

COMMON MARKET LAW REVIEW

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Aims

The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Establishment and Aims

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden. The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

Editorial policy

The editors will consider for publication manuscripts by contributors from any country. Articles will be subjected to a review procedure. The author should ensure that the significance of the contribution will be apparent also to readers outside the specific expertise. Special terms and abbreviations should be clearly defined in the text or notes. Accepted manuscripts will be edited, if necessary, to improve the general effectiveness of communication. If editing should be extensive, with a consequent danger of altering the meaning, the manuscript will be returned to the author for approval before type is set.

Submission of manuscripts

Manuscripts should be submitted together with a covering letter to the Managing Editor. They must be accompanied by written assurance that the article has not been published, submitted or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within three to nine weeks. Digital submissions are welcomed. Articles should preferably be no longer than 28 pages (approx. 9,000 words). Annotations should be no longer than 10 pages (approx. 3,000 words). Details concerning submission and the review process can be found on the journal's website <http://www.kluwerlawonline.com/toc.php?pubcode=COLA>

Luke R.A. Butler, *Transatlantic Defence Procurement. EU and US Defence Procurement in the Transatlantic Defence Market*. Cambridge: Cambridge University Press, 2017. 268 pages. ISBN: 9781107115514. GBP 95.

In his book, Butler attempts for the first time to look at defence procurement, a field that was traditionally jealously guarded by States against foreign competition, in the context of EU-USA relations and more generally taking into account the legal barriers to free trade in the defence markets. The literature on defence procurement consists primarily of the books by Trybus (Butler's PhD coordinator, *Buying Defence and Security in Europe*) and of Heuninckx (*The Law of Collaborative Defence Procurement in the European Union*). The uniqueness of this book comes from the fact that it looks at the hottest issue in the *transatlantic* relationships – one that the other two books only identify, without going further and analysing: the defence market and how new regulations are challenging the status quo.

Public procurement generally has been identified lately as one of the effective legal instruments at the disposal of States that can guide the markets and open them up to competition, especially within the common market of the EU but also, due to the adoption of the Government Procurement Agreement under the WTO, to selected foreign jurisdictions.

Defence procurement, on the other hand, has been left outside the regulatory framework for a long time, due to security concerns, as it is intrinsically linked to a core sovereign function of the State (p. 2). This paradigm has changed with the new *Defence Package* from 2009 (Defence procurement Directive 2009/81 and Directive on transfer of defence related products 2009/43), which aims to open up a bit the market inside the EU, a levelling field for contractors inside the

EU who were previously outnumbered by the bidders from third countries (p. 5). From a transatlantic perspective, though, the new package raises questions of whether it erects new barriers to trade with the transatlantic partners, especially the US. The author stresses that the EU package does not impose *per se* any new restrictions, although talk of a regulation for access to procurement market by third country nationals is on the agenda (p. 6). EU Member States are still left with the discretion on whether to permit third country contractors to participate in defence procurement, but the laws transposing the Directive might have an impact on third country contractors if they choose to restrict it. The legal background is circumscribed also by the tentative TTIP negotiations which include defence related matters.

Writing in this context, Butler offers a first informed and pertinent analysis of the regulatory frameworks for defence procurement in the EU and US, tackling three main issues: the external dimension of the EU law in the field of defence procurement, the differences between the EU and US legal regimes of defence procurement, and the need for further research on the other non-tariff barriers to transatlantic trade.

First, the allegations that the new Defence Package contains in disguise barriers to market access for US contractors had to be investigated by analysing, from author's own perspective but taking stock of the existing literature, the application of the Defence Directive. The Directive excludes from its remit the awards based on international instruments, so in principle it should not be a threat to the access of third country contractors. However, the book shows the controversies surrounding the practice of such awards. Second, comparative perspectives on EU-US defence procurement are scarce, as the debate whether the legal regime of such awards should be harmonized and at which level – national, European or international – is still alive. Against this background, analysing the similarities and differences between the two legal regimes seems worthwhile. For instance, the US system covers formation and performance of contract while the EU system only covers formation of contracts (award procedures). Equally so is the endeavour to assess the treatment of EU contractors by the US procurement legal regime, in order to have a reference and a point of departure for analysing the possible adverse effects of the EU Defence directive to US contractors. Third, the book is one of the few to assess the impact of legal regulation as a discrete barrier to transatlantic defence trade, as usually the focus is on policies and practices that create barriers. As a result of the analysis, the author also examines initiatives proposed to address such barriers (such as defence trade treaties).

The book's limits are clearly spelled out by the author: it does not cover the sensitive defence procurement and dual-use defence material, but only the "hard defence material", although the two categories are worthy of attention in practice due to challenges arising from their legal regime. It does not cover procurement by NATO or cooperatively by US and individual EU Member States either, even though the legal regimes in the EU and US have an impact of such procurement as well (p. 13). Other limitations stem from the lack of empirical data given the political sensitivity and confidentiality attached to defence procurement, and from the legal perspective, which does not include political and economic considerations. The author works on the basis of some assumptions that might prove to be too optimistic or not as accurate as in recent times, such as: the EU and US remain committed to cooperation on defence, in the context of the debates relating to the relevance of NATO, the progressive development of EU defence policy and disparities in defence spending; addressing barriers in trade has as a result cost effective procurements that improve security cooperation; the EU and US have the same incentives to address the trade barriers – for instance the resolution of the EU to address internal barriers cannot be considered as powerful when it comes to transatlantic trade, where the reduction of dependency from the US seems to be the objective (p. 15).

Following an introduction and a contextualization of the transatlantic defence market, the book is structured in two main parts, one dedicated to external dimension of the EU defence procurement regime and the other to the US defence procurement regime. A third part comprises a single chapter focused on future research trajectories.

The first part (EU part) has four chapters. Chapter 2 discusses the sources of EU defence procurement law from the provisions of Article 346 TFEU to its interpretations by the Members States, EU institutions and the ECJ and the secondary legislation (the Defence Directive).

Chapter 3 analyses the contracts excluded from the Defence Directive, but subject to the Treaty principles, contracts awarded under international agreements rules and by international organizations and cooperative programmes based on research and development. Chapter 4 presents modes of participation of third country contractors (including e.g. EU subsidiaries) in the EU market for defence and their treatment under the Defence Directive. Chapter 5 addresses the concerns that Defence Directive is raising barriers to trade with the US, and analyses instances where such barriers may occur: when defining technical specifications by reference to standards, equivalence and interoperability, security of supply, security of information. The author concludes that generally the US regulations are far stricter in terms of confidentiality security of information and security of supply than the Defence Directive and that is rather unlikely that US contractors would have difficulties in meeting the EU requirements for participation in award procedures. However, the lack of empirical data to support this conclusion is acknowledged as well (p. 242).

The second part (US regulations) discusses in Chapter 6 the sources of US defence procurement law (statutes, regulatory sources), the exercise and oversight of procurement function (executive, legislative, administrative and judicial) and continues in Chapter 7 with the provisions accommodating foreign participation in open defence competition. The chapter contains also a case study for open competition bid. Chapter 8 addresses the non-competitive procurement using the “only one responsible source” system, the non-competitive procurement justified by maintenance of industrial base, national security, unusual and compelling circumstances, international agreements, and the “necessary in the public interest” test (pp. 312 et seq.). Chapter 9 analyses the US law on foreign procurement, with the famous Buy American Act and other special legal regimes. It touches also on the reciprocal defence procurement memoranda of understanding, and on the UK-US Defence Trade Cooperation Treaty (pp. 373 et seq.). Chapter 10 makes a comparison between the regime for government to government contracts and of offsets in the EU and US defence procurement.

Finally, the third part is dedicated to designing a legal discourse on the possible future of defence procurement in transatlantic settings, identifying the main constitutional, legislative and policy implications and envisaging new instruments that could be used for regulating the market, such as extended bilateral defence trade treaties and even a Transatlantic Defence General Agreement on Tariffs.

In conclusion, it is an informative book which addresses the impact of recent regional (European) legal framework for defence procurement against a previously highly regulated national procurement regime (p. 8), the counterpart across the Ocean and its implications for transatlantic trade arrangements in a sensible area such as defence and security. The declared objective of the book is not to advocate harmonizing the EU and US legal regimes, but to gain a proper understanding of the impact of legal regimes on market access and treatment of foreign contractors in the two procurement markets, and that harmonization of best practices is more desirable than harmonization of legal rules (p. 9). Well written, with a logical structure and flow of ideas, the book is a worthwhile read for those interested in the field of defence but also for public lawyers, public procurement experts and investment law specialists.

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