Recent Developments in Defence Procurement and Offsets in the EU: Time for Changing Paradigm?

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Outline

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- DSPD 7 years on
- Pima facie Winner(s)
- Prima facie Loser(s)
- “How” to fix “What”?
- Trade Liberalisation/Competition paradigm
- Industrial policy/Cooperation paradigm
- Need for a positive vision
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The EU Legal Edifice

Internal Market

CFSP (Common Foreign and Security Policy)
CSDP (Common Security and Defence Policy)

Different degree of Integration
The EU Legal Edifice

- This differentiation in the intensity of integration refers primarily to the following:
  a) Decision making process - instruments
  b) Role of the European Commission
  c) Adjudicative role of the Court of Justice of the EU
  d) Role of the European Parliament

- Accordingly:
  - Internal Market -> high degree of intensity of integration (supranational)
  - CSDP -> lower degree of intensity of integration, limited role for Commission, CJEU, Parliament (intergovernmental)
The ‘Geography’ and ‘History’ of Defence Procurement Regulation

Defence Procurement Directive

Internal Market

Code of Conduct Defence Procurement (EDA)

CFSP

CSDP

Offsets Guidance

CoC on Offsets
DSPD - 7 Years on…

Has the DSPD achieved its main objective (opening up national defence procurement markets)?

Before the DSPD:
- **EU Public Procurement Rules**
  - Article 346 TFEU

After the DSPD (Intention/Ambition):
- **DSPD 2009/81/EC**
  - Art 346 TFEU

7 years on (Reality):
- **DPSD 2009/81/EC**
  - Article 346 TFEU
Value of contracts published under DSPD: EUR 30.85 billion

Total defence procurement spending (Excluding R&D spending): EUR 186.5 billion

DSPD - 7 Years on...

- Disappointing results, limited impact so far
- Foreseeable “teething” problems?
- More fundamental problems?
- Has the DSPD achieved any other of its ambitions?
- Any Winners?
“Prima facie Winner(s)”

- Commission: Managed to convince MSs to include Defence procurement in the Community/Union regulatory acquis

- The ‘Community method’

- Arguably the EU defence primes particularly in the field of aeronautics/aerospace who have nominally increased their ‘home/EU’ market without actually losing much of their ‘home/MS’ market

- Winner(s) on paper only?
“Prima facie Loser(s)”

- The intergovernmental ‘soft’ method of cooperation

- Arguably the second, third etc. tier SMEs, particularly of MSs with small/medium industrial bases who are not integrated in the supply chains of EU defence primes.

- Subcontracting provisions a “red-herring”

- Loser(s) on paper only?
“What is at fault: System or Premise?”

- If the DSPD does not face only ‘teething’ issues but more fundamental ones the question arises: What needs to be fixed?

- Option one: “Fix” the system (DSPD)
  - e.g. Tougher enforcement by Commission; amendment of DSPD; new interpretative guidance(s), communications…..

- Second option (my preferred option): Step back and consider this: ‘Do we ask the right question(s)? In other words is the premise upon which the DSPD sound?”
“DSPD’s Premise”

- The DSPD is based on what could be termed as the *internal market logic* which in turn is based on a *trade liberalisation/competition logic*.

- This was the tool that the Commission used to bring/impose the ‘communitarisation’ of defence procurement. DSPD a “bespoke flexible” instrument: “Now you (MSs) cannot use the excuse of the inflexibility of the procurement rules of the public sector directive…”

- This approach has its limits: In defence procurement the question of “*what to buy*” is as important as the question “*who to buy from*” (“political/strategic” credit particularly for medium /smaller MSs).

- The DSPD can only deal with the first question…
“Trade Liberalisation/Competition Paradigm”

- The internal market/trade liberalisation/competition paradigm was used in order to make the debate of the defence procurement integration more legal than political.

- This legal approach is also based on coercion.

- However, it led the Commission’s DG Growth to adopt a legalistic non-pragmatic approach regarding defence market(s) (focusing on the tree and missing the forest).

- Example: The Commission’s approach on offsets after the enactment of the DSPD: it undermined de facto the important work that the EDA has started with the CoC on offsets.
“Trade Liberalisation/Competition Paradigm”

- The legal/coercion approach (negative in its nature) was useful to start the ‘communitatisation’ of defence procurement but cannot on its own take defence procurement integration any further.

- The Defence market intergation process is now in need also for a positive approach: a vision.
“Industrial Policy/Cooperation paradigm

- The positive vision must involve other instruments that are more closely linked with the creation of EDTIB

- The Establishment of the European Defence Fund (EDF) signals a shift towards this direction; It could become a ‘game changer’ in the future if properly supported

- The EDA can play be an important role here
State of Play

- The Commission has completed the first evaluation of the DSPD implementation (2016). Some of the conclusions of this exercise are:
  - No Need to amend the DSPD at this point.
  - Focus on the enforcement of the instrument;

- Infringement proceedings against Denmark, Netherlands, Italy, Poland and Portugal
Conclusions and Future Trends

- The re-configuration of the EU competences (Commission, CJEU) in this area has knock on effects on both the internal and external EU arms trade dimensions.

- Possible shift (or rather ‘nudge’) of the centre of gravity of policymaking in the field.

- “Brexit”, depending on the form that it will take, may lead to yet another realignment of the centre of gravity.
Conclusions and Future Trends

- MSs remain veto players

- Suggestion/proposed next steps: A realistic and productive approach regarding offsets regulation in the EU aimed at enhancing transparency and coordination.

- There are various options/formats that could be followed:
  E.g. A. Georgopoulos *European Defence Procurement Integration: Proposals for Action within the European Union* *(PhD Thesis)* p. 344 and after
A realistic approach on offsets

Gottlieb Schick (1776-1812) Achilles with Agamemnon's Ambassadors, Galerie Michel Descours
Relevant Articles/Chapters

- ‘EDA and Defence Procurement Integration’, 2015
  (http://ssrn.com/abstract=2618357)

  (http://ssrn.com/abstract=2757378)

  (http://ssrn.com/abstract=2757349)
Thank You

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