security” may be problematic.<sup>361</sup>

The Report concludes that there are risks inherent in the proposal as written, and amendments are needed to avoid the “likely erosion of the existing safeguards under the EC Treaty which may be the result of this proposal.”<sup>362</sup> In addition, there were concerns with the ambiguity of terminology concerning sensitive information and issues over defining “terrorism” and “criminal organisation”<sup>363</sup> in an EC instrument, since some thought such matters should be under the scope of the EU Treaty. Other areas which were considered questionable were issues concerning the exclusion of some contracts awarded in third countries,<sup>364</sup> “whether the proposed Directive should have any application where the contract is awarded in a country outside the European Union,”<sup>365</sup> and “the degree to which extra-territorial jurisdiction is intended by this provision.”<sup>366</sup>

One stakeholder, the Society of British Aerospace Companies (SBAC), the UK’s national trade association representing companies supplying civil air transport, defense, homeland security, and space, has concerns. SBAC rightfully observes that this is “new territory for the Commission.”<sup>367</sup> SBAC questions whether the Directive would really result in a “level playing field for all.”<sup>368</sup> SBAC’s chief concern was that defense R&D should be excluded from the Directive in no uncertain terms, because to include it would undermine both the creation of high value-added employment and intellectual property rights (IPR).<sup>369</sup> This was felt to endanger the technological and industrial base of Europe’s defense sector, which SBAC predicts will decline as companies are discouraged from EU R&D investment.<sup>370</sup> Including R&D would be contrary to “European defence ministers’ stated ambition and should be of particular concern to

361. UKHC, SELECT COMMITTEE ON EUROPEAN SCRUTINY, DEFENCE AND SECURITY PROCUREMENT THIRTEENTH REPORT, SESSION 2007–08 (Feb. 14, 2008), available at <http://www.parliament.the-stationery-office.co.uk/pa/cm200708/cmselect/cmeuleg/16xi/1608.htm>.

362. *Id.* ¶ 6.18.

363. *Id.* ¶ 6.19.

364. *Id.* ¶ 6.20.

365. *Id.*

366. *Id.*

367. Press Release, SBAC, SBAC Comment on EU Defence Package (Dec. 5, 2007), available at [http://www.sbac.co.uk/community/cms/content/preview/news\\_item\\_view.asp?i=17700&t=0](http://www.sbac.co.uk/community/cms/content/preview/news_item_view.asp?i=17700&t=0) (last visited June 8, 2008).

368. *Id.*

369. *Id.*

370. *Id.*

the UK (given that Britain accounts for about 40% of the EU's total defence R&D spend [sic]).<sup>371</sup>

SBAC raises an important point, and a sticky one at that, as noted in a recent House of Lords Report,<sup>372</sup> wherein the participants reflected on the importance of an established industrial base concluding that the UK defence policy prioritizes that “the defence need comes first,” and that the strategy

is not driven by the convenience of the manufacturers [or] the Ministry of Defence . . . [but] by the need for the ultimate users, the military, to have an industry which is going to serve what they want and, therefore, they have got to have some planning flow of orders. In that context, what is the point of Britain being independent?<sup>373</sup>

The report cited the need to move past national duplication in procurement R&D.<sup>374</sup> It also reminds the participants that it is all about choices and a pragmatic approach to working with other Member States; the way forward with respect to progress is through “a high-level aspirational document that sets out principles, but gives a framework for industry to deliver against those principles and for projects to be looked at through the framework that the strategy sets out . . . .”<sup>375</sup>

On first glance, the Defence Directive appears to meet this objective. Furthermore, the UK Ministry of Defence (UKMoD) has gone on record that it gave serious consideration to defense procurement in light of domestic industrial strategy loss, and with respect to overlapping security of supply and technology innovation issues.<sup>376</sup> It concluded that having a closed market as a default is inefficient; competition is the only way to achieve and maintain value-for-money acquisitions.<sup>377</sup> And while the Defence Package hardly provides absolute answers, and still leaves many questions unanswered, such as “whether nonmilitary security equipment should also fall within the scope of the directive, . . . [as] it would make sense to do so [since] defence and security equipment are similar,” yet Member States are still reluctant to integrate security products.<sup>378</sup> In any

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371. *Id.*

372. HL Paper 161, *supra* note 244.

373. *Id.* at 5.

374. *Id.* at 6.

375. *Id.*

376. UKMoD, DEFENCE INDUSTRIAL POLICY, *supra* note 216, at 11–13. *See also infra* note 402.

377. *Id.*

378. *Internal Market, Broad Support for Common European Defence Market in the European Parliament*, SLOVENIAN PRESIDENCY UPDATE (Ass'n of Employers of Slovenia (ZDS)), 6th ed., Apr.



case, every step forward adds some clarity. As Trybus recently noted to the European Parliament, clarity “makes it more difficult to ignore Community law.”<sup>379</sup>

In any case, the process is just commencing,<sup>380</sup> and it will be interesting to monitor the critiques from other stakeholders as they digest the Package and speculate about its impact on the industrial base, and to EDEM as a whole.

## XV. STATE AID

Given Member States’ concerns about sovereignty, establishing an operational connection between defense as a security activity and the “business” of defining and procuring defense needs within the scope of the Internal Market was challenging.<sup>381</sup> The Lisbon Agenda “stagnated into a mid-life crisis,” and the Commission attempted to revive it throughout 2005, sidestepping sensitive competition issues and industrial policies.<sup>382</sup> State aid policy was an important input. Effective competition policy development encompassed non-economic facets to be “wrestl[ed] . . . away from the prerogatives of States” to combat “inherent and intrinsically negative and protectionist outcomes of national industrial policy.”<sup>383</sup> Thus state aid, never far from a discussion on defense procurement, was a necessary evil in the struggle to balance open markets with industrial development. Competition became the figurative battering-ram to widen EU industrial strategy, including in defense, with no apologies from the Executive for its weapon of choice.

Of particular concern to the notion of “essential interests” under Article 296 is the application of state aid, covered under Articles 87-89EC.<sup>384</sup> State aid interacts uniquely with defense procurement because of the close relationship between the state and the defense sector, and the likelihood

21, 2008, at 10–11, *available at* [http://www.bdi-online.de/download/ZDS\\_Newsletter\\_6.pdf](http://www.bdi-online.de/download/ZDS_Newsletter_6.pdf) (last visited June 17, 2008).

379. Martin Trybus, Dir., Inst. of Eur. Law, Birmingham Univ., Presentation to the European Parliament, *Defence Package: Rationalising the European Defence Market—Risks and Benefits* (June 2, 2008), *available at* <http://www.europarl.europa.eu/activities/committees/hearingsCom.do?language=EN&body=IMCO> (last visited June 17, 2008).

380. According to the Package’s Parliamentary Procedure File, its first reading is scheduled for Nov. 18, 2008. See Parliamentary “Forecasts” at <http://www.europarl.europa.eu/oeil/file.jsp?id=5573442>, the timetable is estimated in the Slovenian Presidency Update, *supra* note 378, at 11.

381. COM (2003) 113, *supra* note 189. *See also id.* at 7–17.

382. Erika Szyszczak, *Modernising State Aid*, in *EUROPEAN CURRENT LAW* lvii, lix (John Porritt et al. eds., 2005).

383. *Id.* at lix, lxii.

384. EC Treaty arts. 87–89.

that a preferred procuring entity could acquire products at artificial, non-market prices and then use them to cross-subsidize civil production.<sup>385</sup> The inherent problem of monopsony, with the state the sole buyer of a good that can be produced by several different suppliers, is that it renders market pricing difficult, and long-term competition among suppliers nearly impossible. Dependency easily develops between buyer and seller, and state aid is often the result.<sup>386</sup>

Article 87EC<sup>387</sup> prohibits the granting of State aid which could distort competition by favoring certain firms or backing the production of certain items. The Court of First Instance in *Fiocchi Munizioni SpA v. Commission*<sup>388</sup> permitted derogation from Article 88EC notification and examination procedures based on “essential interests of its [internal] security.”<sup>389</sup> Competition rules did not apply to state aid grants to an arms production undertaking, producing goods from The List.<sup>390</sup>

Note however, that the Commission is drawing distinctions. For example, it is still reviewing state aid to the Greek company ELVO—which produces dual-purpose goods not entirely covered by Article 296—to ensure that state aid instruments, such as debt write-offs, are not applied to the civilian portion of ELVO’s output.<sup>391</sup> The Commission will block an Article 296 exemption when it is invoked as a pretext for illegally applying state aid to civilian activities.<sup>392</sup>

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385. Alik Doern, *The Interaction Between EC Rules on Public Procurement and State Aid*, P.P.L.R. 2004, 3, 97–129, 121–22. Doern discusses the relationship between Article 87EC and Article 296. Though outside the detailed scope of this Article, he notes, at 129, that the relationship between these two provisions will become increasingly important as the Commission refines its data and policy on cross-subsidization. *See also* comment, *supra* note 50.

386. European Monitoring Centre on Change (EMCC), *Sector Futures: Defence Industry: European Defence Industry-What Future?* 5, <http://www.emcc.eurofound.eu.int/content/source/eu06019a.html> (last visited Apr. 6, 2008) (updated July 12, 2006) (discussing peculiarities of the defense industry). For the success of European defense industries, “the outcome will particularly depend on the role of individual governments, European collaboration and European-US cooperation.” *Id.*

387. EC Treaty art. 87.

388. Case T-26/01, 2003 E.C.R. II-3951.

389. *Id.* ¶ 58.

390. *Id.* ¶¶ 58–59, 63–64, 74.

391. State Aid: Commission Investigates Support to Greek Vehicle Producer (Dec. 8, 2005), *available at* RAPID, <http://europa.eu/rapid/searchAction.do> (search complete database, reference “IP/05/1549”).

392. *Id.* *See* Notice from Commission to Greece, State Aid C 47/2005 (ex NN 86/2005 and CP 76/2002) Greece ELVO (Hellenic Vehicle Industry S.A.), D (2005) 4680 (Dec. 7, 2005), [http://ec.europa.eu/comm/competition/state\\_aid/register/ii/by\\_case\\_nr\\_c2005\\_0030.html](http://ec.europa.eu/comm/competition/state_aid/register/ii/by_case_nr_c2005_0030.html) (select hyperlink for “C 47 / 2005”); Invitation to Submit Comments Pursuant to Article 88(2) EC Treaty 2006/06, 2006 O.J. (C 34) 24. The Commission will conclude the case after all measures are clarified; this was anticipated to happen by the end of 2007. E-mails from Novotna, European Comm’n, to

Alik Doern references *Spain*,<sup>393</sup> offering perspective on ECJ limits to the application of the proportionality principle on matters of domestic necessity, essential needs, and national security. The key danger of ECJ overextension for Doern is that “a strict application of the proportionality test would render Art. 296(1)(b)EC superfluous since it would be no different from Art. 30EC.”<sup>394</sup> Other initiatives on cross-subsidies are also underway.<sup>395</sup> The Commission considers the economic angle to state aid reform a crucial tool of its success and is refining economics as per its State Aid Action Plan.<sup>396</sup> Mature markets and procurement environments in other Member States can also move this process forward.

#### XVI. COMPETITIVE PROCUREMENT—THE UK EXPERIENCE

The UK has a well-established competitive defense procurement regime to mentor Member States towards establishing EDEM. In its Defence Industrial Strategy Paper, the UK examined “essential interests,” finding it unnecessary to exempt all defense procurements from open competition even when they may qualify for national interest exemptions, as “no country outside the US can afford to have a full cradle to grave industry in every sector . . . .”<sup>397</sup> Capabilities such as nuclear technology, biochemical and radiological warfare and other counterterrorist measures are most likely to be retained,<sup>398</sup> as are capabilities for building complex ships and submarines,<sup>399</sup> which are considered a fragile industry requiring a highly specialized labor force. As a policy, the UK will analyze and retain capabilities to assure continued and consistent equipment performance, to retain its “[s]trategic influence (in military, diplomatic or industrial terms),” and to consider potential technology benefits for those

author (Dec. 20, 2007, and July 26, 2007) (on file with author). However, it has not yet been concluded.

393. Doern, *supra* note 385, at 122.

394. *Id.* at 123. Case 74/76, Iannelli & Volpi S.p.A. v. Ditta Paol Meroni, 1977 E.C.R. 557, ¶¶ 12–13.

395. Neelie Kroes, European Comm’r for Competition Policy, The Refined Economic Approach in State Aid Law: A Policy Perspective (Sept. 21, 2006), *available at* RAPID, <http://europa.eu/rapid/searchAction.do> (search complete database, reference “SPEECH/06/518”).

396. Commission, State Aid Action Plan (Consultation Document), COM (2005) 107 final (June 7, 2005). *See also id.* ¶¶ 8–9, 18–19, 21–22.

397. UKMoD, DEFENCE INDUSTRIAL STRATEGY, DEFENCE WHITE PAPER 21 (Dec. 2005) [hereinafter “DIS (2005)”].

398. *See id.* at 7–11, 21–22. For information on individual industrial sectors and cross-cutting technologies, see *id.* Part B.

399. Memorandum from BAE Systems to UK Parliament (Oct. 17, 2006), SND2 41, <http://www.parliament.the-stationery-office.co.uk/pa/cm200607/cmsselect/cmdfence/59/59we02.htm> (last visited June 8, 2008).

with wider value.<sup>400</sup> Notwithstanding, the UK Defence Industrial Strategy remains committed to competitive procurement and intends to participate in global procurement, even where certain industrial capabilities could be sustained in the UK for strategic reasons.<sup>401</sup>

While this Article is not meant to address EU procurement in the global context, the UK's own global strategy offers parallels to EU cross-border procurement. The UK strategy highlights that the UK Ministry of Defence (UKMoD) has thoroughly considered defense procurement in light of domestic industrial loss. It considered important overlapping security of supply and technology innovation issues,<sup>402</sup> concluding that a default to a closed market is inefficient; competition is the only way to achieve and maintain value-for-money acquisitions. With respect to monopsony, there is also a broader range of suppliers in a wider market.

Other Member States may not share the UK's confidence in applying or defining "essential interest." One could plausibly argue that the UK has more industries and faces less overall risk and more potential benefit by expanding defense procurement options. Europe relies heavily on the UK for protection given the UK's ranking as the second largest defense industry. Yet the UK market is vulnerable and political risks are therefore considerable. UK investment commitments are massive, its global networks and procurement environment are well-established. Furthermore, the UK offers vast procurement resources for Member States to study and leverage. In addition, it has heavy responsibilities within NATO and the EU, as well as a considerable stake in EDEM. Objectively, in some respects, the UK's risk in opting for open defense markets may actually be higher than that of other Member States.

An open defense market in the UK advances cross-border competition in the EU's defense procurement regime. The UK "classroom" is a hands-on laboratory in which Member States may consult and experiment with ways to reduce automatic reliance on Article 296 exemptions, and yet still

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400. DIS (2005), *supra* note 397, at 7. *See also* 8–11, 17, 22. It will also seek to retain "operational sovereignty" on technology bought in. *See for example* the arguments with the United States over the purchase of the F35 Joint Strike Fighter. Justin Wastnage, *Breakthrough as UK Signs Technology Transfer Deal with USA (F-35 JSF Purchase)*, FLIGHT INT'L ONLINE, at <http://www.freerepublic.com/focus/f-news/1752274/posts> (last visited June 10, 2008). *See also* Lord Drayson: Joint Strike Force Operational Sovereignty is Vital for UK Defence Interests, Mar. 14, 2006, [http://www.britainusa.com/sections/articles\\_show\\_nt1.asp?d=0&i=41062&L1=&L2=&a=41390](http://www.britainusa.com/sections/articles_show_nt1.asp?d=0&i=41062&L1=&L2=&a=41390) (last visited June 10, 2008).

401. DIS (2005), *supra* note 397, at 2, 6, 9, 21, 26, 42. *See id.* at 66–67 (noting intention for international R&T collaboration); *id.* at 104–05 (the sustainment strategy).

402. UKMoD, DEFENCE INDUSTRIAL POLICY, *supra* note 216, at 11–13. *See also* UKMoD, DEFENCE INDUSTRIAL STRATEGY, *supra* note 397.

appropriately focus on their interpretations of essential interests for their unique needs. The UK is skilled at evaluating production costs and value-for-money. Furthermore, if the UK subjects its own sensitive technologies to the Internal Market's rules—thus setting an example by following Commission guidance pursuant to the Interpretative Communication on 296<sup>403</sup>—this supports the aims of the Defence Package, and makes it difficult for other Member States to exclude less sensitive procurements from the potential procurement participation of their EU allies absent a compelling justification.

## XVII. DEFENSE 2007 AND BEYOND

Defense procurements outside 2004/18/EC are invariably opaque transactions undertaken in part for political reasons, which seemingly condone national protectionism and facilitate back-door negotiations.<sup>404</sup> Therefore, lack of transparency remains a key impediment to EDEM. However, the Commission continues its efforts in this regard.<sup>405</sup>

The Commission's 2007 Work Programme encourages competition in the defense sector by addressing its unique needs. It will address commercial deficiencies with defense integration and will target fragmentation in "*defence industries and markets*," citing the "need to respect the demands of national security," which has "kept these industries apart from the competitive rigours of the internal market."<sup>406</sup>

Additional Commission commitments are included in initiatives outlined in FP7, which has earmarked billions of euros to fund innovation along four themes: Cooperation, Ideas, People, and Capacities in areas such as nanotechnology, nuclear energy, transportation (including aeronautics), space, and security.<sup>407</sup> Research and innovation benefits from FP7 will be directly applicable to certain defense capabilities, especially through the development of dual-use technology. These developments will strengthen defense, and are consistent with publicized EU efforts to place

403. When the UK needs to invoke Article 296, relevant justifications will be compatible with the December 2006 Interpretive Communication. E-mail from Sandra Docking, UKMoD, to author (Jan. 8, 2007) (on file with author).

404. See Wilson *supra* note 46, at 3.

405. Siim Kallas, Vice-President of the European Commission Responsible for Admin. Affairs, Audit and Anti-Fraud, European Transparency Initiative (Jan. 18, 2007), available at RAPID, <http://europa.eu/rapid/searchAction.do> (search complete database, reference "SPEECH/07/17").

406. Defense is prominently featured in the EU's current working agenda. See Commission Communication, *Commission Legislative and Work Programme 2007*, COM (2006) 629 final 5 (Oct. 24, 2006). See also *id.* at Annex, 15–16 (Strategic Initiative #18).

407. CORDIS, *Understand FP7*, *supra* note 32.

defense within the Internal Market through the 2007 Work Programme. The 2007 Programme also fosters the initiatives toward public-private partnerships in defense, changes in public procurement, the Interpretative Communication, and the upholding and clarification of ECJ case law.<sup>408</sup> Movement is expected in these areas during the course of the French Presidency rotation.<sup>409</sup> In addition, there is the economic “spin-off” effect that occurs, especially in defense, as the civilian sector recoups massive research and innovation costs through procurement and secondary innovations deriving from government-sponsored research.<sup>410</sup>

Bolstering this positive progress requires stronger instruments to clarify the relationship between competition policy and defense procurement. The EDA’s Voluntary Code of Conduct, which had a successful first year, reflects Community support and cooperation toward trade-barrier removal, on a voluntary basis.<sup>411</sup> The principles of free movement will pressure the retooling of—or mergers between—obsolete or depressed industries, artificially kept alive through national protectionist measures and Article 296.<sup>412</sup>

The Commission is taking a harder line and encouraging Community cooperation in research innovation to avoid harmful gaps and unnecessary duplication from national efforts that are neither conducted nor tracked through any central EU mechanism.<sup>413</sup> Mr. Solana believes the only way forward in defense innovation is to spend more, spend better, and spend together.<sup>414</sup> Big spenders like Spain believe a proper procurement regime is an essential precursor to an open defense industrial market.<sup>415</sup> Current instruments to date (i.e., legislation and Article 296) have been ineffective at balancing the peculiarities of defense with the multiple stakeholders, national sovereignty, and long life-cycle of defense systems.<sup>416</sup> EDEM offers vast unexplored commercial potential.<sup>417</sup> Strengthening cross-border

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408. COM (2006) 629 final, *supra* note 406.

409. *See supra* note 30.

410. COM (2004) 590 final, *supra* note 205.

411. EDA, The Code of Conduct, *supra* note 304.

412. CSIS, CONFERENCE REPORT, *supra* note 266, at 10–11.

413. CORDIS, *Verheugen Calls for Increased Cooperation in European Security Research* (Feb. 10, 2006), [http://www.cordis.europa.eu/fetch?CALLER=EN\\_NEWS&ACTION=D&DOC=3&CAT=NEWS&QUERY=0119df34780f:79efcebc&RCN=25191](http://www.cordis.europa.eu/fetch?CALLER=EN_NEWS&ACTION=D&DOC=3&CAT=NEWS&QUERY=0119df34780f:79efcebc&RCN=25191).

414. *Id.* *See also* Solana Speech, *supra* note 243, at 1.

415. *See generally* SPANISH MOD ANSWERS, *supra* note 292, at 3.

416. *Id.*

417. Towards an EU Defence Equipment Policy: Commission Proposals (Mar. 11, 2003), available at RAPID, <http://europa.eu/rapid/searchAction.do> (search complete database, reference “IP/03/355”) (last visited June 8, 2008).

defense procurement within the Internal Market will increase competition and allow that potential to be exploited.<sup>418</sup>

Defense procurement has come “under the spotlight” in an effort to defend and widen the single market. “If the EU really wants to punch its weight in world affairs, the ultimate test will be its willingness to boost its defence capability.”<sup>419</sup> Hard defense decisions cannot be taken through isolation; politically, no superpower can afford to operate alone.<sup>420</sup> The defense decision-making culture must change. Strengthening EU defense industrial capacity will require weighted input by economic analysts in areas like state aid sustainability. Public scrutiny of enormous defense expenditures also plays a role, as support for defense is stronger when economic incentives like employment touch citizens personally, or through humanitarian applications to which the public can relate.<sup>421</sup>

Safeguarding the economic strength of the EU’s economy is itself a step towards security of defense. Legal certainty for predictable cross-border commercial procurement opportunities and procedures will facilitate the success of FP7 objectives toward research and innovation. Stronger measures to open defense procurement to the Internal Market could foster e-procurement, facilitate economic interdependence, and enhance political will among Member States, the Institutions, industry and the public to benefit from a more competitive defense market.

Recently, the Defence Directive discussed in 2006<sup>422</sup> was finally unveiled, and is now a pending proposal awaiting co-decision approval by the European Council and Parliament.<sup>423</sup> As mentioned, there can be no doubt that such a Directive will be helpful, notwithstanding its deficiencies. Stakeholders and scholars support this legislation for many reasons.

Firstly, it will facilitate procurement of dual-use items caught between defense and security needs categories, and would “diffuse the issue of

418. The UKHC supported the Commission’s position and proposals, recognizing the need for the EU to “create for itself a more robust, internationally competitive, Defence Technological and Industrial Base.” See UKHL, An EU Defence Equipment Policy (23d Report of Session 2002–2003), ¶ 22.5.

419. José Manuel Barroso, Does Europe Really Mean Business 5 (Sept. 12, 2006), available at RAPID, <http://europa.eu/rapid/searchAction.do> (search complete database, reference “SPEECH/06/489”).

420. DIS (2005), *supra* note 397, at 21.

421. See Wagner, *supra* note 190, at 11–15, Eurobarometer, *supra* note 192, and other sources at *supra* note 201.

422. IC296, *supra* note 5, at 9.

423. See Defence Directive *supra* note 8. See also the Defence Package documents, *supra* note 6, and Parliamentary Procedure File, *supra* note 380.

choosing between Community rules and Article 296.”<sup>424</sup> Secondly, Aris Georgopoulos sees this as a move towards a common approach that would enhance global competition opportunities for the Community; it is an opportunity that should not be missed by Member States.<sup>425</sup> Arrowsmith appears skeptical that a single body of rules will suit all Member States, and that it may be beyond Community competence.<sup>426</sup>

Siding with Georgopoulos, however, given the anticipated future reliance on dual-use items and/or technology that can be integrated into defense applications, and which frequently use sensitive technologies, Member States would be better served if they had legislative guidance on which they could rely. Further, consistent application of expressed guidelines creates precedent, which, in turn, establishes legal certainty of the type that has facilitated the maturity and success of the EU’s Internal Market to date.

Consider the dual security-defense use of unmanned aerial vehicles (UAVs) that can be equipped with border cameras for security, or missiles for defense. Another dual-use example is software-defined-radio.<sup>427</sup> Targeted legislation contemplating such developments is a practical necessity to guide Member States towards EDEM, while reinforcing the message delivered earlier by the Interpretative Communication on Article 296.<sup>428</sup> The process is quickly moving forward and stakeholders appear anxious to leverage momentum.

The role of the ECJ will also be critical. One cannot credibly claim that the ECJ is comprised of “unspecialist judges” who do not understand the practicalities of procurement, implying that they make biased determinations.<sup>429</sup> This was the same jaundiced rhetoric used by critics of antitrust modernization. The judiciary—adept jurists who routinely handle complicated issues—has repeatedly demonstrated its capacity to expand its expertise consistent with dynamic Treaty responsibilities. The Commission’s confidence in the Court is evident from the integration of ECJ rulings throughout secondary legislation. Commercial aspects of defense are based on foundations of free movement and competition that are well within the ECJ’s intellectual capacity, not to mention within its mandated Treaty oversight role. In fact, because commercial policy is the

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424. COM (2005) 626 final, *supra* note 213, at 7.

425. Georgopoulos, *supra* note 298, at 571–72.

426. Arrowsmith, *supra* note 45, at 383–84.

427. EDA, Background on Software Defined Radio, <http://www.eda.europa.eu/webutils/downloadfile.aspx?fileid=51> (last visited June 8, 2008).

428. FAQs, *supra* note 325. An impact assessment is currently underway.

429. Arrowsmith, *supra* note 45, at 383.



most mature of all the policies in the *acquis*, the Court has a vast arsenal of its own well-established precedent from which to draw in addressing and shaping cross-border defense industrial policy.

#### XVIII. COMMENTARY: THE TREATY OF LISBON

The final section of this Article is dedicated to the Treaty of Lisbon.<sup>430</sup> On June 13, 2008, after eighteen (of twenty-seven) Member States had already ratified the Treaty in what seemed like a smooth exercise, Ireland announced the results of its June 12 referendum; approximately one hundred thousand Irish nationals rejected the Treaty of Lisbon, a result that prevents the process of institutional reform from moving forward.<sup>431</sup> Ireland's voters are testing the relationship between EU Member States, Institutions, and citizens.

On June 19, 2008, the UK officially parted ways with Ireland when the UK Parliament's vote in favor of approving the EU Amendment Bill received Royal Assent and thus became UK law, making the UK the nineteenth Member State to ratify the Treaty of Lisbon,<sup>432</sup> notwithstanding

430. Lisbon Treaty, *supra* note 1. The Lisbon Treaty is in limbo and must be ratified by all twenty-seven EU Member States before it can take effect. As of June 20, 2008, nineteen Member States had ratified it, a process that went smoothly until Ireland held a referendum on June 12, 2008 (as required by its constitution), and Irish voters rejected the Treaty, prompting speculation that the Treaty ratification process would end. However, in the aftermath of the Irish referendum, the European Council met in Brussels on June 19 and 20, 2008, and declared that Ireland must be given time to examine the situation and decide on a course of action. Therefore, the Council will stay decisions on the Treaty's future until it next meets on October 15, 2008. See EUROPA, Ratification Situation, [http://ec.europa.eu/comm/nice\\_treaty/ratifiable\\_en.pdf](http://ec.europa.eu/comm/nice_treaty/ratifiable_en.pdf); COUNCIL OF THE EUROPEAN UNION, PRESIDENCY CONCLUSIONS OF THE BRUSSELS EUROPEAN COUNCIL, 11018/08, CONCL 2, at 1, available at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/101346.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/101346.pdf) [hereinafter "June Council Conclusions"]. See European Council to Analyse Further and Return to Lisbon Treaty in October; Meanwhile, Ratification Continues, June 20, 2008, [http://www.eu2008.si/en/News\\_and\\_Documents/Press\\_Releases/June/0620EC\\_LisbonTreaty.html](http://www.eu2008.si/en/News_and_Documents/Press_Releases/June/0620EC_LisbonTreaty.html).

431. Ireland's population is 4.4 million (.888%) of the EU's half billion. See EUROSTAT, Total Population Table at January 1 (2008), <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=0&language=en&pcode=caa10000>; EUROSTAT, National Population: Share of EU-27 Population (%), [http://epp.eurostat.ec.europa.eu/portal/page?\\_pageid=1996,39140985&\\_dad=portal&\\_schema=PORTAL&screen=detailref&language=en&product=Yearlies\\_new\\_population&root=Yearlies\\_new\\_population/C/C1/C11/caa12560](http://epp.eurostat.ec.europa.eu/portal/page?_pageid=1996,39140985&_dad=portal&_schema=PORTAL&screen=detailref&language=en&product=Yearlies_new_population&root=Yearlies_new_population/C/C1/C11/caa12560). Poor turnout by Irish voters as indicated, *supra* text accompanying note 261, was more than sufficient to block the Treaty from taking effect. The vote was 53% to reject and 46% in favor. McDonald & Stratton, *supra* note 261.

432. It was said prior to the summit that Irish "Prime Minister Brian Cowen, faces certain embarrassment and possible isolation" by EU Officials for what will certainly be perceived by the collective as a political failure. *Ireland's Veto of EU Treaty Poses Union Roadblock*, DAILYPRESS.COM, June 14, 2008, available at <http://www.dailypress.com/topic/ny-woire/1145726795jun14,0,6738536.story>. See also *supra* note 443. Notwithstanding the united front conveyed to the public by the Council, there are reports of finger-pointing and less cohesion on summit margins. See Jenny Percival, *Lisbon Treaty: Brown Defends Mandelson After Sarkozy Blames*

the Irish rejection. The nineteen Member States voting in favor of ratification were Austria, Bulgaria, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovenia, the Slovak Republic, and the United Kingdom.<sup>433</sup>

It can certainly be said that Ireland's rejection of Lisbon has raised concerns about the strength and credibility of the collective, and that the result could torpedo the Treaty. However, contrary to media representations, even if this did occur, it is not a fatal situation.

For one thing, certain concepts reflecting the collective's desire to move the Institutions towards transparency and democratic principles in its operations will continue to drive EU institutional policymaking. Such concepts are already being integrated and are observed and enforced in Commission operations—notably in the area of procurement.<sup>434</sup>

It must also be remembered that the Irish “no” is hardly the first time in EU evolution that a Treaty has been rejected. For example, the French and the Dutch rejected the Constitutional Treaty in 2005—an event that was the very genesis of the Treaty of Lisbon. In 2001, Ireland itself rejected the Treaty of Nice by 54%, only to hold a second referendum in 2002, approving it by 63%.<sup>435</sup> Thus, looking at the events from a historical perspective, it is difficult to believe the Treaty is dead at this point in time.

To the contrary, the European Commission and the Council have officially announced that the ratification process for Lisbon will continue through the end of the year to allow the Member States and the Institutions to evaluate support, and plan their options accordingly.<sup>436</sup>

If Ireland remains a hold-out and refuses to ratify the Treaty, it may find itself uncomfortably isolated from the other Member States (and unpopular among other EU citizens). The Czech Republic will be watching this carefully, too, since its own Constitutional Court must

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*Him for Irish “No” Vote*, GUARDIAN.CO.UK, June 20, 2008, <http://www.guardian.co.uk/world/2008/jun/20/eu.mandelson>. Either way there promises to be a cooling off period to allow Ireland time to reflect. Jim Brunsten, *Ireland Given “Time and Space,”* EUROPEANVOICE.COM, June 16, 2008, available at <http://www.europeanvoice.com/article/2008/06/1622/ireland-given-%E2%80%98time-and-space-61219.aspx>.

433. The UK's ratification *after* the Irish referendum is a strategically symbolic demonstration of support for the legislation. See Lisbon Website, *supra* note 1.

434. See generally the proposed amendments in Lisbon's Article 1(12) (Title II Provisions on Democratic Principles) and discussion *supra* Part VI.

435. See EUROPA, Ratification Situation, [http://ec.europa.eu/comm/nice\\_treaty/ratifiable\\_en.pdf](http://ec.europa.eu/comm/nice_treaty/ratifiable_en.pdf).

436. Presidency Conclusions, Brussels European Council (June 20, 2008), available at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/101346.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/101346.pdf). See Statement by President Barroso Following the Irish Referendum on the Treaty of Lisbon (June 13, 2008), available at [http://ec.europa.eu/commission\\_barroso/president/pdf/statement\\_20080613.pdf](http://ec.europa.eu/commission_barroso/president/pdf/statement_20080613.pdf).

deliver a positive opinion that the Lisbon Treaty accords with the Czech constitutional order, in order for ratification to occur there.<sup>437</sup>

There has been post-referendum backlash against Ireland for holding up institutional reform suggesting that work on EU priorities cannot wait for the Irish when there are millions of other EU citizens to consider. In addition, some measure of optimism has been glimpsed from Commission statements that reflect a hope that the Irish should vote again and may eventually support the legislation. Institutional reform is badly needed; further enlargement cannot take place under the current framework, which is already stretched to its limits.

Innumerable media reports on Lisbon<sup>438</sup> describe the outcome as nothing short of catastrophe, chaos, and a slew of other negative adjectives prompting images of doom and the demise of the collective altogether.

To read such accounts, one would think that the Commission is paralyzed; its staff members—constructively discharged—packing their desks to become job seekers themselves. This author believes that any account that paints such a portrait is highly exaggerated.

Of course, it is a valid question to ask “what will happen to the EU?” In the short-term, the answer is “not much.” While there is no doubt the Irish “no” caused a hiccup in the evolution of the institutional framework, one can hardly expect the EU to close for business as a result. The EU didn’t collapse when the Irish rejected the Treaty of Nice in 2001,<sup>439</sup> or when the French and Dutch rejected the Constitutional Treaty for Europe in 2005.<sup>440</sup> The normal business of the Commission continues in most areas so the daily lives of citizens will not really be affected at this point.<sup>441</sup> In addition, though existing mechanisms are cumbersome, they are still in place.

The Lisbon Treaty is intended more as an exercise in institutional reform—an effort to streamline governance of five hundred million people who are currently subject to a bureaucracy which operates under an

437. See June Council Conclusions, *supra* note 430.

438. Apart from the reports cited in this Article, a simple “google” search of the “Irish Referendum for the Lisbon Treaty” produces scores of on-point hits too numerable to include herein.

439. See, e.g., *Ireland Rejects EU Expansion*, BBC NEWS, June 8, 2001, available at <http://news.bbc.co.uk/2/hi/europe/1376379.stm> (last visited June 28, 2008); *EU “to Proceed with Enlargement,”* BBC NEWS, June 11, 2001, available at <http://news.bbc.co.uk/2/hi/europe/1382163.stm> (last visited June 28, 2008).

440. See *Dutch Say “No” to EU Constitution*, BBC NEWS, June 2, 2005, available at <http://news.bbc.co.uk/2/hi/europe/4601439.stm> (last visited June 28, 2008).

441. According to Julia Bateman, the head of the Law Society’s joint Brussels office, it is “business as usual in Brussels.” Julia Bateman, *Irish “Ayes” Not Smiling*, LAW SOCIETY GAZETTE, June 26, 2008, at 12.

obsolescent framework, unsuitable for the task of governing the EU at its current size, and certainly not suited to accommodate further expansion.

So for now, the existing Treaties, most recently amended by the Treaty of Nice, remain the law. This will only change if an official decision is made to either end the process and initiate new options, or suggest and negotiate a compromise acceptable to Irish voters (and any other governments that might still reject the Treaty of Lisbon) before the ratification period runs out or before the remaining Member States have officially endorsed or rejected it.

Current media reports mainly attribute the Irish rejection to a lack of understanding of the Treaty,<sup>442</sup> and to job seekers from other Member States taking Irish jobs, among other reasons.<sup>443</sup> This explanation clearly signals dissatisfaction with Prime Minister Brian Cowen and the Irish economy, and caused the Prime Minister considerable embarrassment over his inability to get the message of the Treaty to his constituency. Yet considering that less than half of Irish citizens voted in the referendum, one cannot easily accept that the result was an outright blanket rejection of Lisbon's provisions and principles.<sup>444</sup>

As previously mentioned, the ratification process will continue for now. It is even possible that the Irish will hold a second vote later this year, or that another Member State will fail to ratify the Treaty. Some commentators have suggested that the Member States will consider separate protocols for Ireland (or any others who may not ratify the Treaty), or a two-track progression by some Member States.<sup>445</sup> Others

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442. "Nearly a third of respondents told The Irish Times that they did not know what they were voting for . . ." *Will Irish Voters Put Europe to the Sword over Lisbon Treaty?*, TIMES (LONDON), June 12, 2008, at 40, available at <http://www.timesonline.co.uk/tol/news/world/europe/article/4116653.ece>.

443. Shawn Pogatchnik, *Irish Voters Veto EU Treaty*, ASSOCIATED PRESS, June 14, 2008, available at <http://ap.google.com/article/ALeqM5jcOuUAmav6-7wKlhwZljN3F1mqIQD919EJ200> (last visited June 15, 2008).

444. McDonald & Stratton, *supra*, note 261; *Ireland Set to Throw out EU Treaty*, THE INDEPENDENT (LONDON) ONLINE, June 13, 2008, <http://www.independent.co.uk/news/world/europe/ireland-set-to-throw-out-eu-treaty-846621.html>.

445. It has been suggested that "the scope of the treaty could be limited to the other 26 member states and that Ireland could be offered some other type of legal arrangement." Ralf Beste, Hans-Jürgen Schlamp & Stefan Simons, *EU in Chaos After Ireland's 'No' Vote*, SPIEGEL ONLINE, June 15, 2008, <http://www.spiegel.de/international/europe/0,1518,559730,00.html>.

Three options appear to be currently on the table. Firstly, a small group of the more ambitious countries could move forward in the form of reinforced cooperation. In case no common solution can be found with Ireland, this approach is favoured most notably by Luxembourg's Prime Minister Jean-Claude Juncker and is likely to gain the support of Germany and France.

have even suggested that Ireland withdraw altogether.<sup>446</sup> The point to be made is that there are in fact other avenues to move the collective forward and though there is some measure of resentment that Ireland did not own up to its responsibilities as a member of the team, this shall pass.

However, as previously stated, to suggest the imminent demise of the EU is a gross exaggeration.<sup>447</sup> It is worth noting, for example, that the Lisbon rejection was seemingly the priority of the EU Summit, yet the meeting commenced with a discussion of the accession of Slovenia to the Eurozone and not the Irish referendum.<sup>448</sup>

In light of this, some commentary with respect to the Treaty's aim within the context of this Article is warranted.

The Lisbon Treaty would add a unique footprint to the *acquis* by modifying defense and security dimensions of the EU's Internal Market. Though the current situation precludes a comprehensive review of the Lisbon Treaty here,<sup>449</sup> some of its essential points are noteworthy.

First, The Lisbon Treaty aims to establish a more democratic and transparent Europe by giving the EU Parliament, and EU citizens, a stronger role in policy-making.<sup>450</sup> The second aim is to improve institutional efficiency by providing consistency and mechanisms to

But it is also certain to be opposed by small and new member states, which are against a "core" or "two-speed Europe." Spain's Prime Minister José Luis Rodríguez Zapatero dismissed talks on this issue as "premature" at this point.

A second option would be to apply the treaty only to 26 countries, with a special statute for Ireland. This view was voiced by Germany's Foreign Minister Frank-Walter Steinmeier who even considered the option of Ireland temporarily exiting the integration process.

The last option would have Ireland vote again on a revised text after the ratification process is completed in all other member states. This revised text might grant the country certain opt-outs and assurances as was the case for Denmark, which said "yes" to the Maastricht Treaty in 1992 after an initial referendum had failed.

*EU Ministers: Treaty "Not Dead", "Emergency Plan" Needed*, EURACTIV.COM, June 17, 2008, <http://www.euractiv.com/en/opinion/eu-ministers-treaty-dead-emergency-plan-needed/article-173383> (last visited June 17, 2008).

446. See, e.g., Patrick Smyth, *Dane Urges Ireland to Pull out of EU*, IRISH TIMES, June 20, 2008, at 8.

447. See also *Treaty "Not Dead"*, *supra* note 445.

448. See Janez Janša, President of the European Council, Slovenian Presidency Summit Invitation (June 17, 2008), [http://www.eu2008.si/en/News\\_and\\_Documents/download\\_docs/June/0619\\_EC1/040PMinvitation.pdf](http://www.eu2008.si/en/News_and_Documents/download_docs/June/0619_EC1/040PMinvitation.pdf).

449. The specific elements will not be discussed in this Article. The reader is referred to the Lisbon Treaty Website, *supra* note 1, which has links to all Lisbon Treaty information including the full Treaty text.

450. Lisbon Treaty, *supra* note 1. See generally the proposed amendments in Article 1(12) (Title II Provisions on Democratic Principles).

facilitate decision-making and simplify voting on legislation.<sup>451</sup> In addition, the Presidency of the Council would become an elected position for a two-and-a-half year term,<sup>452</sup> providing for greater leadership continuity. The Lisbon Treaty will hopefully improve the quality of life of Europeans by providing a legal basis for action in several policy areas such as freedom, security and justice, terrorism, or crime.<sup>453</sup> Third, European rights and values, freedom, solidarity, and security would be emphasized through recognition of the Charter of Fundamental Rights within the framework of EU primary law.<sup>454</sup> Finally, the Lisbon Treaty would give the EU legal personality, which would define it as a global actor, resulting in greater cohesion with respect to EU external relations.<sup>455</sup>

Of the specific themes outlined in The Lisbon Treaty,<sup>456</sup> several are linked to the security and defense themes raised throughout this Article.<sup>457</sup>

The establishment of the High Representative for Foreign Affairs and Security Policy is perhaps the most significant change. The High Representative will not only become a Commission vice-president, but will in effect become the EU's foreign minister,<sup>458</sup> a move that will facilitate continuity and establish credibility in the development and implementation of external policy. Changes to proposed Chapter 2, Section 1 TEU guide "[t]he Union's action on the international scene" with respect to its Common Foreign and Security Policy.<sup>459</sup> A new Section 2 has been proposed to deal with the common security and defense policy

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451. *Id.* See generally *id.* art. 1(13) (Institutions) and proposed Title III, Provisions on the Institutions.

452. *Id.* art. 1(16), art. 9(13)(5). *But cf. supra* note 26 (discussing the current state of the Council Presidency).

453. There are innumerable references to this throughout the Treaty text. See Conference of the Representatives of the Governments of the Member States, Declaration by the United Kingdom of Great Britain and Northern Ireland on Article 61 H of the Treaty on the Functioning of the European Union (Dec. 3, 2007), available at <http://www.reformtreaty.ie/eutreaty/Reform-Treaty-03-Dec-07-CIG-14-07-cg00014.en07.pdf>.

454. See, e.g., Lisbon Treaty, *supra* note 1, proposed art. 6 and Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.

455. Lisbon Treaty, *supra* note 1, art. 1(55). Efforts to establish a global role for the EU will likely move forward.

456. José Manuel Durão Barroso, President of the European Commission: The European Union After the Lisbon Treaty (Feb. 4, 2007), available at RAPID, <http://europa.eu/rapid/searchAction.do> (search complete database, reference "SPEECH/07/793"). See also Commission Welcomes Signature of the Treaty of Lisbon and Calls for Its Swift Ratification (Dec. 13, 2007), available at RAPID, <http://europa.eu/rapid/searchAction.do> (search complete database, reference "IP/07/1922").

457. Special thanks to Ms. Stacy Ferraro and Wg Cdr Paul O' Neill for lively debates on defense within the context of the Lisbon Treaty.

458. Lisbon Treaty, *supra* note 1, arts. 1(19) (proposed Article 9(E) TEU), 1(30) (proposed Article 13(a)), 1(38)(b)(ii) (proposed Article 19(2) TEU).

459. *Id.* art. 1(26). See generally *id.* art. 1(25).

aspects.<sup>460</sup> Here, the specific inclusion of the EDA within the Treaty provisions defining the EDA's obligations—such as those proposed by Articles 28 A(3) and 28 D—suggests a higher prominence for the future EDA, in which it could become a main channel of participation in a permanent structured cooperation rather than a forum for *voluntary* participation as it presently exists.<sup>461</sup> This seems to be what is suggested by granting authority to the EDA to determine whether Member States' military capabilities satisfy the higher criteria required by permanent structured cooperation.<sup>462</sup>

The Lisbon Treaty provisions modernize the Petersberg Tasks on peace-keeping, disarmament, and conflict prevention<sup>463</sup> allowing their application to more challenging military missions, thus necessitating greater military capabilities and enhanced interoperability amongst forces.<sup>464</sup> This strengthens the arguments for a genuinely open market in defense matters where European cooperation in armaments satisfies both economic and military imperatives. The role of civilian crisis-management capabilities is also underscored,<sup>465</sup> suggesting a broader definition of security that would encompass combating terrorism, working towards mutual defense, ensuring energy security, and strengthening links with development policy and humanitarian aid.

While Lisbon reflects Member States' efforts to evolve their pooled sovereignty into a contemporary institutional framework supporting the emergence of a Common European Security and Defence Policy with a robust base in the defense industry, it is too early to tell where all this will lead. Members of the UK House of Commons raise important questions

460. *Id.* art. 1(48).

461. *Id.* at Protocol on Permanent Structured Cooperation Established by Article 28A of the Treaty on European Union.

462. *Id.* art. 1(49)(c)(6) (proposed Article 28A TEU).

463. The Petersberg Tasks are integral to ESDP and were explicitly included in Article 17(2) TEU. The Western European Union (WEU) Member States declared their intention to strengthen the Atlantic Alliance and define "missions, structures and means" to strengthening WEU's operational role in European security. Petersberg Declaration—Bonn Section II (June 19, 1992), [http://www.assembly-weu.org/en/documents/sessions\\_ordinaires/key/declaration\\_petersberg.php](http://www.assembly-weu.org/en/documents/sessions_ordinaires/key/declaration_petersberg.php) (last visited Apr. 6, 2008). WEU States declared "their readiness to make available to the WEU, but also to NATO and the European Union, military units from the whole spectrum of their conventional armed forces." EUROPA Glossary: Petersberg Tasks, [http://europa.eu/scadplus/glossary/petersberg\\_tasks\\_en.htm](http://europa.eu/scadplus/glossary/petersberg_tasks_en.htm). These tasks were originally set forth in the Petersberg Declaration adopted at the Ministerial Council of the WEU, Bonn, June 19, 1992. They cover: humanitarian and rescue tasks; peace-keeping tasks; and tasks of combat forces in crisis management, including peacemaking. Petersberg Declaration—Bonn Section II (June 19, 1992), [http://www.assembly-weu.org/en/documents/sessions\\_ordinaires/key/declaration\\_petersberg.php](http://www.assembly-weu.org/en/documents/sessions_ordinaires/key/declaration_petersberg.php) (last visited June 8, 2008).

464. Lisbon Treaty, *supra* note 1, art. 1(49)(c)(6) (proposed Article 28A TEU).

465. *Id.* art. 1(50) (proposed Article 28D TEU).

about how seriously the provisions could ever be implemented *if* the Lisbon Treaty is ever ratified. Given the UK's importance to European defense, the questions raised by knowledgeable stakeholders in the UK are not to be shrugged off. The debate, however, will be ongoing for some time,<sup>466</sup> especially since the provisions do not offer much substance with which to develop an aggressive implementation strategy. Therefore, the discourse through the ratification process should be most illuminating.

### XIX. CONCLUSION

Simplified, non-discriminatory and transparent procurement policies, clear guidance from the Commission and the ECJ, and cooperation among Member States' competition authorities are long overdue in the EU's public procurement regime. Procurement procedures must be streamlined, must maximize transparency, and must facilitate participation among the widest range of potential providers to foster a technologically advanced, cost-effective, European-based procurement market. Achieving these goals depends both on policy measures to open the market and on operational measures to enhance it.

European economic conditions are becoming increasingly hospitable to cross-border procurement. Technology has enhanced tendering procedures and the computer revolution has lowered the costs of handling information to the extent that there exists a nearly "frictionless" market, the economic ideal. Data are more accessible and quantifiable.<sup>467</sup> Principles of equal treatment, recently affirmed by *Fabricom*,<sup>468</sup> will be applied whenever possible. EU Institutions and Member States can capitalize on this, sharing industrial strategies and leveraging existing research to increase cross-border competitive capacity.

The defense sector's potential commercial contribution to the Lisbon Agenda is clear. Concerning defense procurement, however, it must be remembered that a tender only becomes a defense procurement eligible for special handling when exempted by Article 296. Otherwise, it is simply public procurement subject to 2004/18/EC, and potentially, the 2007

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466. UK PARLIAMENT, FOREIGN AFFAIRS—THIRD REPORT § 7 (Session 2007–08), available at <http://www.parliament.the-stationery-office.com/pa/cm200708/cmselect/cmfaaff/120/12002.htm> (last visited Apr. 6, 2008). One example, "the somewhat cumbersome procedures involved in establishing and operating 'permanent structured co-operation' . . . [which] might prove to be a little-used device." *Id.*

467. And becoming more so as the EDA becomes a dependable source of annual commercial defense statistics.

468. Joined Cases C-21 & 34/03, 2005 E.C.R. I-1559. *See supra* notes 71–72.



Defence Directive. To date, the Treaty, Public Procurement Directives, and case law have not coherently addressed the unusual features of defense, armaments and national security industrial sectors. In addition, the pending Defence Package has yet to pass Council and Parliament, or be tested against public scrutiny. Until that occurs, the EU's defense market thus remains fragmented, and largely exempt from Internal Market rules; it lacks standardization, is characterized by artificially high prices, and most importantly, results in reduced defense capabilities. Though Article 296 abuses have long exploited this situation, the Commission and the ECJ are finally headed towards a common approach to correct the aforementioned defects by restricting Article 296 exemptions, and attempting to provide clearer guidelines.

This Article does not suggest that Member States should be required to cede authority over their essential national interests to EU Institutions. Rather, it concludes that Member States' responsibilities to the collective require careful consideration of exemptions in light of the Treaty and the Internal Market obligations they have willingly accepted. In the Community's best interest, derogations must be parsimoniously granted; it has been shown herein that essential security interests can be effectively protected notwithstanding Internal Market obligations. Although value-for-money, transparency, and equal treatment should drive all government spending, achieving transparency in tender awards and Article 296 exemptions will be difficult in a national security context, as recently illustrated by the BAE-Saudi and Czech truck procurements.<sup>469</sup> The ECJ's role will be vital in this regard.

Cross-border procurement should increase as ineligible tenders are stripped of Article 296 protection and become subject to Internal Market rules, signaling that any procurement strategies aiming to receive special treatment must be defensible and backed by solid justification.

Admittedly, for the foreseeable future, the defense sector will remain a quagmire of conflicting initiatives since commercial aspects of EDEM are still immature and are consequently unable to benefit from the procurement advances operating in more established commercial sectors. This would be the case whether or not the Treaty of Lisbon is ratified this year. In fact, it seems clear from an examination of Commission initiatives that the Commission has avoided framing its initiatives in the context of a ratified Lisbon Treaty. "Naval gazing" will not be the way forward; important policy decisions are pending in many other areas and cannot be

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469. *See supra* notes 231, 323.

delayed. Therefore, the practical consequences of the rejection will be minimal in the short-term, but institutional reform must occur at some point.

The 2007 Work Programme and FP7 will still promote both common and defense procurement liberalization, however, by engaging private-sector participation and expertise that identifies opportunities, presses for access, executes procurements, and objects to inappropriate dealings.

The Interpretative Communication on Article 296 was a solid first step and a welcome initiative in 2006. The completion of the Defence Package in 2007 was a necessary deliverable to underscore that the Institutions and stakeholders have the political will to tackle the prickly defense procurement minefield. Although the Package's impact will be unclear for some time, its objective is clear even though it still requires substantive development. Member States have been invoking Article 296 for decades with little consideration for its affect on the Internal Market, in which defense and dual-use is of rising importance. Henceforth, abusive application of Article 296 will likely diminish given that the ECJ is poised to strike justifications when they are based on overriding political interests, rather than essential security or defense interests. Bovis appears to be on target regarding the ECJ's broadened competence to interpret the Treaty; it is less the Directives alone that will change the approach, and more the threat of jurisprudence that will define procurement evolution.<sup>470</sup> That being said, a Defence Directive will make the Institutions' tasks much easier by offering clearer guidance to the Commission. Any improvements toward institutional coherence, consistency, and efficiency, whether by Lisbon or some other future initiative, will only facilitate efficiency in all areas of EU operations—especially those that touch on defense, whether directly or peripherally.

Ultimately, collaboration—whether voluntary or forced by more limited Article 296 interpretations—and legislative guidance—will reduce confusion and fragmentation of the defense market, allowing consolidation of underperforming industries, and reducing duplication in research that wastes precious euros. This will better leverage shrinking defense spending.<sup>471</sup> Furthermore, the UK experience has shown that it is possible

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470. Bovis, *supra* note 90, at 631.

471. “[C]onsolidation of demand will drive price pressure, which in turn will drive consolidation of overcapacity, which in turn will create a lower cost structure . . . [which] is a crucial step in generating new and improved capacity in the European industrial base supporting defense.” CSIS, EUROPEAN DEFENCE INTEGRATION, *supra* note 201, at 74.

to develop a national defense market consistent with limited Article 296 exemptions for defense and security procurement needs.

Better cross-border competition and enforcement results in legal certainty, establishes precedent, and creates economic credibility—an environment that invites investment. Economic benefits naturally derive from markets providing the best value-for-money in producing the highest quality equipment and services among the most highly skilled workers and competitive industries. Industry requires a competitive cross-border environment to perpetuate strategic planning and to assess long-term government needs for public-private partnerships.<sup>472</sup> This can be said for both defense and general procurement experiences.

The ongoing protection of vested interests will actually increase the EU's international vulnerability, both commercially and with respect to its common security (not to mention the risk to the lives and well-being of its protection forces). If Member States lower the scope of domestic industrial protection to permit attainment of larger Treaty objectives, they will realize benefits for domestic markets and the Internal Market, as well as to the Community's overall essential security interests.

Article 296 is not solely about traditional notions of sovereign defense. It concerns the unique role of defense in the Internal Market. There, it protects the core physical integrity of the Member States, and thereby defends cross-border movement of goods and establishment of services, and consequently, economic unity and competition. Effective collective defense, therefore, can only be assured by intra-community cooperation and cross-border competition in all areas—which could be facilitated if the Lisbon Treaty or a future iteration enters into force someday. The previous cloak over unjustified national security exemptions is being lifted and will hopefully disappear. It would be advisable for Member States to coalesce through solid proposals aimed to show their global allies that they are in synchronized step, are ready to “punch [their] weight in world affairs,” and can pass “the ultimate test [of boosting their] . . . defence capability,”<sup>473</sup> in the name of the Treaty and for the EU common good.

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472. UKMoD, DEFENCE INDUSTRIAL POLICY, *supra* note 216, at 20–22.

473. Barroso, *supra* note 419, at 5.