Dutch Defence Procurement in Times of War and Reinvestment

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Abstract

This contribution provides a legal reflection on the current challenges in Dutch defence procurement which are a result of the announced reinvestment in the Dutch military and the supply of military equipment to Ukraine. Both these developments originated in the context of the 2022 invasion of Ukraine by the Russian armed forces. In a general sense, these current developments reaffirm and strengthen the existing military-industrial policy which consists of a domestic approach in the maritime sector, a Transatlantic approach for the Royal Netherlands Air Force and cooperation with the German Bundeswehr of the ground forces. Specifically with regards to procurement for supplying Ukraine directly it seems that the negotiated procedure without publication of a contract notice as prescribed by Directive 2009/81 is used and European collaborative procurement is increasing. The war in Ukraine furthermore added pressure to the challenge of striking a balance between meeting immediate military needs (often through US imports) and pursuing a future-proof (European) industrial policy. In this context, the author concludes that the war in Ukraine has further exposed the ineffectiveness of the EU's current regulation of military procurement—as embedded in the Defence Directive—in contributing to the EU's strategic autonomy ambition.

Introduction

The 2022 outbreak of war in Ukraine has led to widespread political agreement to reinvest in the Dutch military.[1] At the same time, the Netherlands has been one of the biggest suppliers of arms to Ukraine.[2] Most of the supplies to Ukraine come from its own stocks. According to the Ministry of Defence, as of 26 June 2023, the Netherlands had delivered equipment from its own stocks to Ukraine with a value of €788 million. The replacement costs are estimated at €1.5 billion. The equipment procured specifically for Ukraine had a total value of €200 million.[3] Enormous procurement challenges have thus been arising.

This contribution provides a legal reflection on these challenges by looking at the extent to which the war in Ukraine has affected the application of the different legal regimes and different types of procurement procedures in the Netherlands. For that purpose, the article first sets out the constitutional and international legal context which determines the function of Dutch defence procurement. Secondly, it provides some

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[1] See Ministry of Defence, Sterker Nederland, Veiliger Europa: Investeren in een Krachtige NAVO en EU—Defensienota 2022 (June 2022).

[2] During the period between 24 January 2022 and 31 May 2023, according to Kiel Institute for the World Economy, Ukraine Support Tracker: A Database of Military, Financial and Humanitarian Aid to Ukraine, *https://www.ifw-kiel.de/topics/war-against-ukraine/ukraine-support-tracker*.

[3] Letter of the Minister of Defence to the Tweede Kamer, *Leveringen militaire goederen aan Oekraïne* (5 July 2023).

insight into the Dutch implementation of Directive 2009/81 (Defence Directive) insofar as it deviates from what is prescribed by the Directive. Thirdly, it sets out the general Dutch military-industrial policy to reach an understanding of how the function of Dutch defence procurement is translated into industrial policy and application of public procurement law and the use of its exceptions. Finally, the direct impact of the war in Ukraine on procurement and the use of different exceptions will be discussed.

Defence procurement in this contribution is defined as all procurement by the Defence Ministry with a military purpose, often falling within the scope of the Defence Directive. This differs from the more narrow category of *military procurement* which is defined as all procurement falling within the material scope of the exception of art.346(1)b TFEU (Treaty on the Functioning of the European Union) as defined by the Court of Justice of the European Union (CJEU).[4]

1. Sovereignty, military alliance and international obligations

The function of the Dutch military is generally defined by art.97 of The Constitution of the Kingdom of the Netherlands, which states that "there shall be armed forces for the defence and protection of the interests of the Kingdom, and in order to maintain and promote the international legal order". Following art.5 of the North Atlantic Treaty, the defence of NATO (The North Atlantic Treaty Organisation) territory should be considered as a part of what should be defended. The constitutional function of the Dutch military was first defined by the constitutional reform of 1983, when it was merely described as "the protection of the interests of the state". The reform in 2000 added the protection and promotion of the international legal order, as the end of the Cold War era seemed to indicate a decline in direct territorial threats. In the years before, the Dutch military had already been used for this purpose on the basis of a UN mandate in Srebrenica (1994–1995) and without a UN mandate in Kosovo (1999).

Besides its function, art.97 of the Constitution also states that: "The Government shall have supreme authority over the armed forces". This simply means that only the Government can decide to deploy troops for military operations, regardless of whether these operations are conducted in cooperation with NATO or EU allies. This also indicates that the Kingdom retains its sovereignty in military affairs, notwithstanding intensive military cooperation with other states—such as the recent integration of all Dutch brigades in the operational structures of the German *Bundeswehr*—and within the framework of NATO and the EU. Meaningful sovereignty, as the war in Ukraine has once again reminded the world, depends to a large extent on the ability to protect one's own territory from foreign invasion, regardless of whether this protection takes place with or without international cooperation.

National sovereignty then legitimises the possession of military power (but not necessarily its use!). Since the Dutch Constitution establishes a strongly monist system, according to which international legal norms have direct effect (art.93 of the Constitution) and generally override incompatible domestic law (art.94 of the Constitution), this legitimation is derived from international law as much as from the Constitution itself. The International Court of Justice (ICJ) has ruled that "in international law there are no rules other than such rules as may be accepted by the State concerned, by treaty or otherwise. whereby the level of armaments of a sovereign State can be limited".[5] In other words, arming oneself is a sovereign right of the state, as without arms one cannot effectuate the right of (collective) self-defence as established in art.51 of the UN Charter.

Rather than limiting the level of armaments, international treaties actually oblige the Netherlands to maintain sufficient military power. First and foremost, such an obligation is an integral part of the North Atlantic Treaty and thus of NATO membership. Based on the principle and legal norm of collective self-defence, the Treaty obliges its signatories to "maintain and develop their individual and collective

[4] For the Court's definition of "military" equipment, see *Insinööritoimisto InsTiimi* (C-615/10) EU:C:2012:324 at [40].
[5] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, judgment (I.C.J. Reports, 1986), p.135.

capacity to resist armed attack".[6] As a NATO member, one thus needs to possess sufficient military capabilities for effective collective self-defence. More concretely the signatories agreed in 2014 that this means that defence expenditure should entail 2% of their GNP (gross national product) of which 20% should be spent on "major equipment".[7] These commitments were reaffirmed by the members of NATO during the 2023 Vilnius Summit. While accession to NATO is undoubtedly based primarily on political consensus among the members, the recent declaration reaffirmed that technical interoperability also plays a crucial role.[8] NATO members should therefore seek interoperability with their allies through their procurement decisions. Conversely, procurement from hostile third countries can lead to diplomatic crises within the alliance.[9]

The EU Treaties also impose military obligations on the Netherlands in the context of the Common Security and Defence Policy (CSDP). Somewhat similar to NATO's collective self-defence, Article 42(7) TEU imposes an obligation of "aid and assistance" on the Member States if one of them would be "the victim of armed aggression". However, according to art.4(2) TEU (Treaty on the European Union), national security remains the sole responsibility of the Member States. Article 42(3) TEU therefore emphasises that the CSDP is implemented with the civilian and military capabilities of the Member States and that they shall "undertake progressively to improve their military capabilities". Much of the commitment to improve military capabilities has been fleshed out in the *more binding commitments* of the Permanent Structured Cooperation (PESCO), including commitments to joint procurement and to making the European defence industry more competitive.[10]

The only attempt to actually regulate defence procurement in a general way is to be found in the Defence Directive in the area of the internal market. Based on the principles of non-discrimination, transparency and proportionality, the Defence Directive seeks to open up Member States' procurement of military equipment to EU-wide competition.

2. Some insight into the Dutch implementation of the Defence Directive

The Dutch regulation of defence procurement is to be found in the implementation of the Defence Directive; the Aanbestedingswet op Defensie- en Veiligheidsgebied (AwDV). The AwDV is largely a copy of the Defence Directive, but with some elaborations such as those on subcontracting and security of information which are discussed below.

General obligation to apply procurement principles to subcontracting?

With regards to subcontracting, the AwDV seems to impose a stricter regime than the Directive in terms of market liberalisation. Under the Defence Directive, contracting authorities may oblige, or Member States may require, successful tenderers to award subcontracts in accordance with the public procurement principles of transparency, equal treatment and non-discrimination, as set out in Title III of the Directive.[11] This includes the obligation to publish a subcontract notice in accordance with the rules of the Directive that normally apply to contracting authorities, when the value of the subcontract exceeds the thresholds.[12] In addition, contracting authorities may oblige, or be obliged by their Member States, to require the successful tenderer to subcontract a maximum of 30% of the value of the contract to third parties, provided that this is proportionate to the object and value of the contract.[13]

[6] North Atlantic Treaty art.3.
[7] NATO, *Wales Summit Declaration*, 5 September 2014, para.14.
[8] In the context of future Ukraine membership, see NATO, *Vilnius Summit Communiqué*, para.11.
[9] See for instance "U.S. Imposes Sanctions on Turkey Over 2017 Purchase of Russian Missile Defenses" *New York Times*, 14 December 2020.
[10] Council Decision (CFSP) 2017/2315 establishing permanent structured cooperation (PESCO).
[11] Directive 2009/81 arts 21(3), 50(1) and 51.
[12] Directive 2009/81 art.52.
[13] Directive 2009/81 art.21(4).

The AwDV implements the optional rules on subcontracting as they are set out in the Directive, meaning that it is left to the discretion of the contracting authorities to decide whether or not a percentage of the contract value should be subcontracted and whether the procedural rules of Title III of the Directive should be followed. However, the AwDV also seems to contain a general obligation for tenderers who have been awarded a contract falling within the scope of the law to comply with the principles of equal treatment, non-discrimination and transparency when awarding a subcontract to a third party if that subcontract *clearly* has a *cross-border interest*.[14] This general obligation seems to exist irrespective of whether the specific procedural rules of Title III of the Directive—implemented in Pt 2.4.2 AwDV—are imposed on the supplier by the contracting authority. It remains unclear how—and by whom—this apparent general obligation could be enforced without the procedural requirements of Title III of the Directive. In any case, the 2020 *Implementation Assessment* of the Directive shows that the Member States barely use the subcontracting rules at all.[15]

Screening of tenderers beyond the Directive's regime

The AwDV implements the Directive's provision on security of information in art.2.68 and the exclusion ground for unreliable tenderers in art.2.77(1)f without significant deviations. However, the actual regulation of security of information and reliability of tenderers is to be found in the *Algemene Beveiligingseisen Defensieopdrachten* (ABDO). In the absence of harmonisation of national security clearances, the Directive recognises in art.22 that the Member States are free to apply their national legislation on security clearances based on the assessment of their own intelligence services. The ABDO generally excludes companies without an establishment in the Netherlands, as well as companies without any Dutch personnel who could be assigned the role of *Security Officer*, from obtaining the certification required for military contracts containing significant amounts of information that is classified as state secret.[16]

In the absence of jurisprudence,[17] it remains somewhat unclear as to whether the ABDO regime could then be legally applied at all within the framework of the Directive. On the one hand, the essence of the ABDO regime clearly conflicts with the principle of non-discrimination as it includes nationality requirements. On the other hand, it could be argued that the Directive leaves it to the Member States to regulate security clearances and that there would not be a problem as long as the regime is applied proportionately and the security clearances of other Member States which are considered "equivalent" are also accepted.[18]

3. The Dutch military-industrial policy outside the Defence Directive

As stated in the 2018 *Defensie Industrie Strategie*, the problem which the Netherlands has with the Defence Directive is that it only opens up the market for prime contracts, while the award of subcontracts in reality remains domestically oriented.[19] This is because the domestic defence industry (with a few exceptions)

[14] AwDV art.1.3(2).

[15] During the covered period, the subcontracting options have only been used 11 times out of a total population of 14,165 contract notices (that is 0.078% of the contracts awarded within the framework of the Directive), while only 11.71% of the value of all military procurement was awarded based on the Directive in the first place. See European Parliament, *EU Defence Package: Defence Procurement and Intra-Community Transfers Directives European*, Implementation Assessment, European Parliamentary Research Service (October 2020), pp.90–99.

[16] Ministerie van Defensie (Defence Ministry), *ABDO Algemene Beveiligingseisen voor Defensieopdrachten 2019* (General Security requirements for Defence contracts), p.12 (1.4. criteria 9–11).

[17] The ABDO regime significantly differs from the Austrian authorisation scheme that was at stake in *Schiebel Aircraft GmbH v Bundesminister fur Wirtschaft, Familie und Jugend* (C-474/12) EU:C:2014:2139, as the ABDO regime specifically applies to economic operators which are to perform contracts for the Dutch Ministry of Defence and the involved employees.

[18] Some degree of such mutual recognition based on mutual trust is foreseen in art.22 of Directive 2009/81 as well as in art.2.68(3) and 2.68(4) AwDV.

[19] Ministry of Defence and Ministry of Economic affairs, *Nota: Defensie Industrie Strategie* (English translation available) (November 2018), p.11. On the persistence of this problem, see also: M. Trybus and B. Heuninckx, "Small and Medium-sized Enterprises and EU Defence Procurement Law: The Soft Impact of Recommendation 2018/624/EU" (2023) P.P.L.R. 115–140.

consists mainly of companies which are involved in defence production through subcontracts awarded by large companies, often based abroad. Therefore, the Netherlands has a long-standing policy of imposing military offsets on foreign suppliers, obliging them to include companies based in the Netherlands in their supply chain. Although these offsets have—over time—become more focused on military interests (rather than economic interests) as required by art.346 TFEU, their compliance with EU law in concrete cases remains debatable (see the submarines example in the section below).[20] The Ministry of Economic Affairs, which is responsible for offsets, nowadays refers to military offsets as "industrial participation". The function of these military offsets for the Netherlands is thus primarily to level the unequal nature of the international market for military equipment.[21] The *unequalness* of this market should be understood as the natural advantage of military companies that are established in a country with higher military spending and which therefore have easier access to more military contracts.

When it comes to international cooperation, the Dutch military-industrial policy can generally be characterised as not strongly prioritising EU cooperation over Transatlantic cooperation or *vice versa*, and thus making its strategic choices on a case-by-case basis. Based on the *Defensie Industrie Strategie*, the Netherlands envisages a predominantly domestic approach for the maritime sector and an international cooperation approach for land and aviation.[22]

A domestic approach in the maritime sector

The domestic approach in the maritime sector is strongly linked to the presence of the maritime company Damen. The Netherlands and Belgium decided in 2016 to jointly procure new frigates for their navies. The leading role in the procurement process was reserved to the Netherlands, which decided to directly award the contract for building the ships to the Dutch company Damen and the contract for the integrated radar- and fire-control systems to the Dutch establishment of Thales, both based on art.346 TFEU.[23] But even in the maritime sector a fully domestic approach is unrealistic. For the award of a contract to replace the Dutch submarines, various bidders are—at the time of writing—competing within a procurement procedure which has been excepted from EU law based on art.346 TFEU. Both the French company Naval and the Swedish Saab are cooperating with Dutch operators in this tender (Naval with the Royal IHC and Saab with Damen) in order to increase their chances of winning the contract. The German company ThyssenKrupp is competing alone, but would just as well include Dutch companies if it would be awarded the contract.[24]

In September 2022 the Dutch Ministry of Defence officially announced that the award criteria for the submarine contract will include the awarding of points based on *essential interests of national security* for the involvement of Dutch companies in the development, engineering, production and maintenance of so-called *critical systems*.[25] According to the Ministry, these award criteria are to be separated from the *Industrial Cooperation Agreements* which the Ministry of Economic Affairs will negotiate with the bidders separately—and simultaneously—from the evaluation of the bids by the Ministry of Defence.[26] This is somewhat odd from a legal perspective, as according to art.346 TFEU all discriminatory requirements for the involvement of Dutch companies would have to be based on essential interests of national security.

[20] This unclarity is also due to a general lack of transparency. To ensure the legitimate military purpose of offsets, I argue in my dissertation for regulating (rather than unrealistically seeking to completely ban) military offsets within the framework of a general CSDP regulatory framework for military procurement (which would include transparency obligations), see N. Meershoek, *Sovereignty and Interdependence in EU Military Procurement Regulation*, Dissertation (Utrecht University, 2023), Chs 2 and 7.

[21] Letter of the Minister of Economic Affairs to the Tweede Kamer, *Enforceability of offset-agreements*, Nr.24 793 (21 June 1996), p.4. More recently, see Letter of the Minister of Economic Affairs to the Tweede Kamer, *Rapportage Industrieel Participatiebeleid* 2017–2018 (20 June 2019).

[22] *Defensie Industrie Strategie* (November 2018), p.23.

[23] See Letter of the State Secretary of Defence to the Tweede Kamer, *B-brief project "Vervanging M-fregatten"* (24 June 2020), pp.2–3.

[24] See Marine Systems, *https://www.thyssenkrupp-marinesystems.nl/en/* [Accessed 31 July 2023].

[25] Letter of the State Secretary of Defence to the Tweede Kamer, *Offerteaanvraag vervanging onderzeebootcapaciteit* (30 September 2022), p.6.

[26] Letter of the State Secretary of Defence to the Tweede Kamer, *Proces tot gunning vervanging onderzeebootcapaciteit* (15 June 2023), p.2.

It could also be questioned whether the Ministry of Economic affairs is better placed than the Ministry of Defence to determine what these security interests would consist of in terms of industrial participation.[27] The Ministry of Economic Affairs did recently adjust its policy after a dialogue with the European Commission in the context of an infringement procedure which was withdrawn by the Commission in 2020. It claims that industrial participation is now only applied to industrial capabilities and technology which the *Defensie Industrie Strategie* refers to and that there is special attention to prevent the disturbance of civilian markets.[28]

Transatlantic ties of the Royal Netherlands Air Force

In the aviation sector, the Netherlands has traditionally had close ties with the US Air Force. The best-known example of the Dutch offsets policy is the participation of the Netherlands in the US-led project for the development and the eventual procurement of the F-35 fighter aircraft. It seems clear that access to US military technology—which was considered superior to European alternatives—and the traditionally close relationship between the Netherlands (its Air Force in particular) and the US were decisive for choosing to procure the aircraft.[29] This decision was thus primarily a geopolitical one. As opposed to the European alternatives, such as the Tornado, Eurofighter Typhoon and Saab JAS39 Gripen programmes, the development phase of the F-35 programme was fully controlled by the US, which wanted to retain monopolies in high technology industries.[30] Companies from non-US partners in the programme have mainly been included in the production phase. Moreover, the prime contractors (Lockheed Martin and Boeing) were already selected before other countries joined the programme. To a large extent based on the close ties with the US in the aviation sector, around 64% of the total value of Dutch imports in the period 2000–21 came from the US.[31]

The war in Ukraine has confronted EU Member States with a pressing procurement dilemma. On the one hand, there is a long-term European desire to achieve strategic autonomy by becoming less dependent on US military imports. On the other hand, there are urgent and concrete military needs which need to be fulfilled within the boundaries of limited budgets, which in the short term are often best fulfilled by US imports.[32] The war in Ukraine has only increased the urgency of these needs, and often also the desirability to procure *off-the-shelf* US solutions rather than investing in the development of European solutions. Simultaneously the war has exposed the reality of US dependency, as the US' military aid to Ukraine is still more than the sum of all European aid.[33] It is therefore unsurprising that the Netherlands has intensified US imports in certain domains by procuring extra capabilities of US weapon systems, such as MQ9 Reaper-drones, F-35 fighter planes and MIM-104 Patriot air defence.

Although the Defence Directive aims to strengthen the industrial base for EU defence policy, US imports can often be excluded from its scope, either on the basis of art.12(a) if the contract is governed by "specific procedural rules pursuant to an international agreement or arrangement" or on the basis of art.13(f) if it is procured through US Foreign Military Sales and can be considered a government-to-government contract[34] falling under the exclusion. Even if the Defence Directive would be applied, it seems that there

[27] See Letter of the Minister of Economic Affairs to the Tweede Kamer, *Rapportage Industrieel Participatiebeleid* 2019–2020 (1 December 2021).

[28] See Letter of the Minister of Economic Affairs to the Tweede Kamer, *Rapportage Industrieel Participatiebeleid* 2019–2020 (1 December 2021).

[29] See G. Scott-Smith and M. Smeets, "Noblesse Oblige: The Transatlantic Security Dynamic and Dutch Involvement in the Joint Strike Fighter Programme" (2012–2013) *International Journal* 49–69; S. Vucetic and K. Richard Nossal, "The International Politics of the F-35 Joint Strike Fighter" (2012–2013) *International Journal* 3–12; and (in Dutch) C. Klep, *Dossier-JSF* (Amsterdam: Boom, 2014), Ch.1.

[30] This comparison was made in: K Hartley, "Collaboration and European Defence Industrial Policy" (2008) *Defence and Peace Economics* 308.

[31] SIPRI Arms Transfers Database.

[32] The Dutch State Secretary of Defence mentioned this dilemma in a 2023 newspaper interview, see NRC, *Defensiestaatssecretaris: "We gaan niet vijftien jaar aan achterstanden in een jaar wegwerken"* (8 March 2023).

[33] See again Ukraine Support Tracker, Ministry of Defence, Sterker Nederland, Veiliger Europa: Investeren in een Krachtige NAVO en EU – Defensienota 2022 (June 2022).

[34] Although there is debate whether this provision could legally be used for the procurement of new military equipment if there is equivalent equipment available within the EU (which is often not the case), see for instance: M. Trybus, *Buying Defence and Security in Europe: The EU Defence and*

is no obligation for competitive tendering. For the procurement of extra capabilities of previously procured weapon systems, the use of the negotiated procedure without publication of a contract notice could be justified on the basis of art.28(1)(e), as for technical reasons as well as exclusive rights the equipment can only be procured through US Foreign Military Sales, or the use of this closed procedure could be based on art.28(3)(a) if the procurement can be considered as "additional deliveries".

Intensified German-Dutch cooperation on the ground

On 30 November 2022, the heads of the Dutch and German armed forces agreed to integrate the last Dutch brigade still operating independently into a division of the German Army, thus completing the full integration of the Dutch land combat units into the operational structure of the Bundeswehr. This cooperation dates back to a bilateral treaty that was signed in 2006, in which the signatories agreed that the cooperation will cover areas of mutual interest and that it will take place on the basis of effectiveness, efficiency and reciprocity.[35] According to the Ministry, this cooperation strengthens the Armed Forces in three ways. By integrating the combat brigades into the German divisions, these brigades gain knowledge and experience in large-scale operations, the joint experience accumulation ensures more effective operational cooperation during joint missions, and it stimulates joint capability development that increases the interoperability of Dutch and German units.[36] More than anything, the cooperation is a consequence of the enormous downsizing the Dutch land forces have been subject to since the end of the Cold War.[37]

Consequently, interoperability with Germany is the main consideration in the procurement of weapon systems for the land forces. In July 2023, Germany and the Netherlands concluded a contract with Rheinmetall for the procurement of so-called *Airborne Vehicles*, following a procurement procedure based on art.346 TFEU in which Germany operated as lead nation.[38] The Dutch companies Rheinmetall Defence Nederland B.V. and VDL Special Vehicles B.V. will be involved as subcontractors. In addition to Rheinmetall, which cooperated closely with Mercedes Benz for the tender, the procurement procedure also included a tender of the German company (with partly French ownership) Kraus Maffei Wegmann which cooperated closely with the Dutch company Defenture for the production of the vehicles.

4. Legal developments after the outbreak of the war in Ukraine

There have been no changes to public procurement law as it is applicable in the Netherlands in response to the recent outbreak of the war. To speed up procurement procedures there have been some changes to the *Defensie Materieel Process* which regulates the communication between the Ministry and the Parliament about large procurement contracts. In response to the war in Ukraine the financial threshold for procurement needs about which the Parliament must be informed separately from the general budget has been raised from €25 million to €50 million.[39] The financial threshold for procurement procedures about which the

Security Procurement Directive in Context (Cambridge: Cambridge University Press, 2014), pp.292–299 and L. Butler, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market* (Cambridge: Cambridge University Press, 2017), pp.408–413.

[35] *Overeenkomst tussen de Regering van het Koninkrijk der Nederlanden en de Regering van de Bondsrepubliek Duitsland inzake de samenwerking op defensiegebied, Münster* (8 November 2006), art.2.

[36] Letter of the State Secretary of Defence to the Tweede Kamer, *Landmacht samenwerking met Duitsland, Den Haag* (23 February 2023), p.3.

[37] The Dutch military consequently also suffers from an enduring personnel shortage, triggering new types of cooperation mechanisms with private companies, see N. Meershoek, E. Manunza and L. Senden, "Ensuring Military-logistic Capabilities through Discriminatory Public Procurement? Legal Routes to Overcome a Personnel Shortage" (2003) P.P.L.R. 141–156.

[38] Letter of the State Secretary of Defence to the Tweede Kamer, *DMP D(2)-brief resultaten verwervingsvoorbereiding project "airborne vehicles"* (15 June 2023). See also "Rheinmetall secures €1.9bn order for assault vehicle from German and Dutch armies" *Financial Times*, 20 July 2023 and a background article on the tender of Dutch company Defenture "Hoe deze Nederlandse autobouwer de uitdager van een wereldspeler is geworden" *NRC*, 16 June 2023.

[39] See Letter of the State Secretary of Defence to the Tweede Kamer, *Wendbaarheid "voorzien-in" proces materieel* (1 November 2022), pp.3–4 and Ministry of Defence, *Afwijkingsrapportage t.o.v. Defensie Projectenoverzicht 2022* (May 2023), p.6. The functioning of the procedures for informing the Parliament (though with the old financial thresholds) can be found in Ministry of Defence, Defensie Materieel Proces bij de tijd, (February 2017).

Parliament must be informed in more detail—the so-called *mandateringsgrens*—has been raised from €100 million to €250 million.[40] Considering that the previous financial thresholds were established in 2001, the increases are not as significant as they seem.

In the long term, the State Secretary for Defence has indicated the wish to explore with other EU Member States the extent to which reforming the EU's public procurement rules in the field of defence would be feasible to make defence procurement more *wendbaar* (agile).[41] For the time being, defence procurement has to be based on existing rules, which means either applying the Defence Directive as implemented in the AwDV, or justifying derogation from that Directive usually on the basis of art.346(1)(b) TFEU.

Procurement for delivery to Ukraine

Publicly available information on procurement for delivery to Ukraine is limited to what is either published on Tenders Electronic Daily (TED) or what can be found in the communication between the Ministry and the Parliament. For supplies to Ukraine, the Ministry has noted that the openness of information is further limited by operational security as well as by the interests of third parties involved, such as those from industry.

Based on the very limited available information, it seems that procurement for direct delivery to Ukraine by the Defence Ministry is primarily executed through the use of the negotiated procedure without prior publication of a contract notice, based on art.28(1)(c) of the Defence Directive.[42] According to this provision, use of this procedure can be justified if "the periods laid down for the restricted procedure and negotiated procedure […] are incompatible with the urgency resulting from a crisis". According to the legislature, this urgency limits itself to the existence of a crisis, because of which preventive measures are excluded.[43] Alternatively, the negotiated procedure without publication is used for civilian purchases based on art.32(2)(c) of Directive 2014/24 in so far this is considered "strictly necessary […] for reasons of extreme urgency brought about by events unforeseeable by the contracting authority".[44]

Obviously, the war in Ukraine can lead to the "urgency resulting from a crisis" which the Defence Directive refers to. Procurement of military equipment for Ukraine should follow the military needs of the Armed Forces of Ukraine, which are for the moment as per the definition of urgent and immediate. The use of the negotiated procedure without competition will often be deemed necessary because of the materiel shortages which are present on the European market for defence equipment as a consequence of the enormous increase in demand. For civilian purchases, the conditions for applying the negotiated procedure without publication are, however, more strict, as the extreme urgency should have been brought about by events unforeseeable by the contracting authority and "the circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority". The question then arises as to whether how long the events can still be considered *unforeseeable*.

Besides domestic urgency procurement, the Netherlands is involved extensively in collaborative procurement for delivery to Ukraine. Together with Denmark and Germany the Netherlands has, for instance, planned to procure 100 Leopard-1A5 battle tanks for delivery to Ukraine, as well as 14

[40] See Letter of the State Secretary of Defence to the Tweede Kamer, *Wendbaarheid "voorzien-in" proces materieel* (1 November 2022), pp.3–4 and Ministry of Defence, *Afwijkingsrapportage t.o.v. Defensie Projectenoverzicht 2022* (May 2023), p.6. The functioning of the procedures for informing the Parliament (though with the old financial thresholds) can be found in Ministry of Defence, *Defensie Materieel Proces bij de tijd* (February 2017).

[41] Letter of the State Secretary of Defence to the Tweede Kamer, *Wendbaarheid "voorzien-in" proces materieel* (1 November 2022), p.5.

[42] See for instance, *https://ted.europa.eu/udl?uri=TED:NOTICE:175820-2022:TEXT:EN:HTML* [Accessed 25 July 2023].

[43] Directive 2009/81 Recital 54.

[44] It has for instance been used for the procurement of €906,249.80 worth of underwear, *https://ted.europa.eu/udl?uri=TED:NOTICE:190288-2023:TEXT:EN:HTML* [Accessed 25 July 2023] and €216, 227.00 worth of pocket-knives, *https://ted.europa.eu/udl?uri=TED:NOTICE:178545-2023:TEXT:EN:HTML* [Accessed 25 July 2023].

Leopard-2A4 battle tanks together with Denmark.[45] With regards to ammunition, it participates in EDA's collaborative procurement of ammunition project. This includes a "fast-track procedure" for a time period of two years based on which EDA procures ammunition on behalf of the Member States. Even though it is stressed that the Member States can either use the ammunition for delivery to Ukraine or to replenish their own stocks, it is indicated that procurement is based on "negotiated procedure with European industry without tendering, based on extreme urgency".[46] Compared to unilateral procurement of ammunition, the need to use the negotiated procedure without tendering is less obvious. One of the main potential benefits of collaborative procurement is to increase the buyer's bargaining power vis-à-vis the suppliers. In times of equipment shortages and limited availability of production capacity due to a crisis situation, the limited bargaining power of a single country without significant domestic production capacity (such as the Netherlands) could necessitate the need to negotiate with potential suppliers without tendering. The increase in bargaining power due to collaboration[47] may be just sufficient to effectively subject suppliers to a tendering procedure, which could reduce unit costs.[48]

Conclusion

Regarding procurement, the war in Ukraine has further pressured the challenge of finding a balance between satisfying direct military needs (often through US imports) and pursuing a future-proof industrial policy. The latter includes the Dutch contribution to the EU's strategic autonomy ambition. The budget increase creates more room for the Netherlands' industrial policy as embedded in the *Defensie Industrie Strategie*, but the war and the need to arm Ukraine—which triggered this budget increase—simultaneously lead to more direct and urgent military needs.

From a legal perspective, the war has further exposed the ineffectiveness of the Defence Directive. Although the Directive's negotiated procedure without publication of a contract notice appears to be often appropriate for the procurement of equipment to be delivered to Ukraine, this does not contribute to the Directive's rationale of opening up the procurement of the Member States to EU wide competition. Derogation from the public procurement principles of non-discrimination, transparency and proportionality based on art.346(1)(b) TFEU or the Directive's exemptions for collaborative procurement and third country imports seems to remain the default *modus operandi* for the large defence contracts which shape the structures of the industry.

The examples of the frigates and submarines show that the application of art.346 TFEU can either lead to a direct award or to a competitive procurement procedure in which the offers of several tenderers are compared. It is unclear how this choice is generally made. Similarly, the definition of specific essential security interests in the offset procedures remains somewhat vague. Outside the Defence Directive transparency is thus very limited.

To some extent, this lack of clarity is a natural consequence of the Defence Directive's ineffectiveness and its (incorrect) choice of legal basis.[49] Both offsets and the use of art.346 TFEU cannot be regulated by the Directive because of its internal market legal basis. My recently defended doctoral thesis—which evaluates the Directive's effectiveness and choice of legal basis—therefore argues for the creation of a general regulation of military-*strategic* procurement within the context of the CSDP to (partially) replace

[45] The purchase of 96 Leopard 1 tanks from the Swiss defence company RUAG by Rheinmetall has, however, been blocked by the Swiss Federal Council. The impact of this blockade on the planned deliveries to Ukraine is not entirely clear. See: The Federal Council—The portal of the Swiss government, "Federal Council rejects export request for Leopard 1 A5 tanks destined for Ukraine", press release (28 June 2023).

[46] See European Defence Agency, Collaborative Procurement of Ammunition—Frequently Asked Questions (FAQ) Project Arrangement (version of 30 June 2023).

[47] In the case of EDA's ammunition procurement the collaboration covers almost the entire EU.

[48] Based on Directive 2009/81 art.33(7), the time-limit for receipt of tenders could be shortened to 10 days if necessary.

[49] On the legal basis, see N. Meershoek, "Why the EU Internal Market is not the Correct Legal Basis for Regulating Military-Strategic Procurement—On Functional Division of Competences" (2022) 47 E.L. Rev. 353–375.

the Defence Directive.[50] The current focus of the different EU institutions seems to be on creating mechanisms to facilitate and finance collaborative procurement and supplying Ukraine, rather than reforming the regulation. But if the EU were truly invested in its ambition to become more self-sufficient in military security, it should base its regulation of military procurement on a more realistic and coherent set of norms.

[50] See Meershoek, *Sovereignty and Interdependence in EU Military Procurement Regulation* (2023), Ch.7.