



# Assembly of Western European Union

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## FORTY-THIRD SESSION

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European cooperation on the procurement of defence equipment  
lessons drawn from the Symposium

## REPORT

submitted on behalf of the Technological and Aerospace Committee  
by Mr Lenzer, Rapporteur

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*European cooperation on the procurement of defence equipment –  
lessons drawn from the Symposium*

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<sup>1</sup> Adopted unanimously by the Committee

<sup>2</sup> *Members of the Committee* Mr Marshall (Chairman), MM Lenzer, Atkinson (Vice-Chairmen); Mrs Aguiar, Mr Arnau, Mrs Blunck, Mrs Bribosia-Picard, MM Cherribi, Cunliffe, Diana, Mrs Durrieux, MM Etherington, Feldmann, Fillon, Mrs Gelderblom-Lankhout, MM López Henares, Lorenzi (Alternate: Speroni), MM Luís, Martelli, Olivio, Polydoras, Probst, Ramírez Pery, Sandrier (Alternate: Le Grand), MM Staes, Theis, Valleix, Mrs Zissi.

*Associate members:* MM Kıratglioglu, Yurur.

N.B. *The names of those taking part in the vote are printed in italics*

*Draft Recommendation*  
*on European cooperation on the procurement of defence equipment*

The Assembly,

- (i) Considering that security and defence in Europe must be founded on autonomous military assets which are interoperable with those of our transatlantic allies;
- (ii) Considering that these assets must rest on a European defence industry that is competitive on the world market;
- (iii) Noting that the defence budgets of western European countries are decreasing, or showing insignificant growth, that markets are shrinking, competition is becoming keener and technological developments are leading to exponential increases in the cost of new weapons systems;
- (iv) Taking the view that Europe is tackling this situation with a dispersed defence industry, fragmented assets and surplus production capacity;
- (v) Noting that these shortcomings are mainly due to the fact that each country has maintained as many independent national capacities as possible even though there is no sufficiently large market in Europe to absorb investment in research and development;
- (vi) Stressing that no single European country has a defence industry able to meet all its requirements in this field;
- (vii) Considering that a European market must constitute the bedrock of a European defence industry;
- (viii) Considering that European cooperation is essential for the armaments sector and has to be achieved by rationalising the industry, which implies restructuring at the national and European levels;
- (ix) Taking the view that this process requires prior agreement to be reached among the states on the definition of common requirements that would enable a sufficient market to be established;
- (x) Welcoming the initiatives taken by the OCCAR countries vis-à-vis WEU in order to obtain the status of subsidiary body;
- (xi) Considering, however, that all the consequences of such a status must also take effect, including the possibility for all member states to benefit from them;
- (xii) Welcoming the fact that the Euclid Cell has embarked on Phase 2 of its work;
- (xiii) Considering that there will be no satisfactory solution to the harmonisation of requirements at European level unless the process starts in the research phase;
- (xiv) Considering that while there is no doubt that the creation of WEAO is a major step along the road leading to a European armaments agency, the Charter by which it is governed gives rise to serious reservations;
- (xv) Stressing, moreover, the desirability of involving the central and eastern European countries in any thinking and work on armaments cooperation;
- (xvi) Welcoming the creation of the WEU Military Committee, which should provide a fitting framework for the definition of common European defence requirements;

## RECOMMENDS THAT THE COUNCIL

1. Urgently request the Military Committee to carry out a study for the purpose of identifying common general and equipment requirements;
2. Invite the countries to provide a detailed description of programmes for the replacement of military equipment so that a European replacement timetable can be drawn up for the short, medium and long term;
3. Convene at the earliest possible opportunity a meeting of the WEU defence ministers whose agenda would be confined to cooperation on defence equipment procurement;
4. Involve the central and eastern European countries in any thinking and work being done in this field;
5. Prepare and submit to all the governments concerned a draft agreement for the purpose of applying to WEAO provisions similar to those of the Agreement of 11 May 1955, and of giving contracts concluded under the auspices of WEAO a binding nature so as to give practical effect to the clause conferring equality of status on all the members of that organisation,
6. Grant OCCAR the status of a subsidiary body with all the effects that entails, in particular, participation in its work of all those members wishing to be involved.

## *Explanatory Memorandum*

*(submitted by Mr Lenzer, Rapporteur)*

### *I. Politico-military aspects*

1. European cooperation in the armaments field has been a political and military objective since the end of the second world war. Finabel, the Standing Armaments Committee, Eurogroup, IEPG, WEAO and OCCAR are just some of the steps along the long and difficult road towards what so far have been rather meagre results.

2. The Declaration on the role of WEU and its relations with the European Union and with the Atlantic Alliance appended to the Treaty on European Union by WEU member countries mentions, with reference to WEU's operational role, the objective of strengthened cooperation in the armaments field in the context of "the establishment of a European armaments agency".

3. Article J.7.1 of the Treaty of Amsterdam states that: "The Western European Union (WEU) is an integral part of the development of the Union providing the Union with access to an operational capability notably in the context of paragraph 2. It supports the Union in framing the defence aspects of the common foreign and security policy". Paragraph 2 specifies that: "questions referred to in this Article shall include humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking". Finally, paragraph 1 adds that: "The progressive framing of a common defence policy will be supported, as Member States consider appropriate, by cooperation between them in the field of armaments".

4. It is quite clear that security and defence in Europe must be founded on autonomous military assets which are interoperable with those of our transatlantic allies. Such assets in turn depend on having a European defence industry which is competitive on the international market.

5. Unfortunately, however, the present situation in the European defence industry shows little difference with the situation two years ago described in Assembly Document 1483. At a time when defence budgets are decreasing, or showing insignificant growth, markets are shrinking, competition is becoming keener and the costs of

new weapons systems are rising exponentially due to technological development

6. Europe is confronting these challenges with dispersed efforts on the part of its industry, fragmented assets and surplus production capacity. All these shortcomings are mainly due to the fact that each country persists in maintaining as many independent national capacities as possible when the European market is clearly not developed enough to absorb all the investment being poured into R&D and industrialisation. The situation in the United States is different in that the home market there is already sufficiently big to make it worthwhile for firms to invest on a large scale with reasonable chances of success

7. All this confirms the view that a European market must form the bedrock of a European defence industry that is competitive on world markets

8. There can be no solution to these problems without a pooling of efforts. Cooperation in Europe started out as political before embracing economic objectives, but in the case of programmes, even those in the aerospace sector which have been a marked success, it falls short of requirements in both quantitative and qualitative terms

9. The European defence industry must be restructured at both national and European levels. It must consolidate the trend that has started towards the creation of multinational firms, even if this means impinging on areas that states consider to be strategic. Prior to such restructuring, states must agree on a definition of their common requirements in order to create a sufficiently large market

10. Furthermore, these changes are a prerequisite for strengthened cooperation in which both states and firms must agree on a division of responsibilities

11. At the beginning of this report we take note of the efforts being made to provide Europe with a suitable institutional framework to promote armaments cooperation. The transfer of the IEPG to WEU and its transformation into

WEAG were a step in the right direction. The subsequent creation of the Western European Armaments Organisation (WEAO) was also a major achievement.

12. A fundamental remark is called for at this juncture. The only way to overcome the difficulties encountered in harmonising requirements at European level is for the harmonisation process to start as of the research stage. This is what makes the Euclid programme (European cooperation for the long term in defence) so crucial. Indeed, we are already feeling the benefits of the

initiative that was taken with the creation of the Euclid Cell.

13. While the creation of WEAO must, from a political standpoint, be hailed as a major step forward in that it has been given its own legal personality, its Charter nevertheless gives rise to serious reservations. Some considerations on this matter are given at the end of this report and the Appendix contains comments on the legal status of WEAO drafted by Mr Adam at the request of the President of the Assembly, Mr de Puig.

*Table 1*

*Trends in government expenditure on military R&D  
in various countries over the period 1989-96*

All figures are given in US dollars on the basis of 1990 prices and exchange rates.

Country	1989	1990	1991	1992	1993	1994	1995	1996	1989-94
US	43 000	40 000	38 000	37 000	37 000	33 000	32 000	32 000	228 000
France	5 900	6 800	6 000	5 600	5 100	5 000	4 800	-	34 400
UK	4 000	3 900	3 700	3 400	3 600	3 200	3 400	-	17 900
Germany	1 900	2 100	1 900	1 800	1 500	1 400	1 500	-	10 600
Japan	660	720	770	830	900	920	1 000	1 100	4 800
Sweden	670	650	780	680	640	490	560	-	3 910
Italy	800	490	670	640	650	630	320	-	3 880
India	460	430	420	430	520	570	-	-	2 830
Spain	440	490	470	390	320	270	280	-	2 380
South Korea	150	230	240	270	320	320	350	370	1 530
South Africa	390	310	220	180	130	130	130	-	1 360
Canada	250	230	190	200	180	180	150	-	1 230
Australia	180	170	160	160	160	150	-	-	980

*Sources* : OECD Main Science and Technology Indicators, No. 2 (1996) and No. 2 (1995). Government of India, Department of Science and Technology, Research and Development Statistics, for a number of years. J. Cilliers, *Defence research and development in South Africa*, African Security Review, Vol. 5, No. 5 (1996), p. 42, and Table 7.10

14 OCCAR is part of the overall effort being made to achieve consistency. The bilateral programme which was born at the December 1993 Franco-German summit in Bonn has become a project with four participant countries (France, Germany, Italy and the United Kingdom) which signed the agreement establishing the new organisation in November 1996 at Strasbourg

15. A few weeks ago in Munich, the Director of OCCAR, Mr Prévôt, described the principles underlying that agreement:

- the priority to be given to cost-effectiveness in defence firms' procurement policy decisions,
- the need over the longer term for harmonisation of user requirements and various national technological policies;
- consolidation of the European industrial base through greatly increased competitiveness,
- abandon of the principle of *juste retour* by programme and an effort to achieve a better overall balance spread over a number of programmes and a period of several years;
- the open-door principle, i.e. the possibility for other countries to join OCCAR subject to two conditions: acceptance of the five principles and significant participation in a cooperation programme conducted under the auspices of the organisation.

16. At their Noordwijk meeting in 1994, the French and German Defence Ministers said that what was then a Franco-German initiative could be considered as the precursor of a European armaments agency. At that time, *Defense News* took the view that this initiative could become one of the pillars of the future European armaments agency

17. Moreover, in his address at the Munich Symposium Mr Guddat, the German National Armaments Director, said that WEAO and OCCAR were complementary and were pursuing the same aims

18. OCCAR is currently working on a timetable for the integration of short- and long-term

programmes and on rules mainly governing acquisitions, contracts, financing and programme management, although these will not be ready until late 1998. Furthermore, it would appear that the OCCAR member countries are doing what they can to ensure that the organisation acquires a legal personality so that it can become a WEU subsidiary body. This solution would confirm the political will to place the project in the context of the sole European organisation with competence in defence matters.

19. It is to be hoped that this process will meet with success since it would solve the current legal and political problems.

20. The decision taken in May 1997 to create the WEU Military Committee is of crucial importance as it will provide the proper framework for defining the joint requirements that need to be met – in particular, the joint use of equipment.

21. These latter points were discussed in Munich in the address given by Colonel Vezinhet on behalf of the Planning Cell. While he explained that the definition of military requirements was not the Cell's main task, his description of its work and the proposals he made for the future were a considerable source of inspiration to the discussions at our Symposium.

22. Colonel Vezinhet stressed in particular that WEU could state its force – and therefore its asset – requirements through NATO and could also make out the case for force compatibility. If it wishes to have some degree of autonomy, WEU will have to ensure that in following this course of action it defines force targets covering all its requirements through the use of European assets

23. General Capizzano, the Italian Deputy National Armaments Director, concluded his address by stating that the fact that "common views are widely shared in the defence sector at operational level" could be a significant spearhead to open the way to European integration". In his opening address the Committee Chairman, Mr Marshall, stressed that a great deal of political will (hitherto inexistent in your Rapporteur's opinion) was needed to make progress in this field



*Table 2*  
*Proportion of cooperative programmes in Europe (percentages)*

Country	Exclusively national programmes	Cooperative programmes	Imported equipment	Total
France	81	15	4	100
United Kingdom	80.6	10.5	8.9	100
Germany	10	75	15	100
Italy	30	50	20	n a
Spain	55	12	33	100
Sweden	70	15	15	100

Source: C. Serfati: *Les industries européennes d'armement*; Paris: La documentation française, 1996, page 59.

Note: The source of the statistics for Italy was an interview given by an Italian defence expert in July 1997.

## *II. Industrial aspects*

24. European cooperation in armaments implies the creation of structures and links between the various European industries, governments and institutions. Such links should serve to facilitate joint European armaments programmes and procurement. The process of cooperation should be considered in the light of the changing role of European armies, which are no longer simply vowed to territorial defence.

25. Following the end of the cold war, European armed forces are increasingly being called upon to intervene outside their original territorial boundaries in operations involving peacekeeping, humanitarian intervention, policing, embargo enforcement and conflict prevention. These forces should be flexible and ready for rapid deployment; they should include mixed forces (army/navy/air force), be multi-European and possess high-tech equipment. It is necessary for Europe to rationalise the equipment of its armies if such forces are to be used successfully. Reaching this goal will only be possible if European armies buy equipment from a common European source. Defining common goals concerning military operations outlined under the Petersberg tasks is a precondition for European cooperation.

26. Harmonisation of weapons procurement in the light of European consolidation and intervention for peacekeeping purposes raises the question of European cooperation in defence programmes. European defence companies have to

face economic competition on two fronts, internal and external. When referring to "internal" economic competition, the focus switches to the fragmentation of the European defence industry.

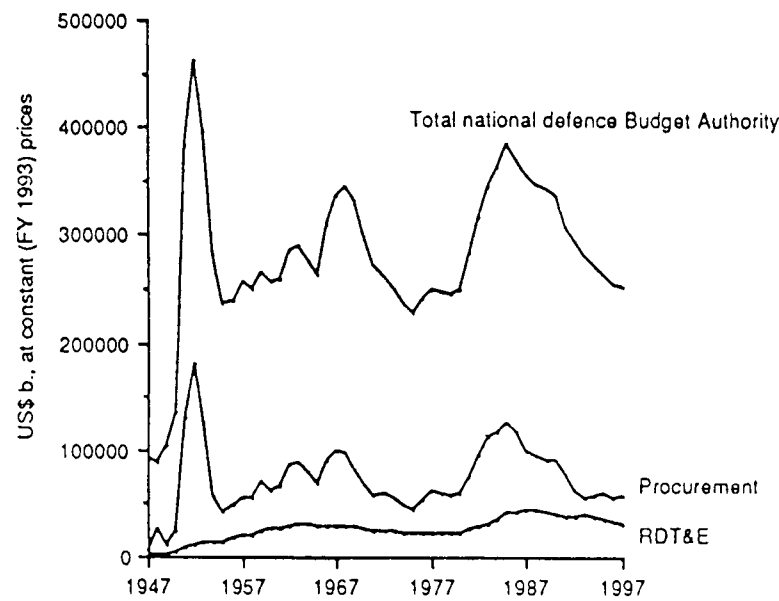
27. In most cases, European defence firms are competing against one another for sales contracts within the diminishing European armaments market. Internal competition induces a reduction in profit margins since competing firms will try to secure a contract by making their product more attractive to the buyer, i.e. by offering the lowest possible price. "Internal" competition also diverts or reduces existing resources which could be employed in a more profitable way, such as investment in research and development where Europe lags behind its transatlantic competitor.

28. The United States spends four times as much as Europe on research and development, which explains how it can produce highly competitive advanced technology equipment<sup>1</sup>. R&D is a key factor for the survival of the European defence industry. Producing high-tech equipment enhances competitiveness on world markets. European firms have the ability to produce such equipment and R&D costs can be reduced through joint programmes. Cooperation should take place in the initial stages of development in order to avoid any future misunderstanding between partners on the finalisation of the product.

<sup>1</sup> (see Tables 3 and 4) Address by Air Chief Marshal Sir Patrick Hine, Symposium on European cooperation on the procurement of defence equipment, Munich, 1-2 October 1997.

Table 3

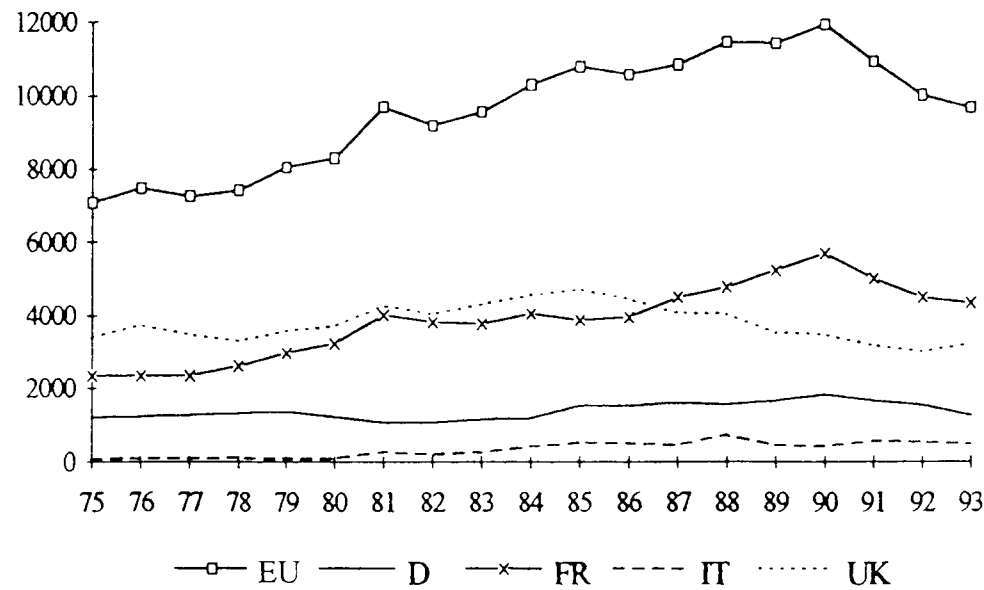
*Total US national defence, procurement, research and development, testing and evaluation budgets for the financial years 1947-97*



Source: The Defense Budget Project, based on US Department of Defense data.

Table 4

*Public funding for defence research and development work in the European Union from 1975-93 (in millions of constant ecu at 1992 prices)*



Sources: From 1975-90 successive publications of *Le financement public de la recherche et du développement*, Eurostat, Luxembourg From 1991-93 successive publications of *Recherche et développement, Statistiques annuelles*, Eurostat, Luxembourg

29. Cooperation, however, is double-edged. While it undoubtedly reduces costs per country and harmonises equipment, it can lead to the emergence of impediments, which in turn can slow down the programme. A partner will have specific needs and demands to be included in the programme which might clash with those of other members of the group. In order to minimise any future obstacles, it is necessary to analyse in detail the requirements of each potential partner prior to launching a programme. Cooperation in equipment production and procurement should not be undertaken without clearly outlining the parameters under which the programme should be developed as there is a risk that the partner nations will hamper the programme with the resulting loss of the technological edge the product was intended to have.

30. European industrial overcapacity compounds the problem. In order to maintain its technological and sales capacity, Europe has to reduce the number of firms competing with one another in specific sectors such as aerospace or armoured vehicles. Consolidating the industry will not only reduce costs and secure a European home market, but will also result in the harmonisation of equipment within European armies.

31. Due to budgetary restrictions, European governments are increasingly forced to cut back the procurement budgets of their armed forces. This process is achieved by reducing the quantity of equipment (i.e. aircraft, tanks, naval vessels etc.) In order to maintain their profit margins, European defence firms are forced to increase unit prices and/or increase exports. Increasing unit prices further weakens a firm's competitiveness. Increasing exports becomes the rational solution for maintaining sales and profit margins.

32. However, certain nations have restricted access to markets because their national defence industries adopt export policies which take into consideration the humanitarian track record of the importing nation. But the biggest obstacle and danger to the European defence industry comes from the United States' defence sector

33. Over the past decade, the US has strongly consolidated its defence industry through mergers of giant companies such as Boeing/McDonnell Douglas, Lockheed Martin/Northrop Grumman and Raytheon/Hughes. By reducing "internal" competition, the US has allowed its industry to

fully focus on external markets. This process has helped North American companies spread their costs and redeploy resources previously allocated for dealing with "internal" competition to research and development.

34. The defence industry produces highly competitive equipment at low cost thereby causing unit prices to drop. The consolidation of the American defence industry has made it a formidable and highly competitive sector. It should be noted, however, that this process was only made possible through sheer political will and financial incentives from governments.

35. The US also has the advantage of being a single nation where the issue of equipment procurement and foreign policy is not as problematic as in Europe "[ ] the total defence-related turnover in the US was about \$86 billion with a comparable figure for Europe of about \$32.5 billion. The figure for Europe is roughly 38% of the figure for the US"<sup>2</sup> The consolidated privately-run American defence industry enjoys an oligarchic national market, where competition is scarce. Europe consequently suffers from transatlantic competition, which merely aggravates the "internal" difficulties faced by its own defence industry.

36. Europe's problem is that it is composed of a variety of nations, with diverging goals and armament procurement needs, no clearly defined common foreign policy and a diminishing European defence market. The European defence industry suffers from the coexistence of private and nationalised firms. Consolidation is impeded by this environment as private firms are reluctant to conduct joint programmes with nationalised firms, whose economic strategy is influenced by political decisions.

37. Nationalised firms, because of political involvement, do not always act according to the same economic rules as the private companies. Privatised industry exists solely for the purpose of making profits. The goals of government-run firms, however, are more ambiguous as they take in economic and political elements.

<sup>2</sup> Address by Mr Graham Woodcock: Symposium on European cooperation on the procurement of defence equipment, Munich, 1-2 October 1997.

38. With most of Europe facing an unemployment crisis, governments are reluctant to privatise their defence industries since this process almost certainly implies restructuring and job losses. BAe is a prime example of this. Before being privatised the company employed an estimated 130 000 people in 1988. By 1995, because of restructuring, its labour force was reduced to about 40 000. It should be noted however, that following the privatisation and restructuring process, the company has achieved an unprecedented level of competitiveness, with sales of £7.5 billion. Over 80% of BAe turnover is generated overseas which emphasises the need for European defence firms to turn towards foreign markets<sup>3</sup>.

39. Acquiring export markets overseas, however, implies increased equipment competitiveness, whether it be technological or financial. Keeping the industry nationalised might save jobs in the short run through the use of economic protective measures, but because of stronger US competition European nations might be forced to shut down their defence industries completely in the long run due to their lack of competitiveness on world markets. Decreasing competitiveness implies lower sales profits and fewer resources available for research and development.

40. As nationalised and/or uncompetitive firms continue to survive through artificial means (i.e. continued government subsidies), there is a possibility that the technological quality of their products will decrease, thus worsening their declining sales figures. A proper analysis of the environment and conditions in which European firms should be privatised is essential for their survival.

41. The might of North American firms poses not only a threat to the European defence industry but also to European defence strategy and foreign policy. If the European defence industry disappears through lack of competitiveness and fragmentation, allowing the United States to be

come the world's major weapons manufacturer, Europe will no longer have any choice in armaments procurement and will consequently be dependent on American technology and arms sales. This will have a direct effect on European foreign policy and defence strategy as European nations might no longer be able to act independently without the United States' consent. It is essential for Europe's defence industry to survive if it wishes to remain independent of the United States.

42. Independence, however, does not imply isolation. The transatlantic link should be viewed as a strong and positive structure for peace and security. NATO remains Europe's only dynamic military defence structure currently capable of dealing with instability around the world and more specifically within the geographic boundaries of Europe. Europeans and Americans should view the development and strengthening of NATO as a positive step towards European security.

43. Some European parliamentarians have however stressed that while NATO is a powerful instrument in European security, it might be too large and slow to tackle certain tasks. NATO is still trying to redefine itself in the post-cold war era. Institutions such as WEU are more suited, because of their size and flexibility, to intervene in certain areas and in predefined conditions, such as those outlined for the Petersberg tasks.

44. WEU and NATO should not be perceived as competing but rather as complementary institutions. Once again, however, if these institutions are to take action in future theatres of conflict, the forces involved must have harmonised equipment. NATO has already harmonised its forces in different areas. If WEU is to intervene with the use of armed forces, its task will be facilitated if troops use the same equipment, implying convergence of joint armaments programmes and procurement (see Table 5).

<sup>3</sup> Address by Air Chief Marshal Sir Patrick Hine; Symposium on European cooperation on the procurement of defence equipment, Munich, 1-2 October 1997.

Table 5

*Comparison of the numbers of different armaments produced by the industries of Europe (the Twelve plus the five EFTA countries) and the United States (situation at 30 June 1993)*

Category	Number of armaments		European producer countries
	Europe	US	
Assault tank	4	1	UK, F, FRG, IT
Armoured infantry fighting vehicle	16	3	F (3x), FRG, UK (2x), IT (3x), SU, GR (2x), SP (2x), AUT, CH
Self-propelled 155 mm howitzer	3	1	F, FRG, UK
Fighter-bomber	7	5	F (2x), UK, SU, FRG/IT/UK, SP/FRG/UK/IT
Ground attack/training	6	1	UK, SP, IT (2x), IT/Br, FRG/F
Strategic bomber	0	1	
Heavy transport aircraft	1	3	IT
Anti-tank helicopter	7	5	F (2x), UK, IT (2x), FRG, FRG/F
Heavy transport helicopter	2	4	F/FRG, IT/UK
Assault gun	7	1	B, F, UK, SP, FRG, IT, AUT
Portable surface-to-air missile	4	1	F, UK (2x), SW
Anti-ship missile	9	3	F (2x), UK (2x), IT (2x), Nor, SU, FRG
Air-to-air missile	8	4	F (3x), UK (2x), SU, IT (2x)
Anti-air missile	3	3	UK, F/FRG, IT
Anti-radar missile	3	3	F, UK, IT
Anti-tank missile	8	5	F/FRG (2x), UK, IT/Br, SU, SP/US
Anti-submarine torpedo	9	2	UK (2x), SU (3x), IT, FRG, F (2x)
Frigate	11	1	F (3x), UK, FRG (3x), NL, SP, DK, IT
Mine hunter	4	2	F/NL/B, UK, FRG, IT
Aircraft carrier (planes and helicopters)	3	1	UK, IT, SP
Aircraft carrier (planes)	1	1	F
Cruiser-destroyer	0	1	
Conventional submarine	7	0	FRG (3x), IT, NL, UK, SU
Nuclear attack submarine	2	1	F, UK
<b>Total</b>	<b>125</b>	<b>53</b>	

### III. Conclusions

45. When organising our Symposium, one of the main ideas was that representatives from the central and eastern European countries should be invited to attend both as speakers and participants, thereby contributing to the discussions.

46. Unfortunately, of all the speakers invited from those countries, only the Polish Vice-Minister for Armaments and Infrastructure, Mr Krzysztof Węgrzyn, was able to attend. While his address was most interesting, it did not enable us to assess the views or position of the central and eastern European countries as regards the objective of our Symposium.

47. There is no doubt that the situation in western Europe is complex enough as it is without the addition of further quantitative and qualitative elements. Nevertheless, all these countries are extremely keen to join the European Union and WEU in the very near future. A cautious but reasonable approach to allow them to participate progressively and in a manner still to be decided in the thinking and work of our Organisation on armaments cooperation would therefore seem to be in order.

48. Mr Węgrzyn confirmed Poland's interest in taking part in the bilateral and multilateral activities of a European armaments agency and joining multinational research and development programmes. Poland was already involved in scientific and technical cooperative work on armaments with the United States, Sweden, the Netherlands and with NATO agencies and committees. Why then should it not do the same with WEU?

49. General Schlieper, moreover, said in his address that France had put forward a proposal for creating the status of an armaments partner in order to develop the dialogue with non-member countries of WEAG. This proposal had also met with Germany's approval and would be referred to the Conference of National Armaments Directors where, if accepted, it would be submitted for the ministers' approval.

50. As regards the negotiations the OCCAR member states are conducting with WEU with a view to obtaining the status of a WEU subsidiary body, your Rapporteur can only welcome this initiative in the hope that it will meet with suc-

cess at the earliest possible opportunity, but he would stress that granting OCCAR the status of subsidiary body must be accompanied by all the consequences, in particular the extension of that status to all member countries desiring to benefit from it.

51. In your Rapporteur's opinion, Mr Heisbourg's proposal to convene a meeting of defence ministers which would be devoted exclusively to armaments procurement is extremely interesting. Although this proposal concerns the European Union defence ministers, it would be logical for the meeting to take place at the level of the defence ministers of WEU, the only European organisation with competence in this field, and in any event for matters falling within the remit of the European Union to be dealt with subsequently. Among other things these include the questions raised by Article 223, i.e. assistance for industry, exports and dual-use technologies.

52. As Mr Woodcock pointed out, European cooperation on equipment procurement can only be successful if it rests on the foundation of a political will amongst the governments involved to share their responsibilities in defence and security matters. This implies going beyond comfortable words to actually making real progress.

53. Sir Patrick Hine took an extremely realistic view of the future of the European defence industry when he said there was only room in Europe for a single aircraft programme to succeed Eurofighter and Rafale and that if the governments were unable to reach agreement on it, the project would quite simply never see the light of day.

54. He also said that while OCCAR was a useful first step, the real test would be whether the governments could decide to make a clean sweep of their own procurement services instead of maintaining them to spy on OCCAR's every action. If they really managed to do this, it would be a practical demonstration of a genuine political resolve to settle the current problems.

55. Mr de Puig, the President of the Assembly, closed the Symposium by stressing that WEU is definitely the organisation that can take the necessary action to promote real European cooperation on defence equipment procurement. Any delay in the process of rationalisation will do irreparable damage to our defence industry,

without which it will be difficult to establish a European defence identity. Our governments must be persuaded of the urgency of the situation and starting thinking now about the remedies that must be applied.

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56. Written Questions 344 and 345, put to the Council on 13 May 1997 by Mr De Decker, Chairman of the Defence Committee, prompted the Council to explain the reasoning behind its decision to extend to countries that are not signatories of the 1954 modified Brussels Treaty certain effects of the Paris Agreement of 11 May 1955 on the status of WEU, national representatives and international staff.

57. The substance of the Council's reply to Question 344 is that the countries concerned decided "to make available WEU's internal legal personality to the WEAG countries" subject to their adopting "every proper measure within their own legal system" in accordance with their undertaking to respect the content of the legal personality of WEAO as deriving from the Paris Agreement. As regards the signatory countries, "the adoption of the Charter ... commits them in their turn to taking every proper step ... This firm undertaking has been explicitly recognised by the WEU Council"

58. This means that, in both cases, the legal status of WEAO will be defined by virtue of national legislation in the member countries, which has still to be promulgated, and not by the application of an international agreement. There is no reason to assume that these legal provisions will be the same in all the countries concerned, nor that they will enter into force at the same time in each of them, to say nothing of how the parliaments in each of these countries will react when the governments give them notice to apply the "firm undertakings" they have given without submitting them for ratification. Under these circumstances, there is no guarantee of any reciprocity in the application of the relevant texts to cooperation ventures involving both states that have acceded to the modified Brussels Treaty and those that, because they have not subscribed to it, are not subject to the 1955 Paris Agreement.

59. In its reply to Question 345, the Council informs us that, rather curiously, Articles 17 and

18 of the Paris Agreement are not applicable to the parliamentary delegations of non-member countries, in the same way as Articles 11 to 15 are not applicable to their representatives in the Council and its subsidiary bodies, but that in contrast Articles 19 to 26 apply on the basis of the exchange of side letters. All this would appear to be somewhat inconsistent if the accepted view is that the Council, on the one hand, and the Assembly, on the other, are supposed to discuss – among other things – matters concerning the WEU subsidiary bodies and, by implication, those concerning WEAO. Exclusion of this sort is in blatant contradiction of the commitments – entered into and reaffirmed since 1992, in Bonn, Petersberg and Ostend – regarding the participation on an equal footing of non-member countries of WEU in the activities of WEAO.

60. It should also be noted that paragraph 11 (a) of the WEAO Charter provides that financial responsibilities arising from WEAO activities are to be borne by the participating states, and that paragraph 11 (b) declines the option of national jurisdiction in favour of an arbitration process. Under these conditions, it is difficult to imagine that the parliaments of the countries concerned will be prepared to vote appropriations for the funding of WEAO activities when they have not ratified its Charter, and harder still to see how national courts will act in the event of an abuse of power on the part of one of the bodies of WEAO when concluding contracts. All these authorities will be even less inclined to abide by the principles set out in the Charter given that in 12 of the countries concerned, their constitution requires parliamentary approval of any agreement affecting national legislation and the funding of an international organisation. Of their number, only Turkey entered a reservation as to the competence of its parliament in the exchange of side letters at Ostend.

61. In its reply to Written Question 345, the Council states in support of its thesis that "no WEU member state has expressed an objection to the operation of the WEAO by reason of its composition". One can take due note of this but if the Ostend documents were not conveyed to the parliaments, which are the vital components of democratic countries, it is difficult to see how the absence of an opinion of those parliaments on texts that were not referred to them could be

taken as implying their approval, let alone ratification.

62. In fact, everything was done as if the fear of opening a debate on a possible revision of the modified Brussels Treaty, or even on the components of a European security, defence and armaments policy, led the governments to dissociate the internal personality of the organisation from

its international personality, as if one did not derive from the other, when the very basis of the organisation's internal personality is an international Treaty. A revision of the modified Brussels Treaty was essential to integrate WEAO in WEU's legal system. A specific international instrument should have been indispensable to give WEAO its own legal status



## APPENDIX

*Comments on the legal status of  
the Western European Armaments Organisation*

1. The creation of the legal status of WEAO calls in the first instance for an explanation of a number of features peculiar to it. Once the 13 member countries of WEAG (the Western European Armaments Group) had unanimously requested the WEU Council of Ministers to grant their Group the status of a WEU subsidiary body, the ensuing process comprised three stages.
2. The first stage, constituting the main legal source of that status, was the adoption (on 19 November 1996) by the WEU Council – composed of representatives (of the foreign affairs ministers) of the 10 member countries – of the Charter of the Western European Armaments Organisation (WEAO) granting it the status of a WEU subsidiary body in pursuance of Article VIII 2 of the 1954 modified Brussels Treaty. The Charter also defined the aims, functions, organisation and operation of WEAO together with the rules governing the conclusion by it of any agreements and contracts, its assets, composition, dissolution and the withdrawal of a state from it.
3. The second stage in the definition of WEAO's legal status consisted of an exchange of letters, on the occasion of the WEU Council meeting at 10 held in Ostend on 19 November 1996, between the Chairman-in-Office of the WEU Council of Ministers and the foreign affairs ministers of Norway and Turkey. In the case of Denmark – a WEU observer country as compared with Norway and Turkey as WEU associate members – the letters that had been exchanged on 14 March 1994 when the functions of the Independent European Programme Group (IEPG) were transferred to Western European Union, that is to the Western European Armaments Group (WEAG), were considered to be a substitute.
4. By virtue of the exchange of letters, each of the three countries agreed to apply the 11 May 1955 Paris Agreement on 'the status of Western European Union, national representatives and international staff' in relation to WEAO activities. Each of the three countries also sought assurances as to its full participation and its rights and obligations in WEAO, on the basis of the communiqué issued in Bonn by the 13 defence ministers on 4 December 1992 and of the Declaration by the WEU Council of Ministers in Rome, upon the transfer to WEU of the functions of the IEPG which had become WEAG, defining the six principles that were to govern the transfer.
5. In his reply, the Chairman-in-Office, noting the undertaking given by each of the three countries to apply the 1955 Paris Agreement in relation to WEAO activities, confirmed in each case their full participation and equal rights and obligations and referred in this connection to the abovementioned Rome Declaration and Bonn communiqué. However, in his reply to the Norwegian and Turkish Ministers, the Chairman-in-Office confirmed their countries' full participation in WEAO "as an expression of their status as WEU associate members".
6. The third stage in the acquisition of WEAO's legal status consisted of the Memorandum of Understanding signed by the defence ministers of the 13 WEAO countries (10 + 3). These were the (defence) ministers of WEAO – not the (foreign affairs) ministers of the WEU Council, the High Contracting Parties to the Brussels Treaty – who have a collective guardianship of the exercise of (ministerial) political authority over WEAO.
7. Moreover the transfer of activities from WEAG to WEAO made this body of ministerial authority a requirement.
8. One consequence of this is that, unlike the foreign ministers, the defence ministers do not in principle have powers of diplomatic representation. They do not sign treaties but rather "technical" agreements (concerning defence) by an implicit or explicit delegation of powers by their foreign affairs colleagues. This being so, the scope of the Memorandum of Understanding was bound to be limited, i.e. to implementation of the Charter.

9. Thus the scope of the Memorandum of Understanding is defined as covering "the principles to be applied in the operation and administration of WEAO, as defined in Section IV of the Charter" (Section 2.1 of the MOU).

10. The second consequence concerns the role assigned to the 13 defence ministers in the definition of the status of WEAO as decided by the foreign affairs ministers of the 10 (WEU Council). The defence ministers could do no more than take note or recognise "that the Council of the Western European Union has decided to establish the Western European Armaments Organisation as a subsidiary body under Article VIII.2 of the modified Brussels Treaty" by virtue of a Charter adopted by the foreign affairs ministers of the 10, not the 13. This constitutes the first infringement of the dual principle of equal rights and obligations and of full participation, as established in the exchange of letters.

11. It is likely that difficulties will arise in the interpretation and application of the WEAO Charter as regards those of its provisions to which there is no reference, in the Memorandum of Understanding, to relations with non-member countries of WEU that have not adopted the said Charter. In fact it applies to them only where reference is made to the application of a specific provision or where such a provision is reproduced in the Memorandum of Understanding.

12. Another legal peculiarity may arise in the case of partnerships (paragraph 25 of the Charter) between two participants *neither of which is a member of WEU*. It is not hard to imagine all the various problems that will arise in such a case where the two partners/participants will have to apply to their activities "as appropriate", or be subject to the application of, the 11 May 1955 Paris Agreement on the privileges and immunities granted to WEU in respect of taxes, duties and charges, pursuant to Section 13.1 of the Memorandum of Understanding signed at 13.

13. The case of partnerships between two or more participants which were not members of WEU could run up against obstacles both as regards a country's national legislation and its internal bodies (including the courts).

14. In contrast, the definition of WEAO as a WEU subsidiary body pursuant to Article VIII.2 of the modified Brussels Treaty will not just

create problems but is bound to result in an impossible situation from the legal point of view.

15. To begin with, two questions have to be asked: what role does WEAO have as a subsidiary body created *within the framework of WEU*? Can the Council create WEAO as a subsidiary body that includes non-member countries of WEU?

16. The first question concerns the specific nature of WEAO. Paragraph 3(a) of its Charter states that it was created within the framework of WEU and pursuant to Article VIII.2 of the modified Brussels Treaty which authorises the Council to set up any subsidiary body considered necessary.

17. But the statutory texts (modified Brussels Treaty and Paris Agreement) do not make provision for any bodies, still less subsidiary ones, created *within the framework of WEU*. The bodies for which provision is made are those set up "*under the Treaty*". They are the bodies that are part of WEU (see Article 12 of the Paris Agreement), not bodies for which it provides a framework and which as such have ties or relations with it.

18. Furthermore, under the Paris Agreement the WEU subsidiary bodies constitute one of the *components* of WEU because they are actually part of it and do not come "*within the framework of the WEU*".

19. The second question is whether a body can be considered to be a subsidiary one where it is created to implement tasks arising out of the Treaty (see the abovementioned provision of the WEAO Charter), but where its composition also includes states which are not party to the modified Brussels Treaty and are third states compared with the Contracting Parties.

20. The answer is clearly that it cannot, given that in its replies to the Assembly (see in particular paragraph 4 of its reply to Written Question 300), the Council has persisted with its assertion that associate members remain outside the modified Brussels Treaty.

21. The ambiguity in which the Council has consistently cloaked the legal nature of the status of a WEU associate member country is now creating difficulties, not to say serious problems, for WEAO.

22. Besides this, the WEU subsidiary bodies enjoy the status accorded to the Organisation under the Paris Agreement because they are a component of WEU (see the definition of the Organisation in Article I(a) of the Agreement). It is because they are an integral part of WEU that they have the juridical personality and capacities accorded to the Organisation. Since they come under the "legal umbrella" or *cover* of WEU, they acquire that personality and those capacities *ex officio*. They are not granted any separate or individual status.

23. There is absolutely no need for the personality and capacities of the subsidiary bodies to be specified as is done in paragraph 8 of the WEAO Charter.

24. It is clearly because there are serious doubts or obstacles as to whether WEAO can be considered a WEU subsidiary body that the abovementioned provision (paragraph 8) of the Charter was included. Such doubts or obstacles have their source in the fact that WEAO comprises not 10 but 13 states. Thus, although WEAO was created by the WEU Council at 10 and therefore conforms to the definition in Article 1(c) of the Paris Agreement as regards one of its characteristics, it ceases to qualify as a subsidiary body given that the number of its members exceeds that of WEU itself, thereby creating a difference in the composition of WEU and WEAO.

25. The High Contracting Parties are not at liberty to create at their convenience bodies they dub subsidiary at their own discretion. Conventional international law prohibits such a practice (see in this connection Article 130 of the Charter of the Organisation of American States and Section I of Annex I to the Agreement on the application of the Montego Bay Convention, signed in New York on 29 July 1994).

26. The subsidiary bodies that exist in contrast to the principal bodies must be *integrated* in the Organisation and their powers must be *compatible* with the instrument establishing the Organisation, otherwise the situation becomes one of an implicit statutory revision of that instrument. But in a judgment delivered on 14 December 1971 the Court of Justice of the European Communities in Luxembourg ruled against the procedure of an implicit revision of statutory texts.

27. This anomaly gives rise to situations that call into question WEU's legal personality and its responsibility.

28. Indeed, under the terms of paragraph 11 of the WEAO Charter, WEU is in fact responsible vis-à-vis third parties for the activities of WEAO. However in the final analysis it is the WEAO member states that would have to bear the consequences of any responsibility, given that once WEU assumed its responsibility proper, the logic of subsuming WEAO's legal personality in that of WEU would require the WEAO participating states (10 + 3) to pay their own debt, arising out of WEAO itself. Thus, in accordance with paragraph 11 of the Charter, the ten WEU member countries have to pay twice, once in their capacity as members of WEU, the initial debtor, and then again within WEAO which is ultimately responsible for bearing any costs and reimbursing the initial debtor. This absurd situation stems from the fact that paragraph 11 makes no provision for any compensation mechanism and that after it has been established that the legal personality of WEAO is subsumed in that of WEU, it suddenly reappears and, worse still, the legal personality of the member states (participants) is also involved when it comes to reimbursements. Thus WEAO's legal personality is relativised and the subsumption of one personality in the other, as specified in paragraph 8(b), is ignored, in the absence of any settlement.

29. It is unlikely that the authors of the Agreement endowing WEU with a legal capacity envisaged such an interpretation of Article 3 thereof or a provision stating that "The WEAO will share in the international personality of the WEU"<sup>1</sup>. Such wording is without precedent in conventional international law. The legal provisions governing responsibility and therefore the legal personality of WEAO are very particular here in that they lift the "veil" that lawyers consider embody the very concept of legal personality.

<sup>1</sup> The English text of paragraph 8(b) of the Charter is more disconcerting than the French text which states that "The WEU will *participate in* the international personality of WEU". If the personality is *shared* on a joint basis, responsibility should be shared in the same way and this should exclude any reimbursements being made by one organisation to the other and, what is more, by their members.

30 This particularity is clearly deliberate and intentional as the WEU Council has never seen fit to revise the modified Brussels Treaty despite the changes that have come about with the creation of the status of associate member, associate partner and observer

31. The various categories of status decided on in Rome, Petersberg and Kirchberg are inconceivable without a revision of the modified Brussels Treaty. Similarly, the status of WEAO, as decided in Ostend, is not consistent with either the modified Brussels Treaty or the Paris Agreement.

32. It was impossible from the outset to make a body with 13 members a subsidiary body of an organisation composed of 10 members. There should have been a formal revision of the modified Brussels Treaty, as there was in 1954, to take account of the different categories of status accorded to the WEU associate countries. Only a formal revision, not an implicit or *de facto* one of the sort rejected by the Court of Justice of the European Communities, as mentioned above, would have made it possible to assimilate WEAO in all respects with a subsidiary body of WEU within the meaning intended by Article VIII 2 of the modified Brussels Treaty.

33. From the technical point of view there are even fewer excuses for the absence of any such revision given that the first WEU subsidiary body, the Agency for the Control of Armaments, was set up by virtue of a Protocol signed on 28 October 1954 (Protocol No IV) and which, after ratification, entered into force at the same time as the Protocol of 23 October 1954 modifying and completing the Brussels Treaty, in pursuance of a special clause in Article IV of the latter Protocol (see paragraph 1)

34 But that is not all. For application of the Paris Agreement to be effective, there is a requirement, in particular in the provisions contained in Articles 2, 8, 9, 12 to 15, 21 and 22, for the WEU member states to cooperate, either directly or indirectly, through the WEU Council. Implementation of the Paris Agreement is, in principle, guaranteed by cooperation of a general nature between WEU and its members (Article 2) and it is this that would give rise to problems, imaginable or otherwise, if there was a move to apply the Agreement to countries that are not members of WEU but participate in WEAO

35. This explains why paragraph 8(a) of the WEAO Charter making that body "an integral part of the WEU" without any revision of the statutory texts governing WEU has to be considered with the greatest reservation. The same lack of a legal base applies to paragraph 8(b) of the Charter which states that WEAO will share in the international personality of WEU as well as in the juridical personality that WEU possesses by virtue of Article 3 of the Paris Agreement on the status of the Organisation.

36. This provision can be contested all the more in that it makes provision for the dissolution of WEAO's legal personality and its subsumption in that of WEU when (a) the legal personality of WEAO has not been established in accordance with the customary procedures of general public international law and of the national laws of the member states, and (b) WEAO comprises alongside the WEU member countries states that are not members of the Union.

37. Since the WEU Council does not have the vested powers necessary to create subsidiary bodies that also include states that are not members of WEU, with a legal personality subsumed in that of WEU, the entire legal legitimacy of the process is open to challenge.

38. Another situation open to legal challenge is to be found in the exchange of letters between the WEU Chairman-in-Office and non-member states participating in WEAO under the terms of the Charter.

39. There are some limits concerning WEU's legal personality that should not be forgotten. The legal personality provided for in Article 3 of the Agreement on the status of WEU refers only to its capacity to conclude contracts and take such action as referred to in subsequent provisions. The legal personality referred to is that of the capacity of natural or legal persons acting within the national laws of the states.

40 As far as legal personality in the international legal system is concerned, it should be noted that there is no provision in either the modified Brussels Treaty or the Paris Agreement that expressly empowers WEU to conclude international agreements. However, such competence is implicitly recognised by virtue of the provisions limiting or restricting the way it is exercised.

41. Thus, in the modified Brussels Treaty WEU's international relations are confined to cooperation with other European organisations (Article VIII.1) and with NATO (Article IV). Similarly, Article 27 of the Paris Agreement restricts WEU's international legal business and contractual relations to its dealings with the member states. Was the intention behind Article VIII of the modified Brussels Treaty, creating the WEU Council and specifying its powers and functions, and Article 1 of the Paris Agreement, making provision for an "Organisation" constituted by the High Contracting Parties to the Treaty, also to create in its framework an international legal person possessing all the qualifications and authority to deal with *all* the other international organisations (excluding the European organisations and NATO) and with *all* states other than WEU members, that is to say those that are not members of WEU because they are not parties to the Brussels Treaty and the Paris Agreement?

42. This question calls for a cautious answer in view of the nature of WEU and the practice it follows.

43. In the first place it is necessary to examine the specific nature of WEU, which came into existence late in the day when a Treaty that had been signed by the contracting powers over six years earlier (on 17 March 1948) was revised and supplemented. Provision for WEU's legal personality was made implicitly in the Protocol of 23 October 1954 and was later given specific mention in the Paris Agreement on the status of WEU, signed on 11 May 1955 (it entered into force in the signatory countries on 19 July 1956). But none of these legal instruments contained an explicit, or even an implicit, reference to WEU's universal competence to conclude international agreements (except in the case of its member states, international organisations and NATO).

44. This is because WEU is one of the least institutionalised international organisations in the world. The High Contracting Parties did not delegate their powers to conclude international agreements either to WEU or to its Council. In concluding the modified Brussels Treaty they kept their residual powers intact.

45. Any pooling of their sovereign powers was reduced to a minimum and confined to Articles VI and VII of the Treaty. The culmination of

this distinctive approach in the modified Brussels Treaty is to be found in Article V which makes provision for military aid and assistance between the allies in the event of any state being the object of an armed attack in Europe by another state.

46. In such a situation the aid and assistance in question would not be provided by either WEU or as a result of a decision taken by the WEU Council but by the contracting powers themselves in accordance with their obligations under Article 51 of the Charter of the United Nations and Article V of the modified Brussels Treaty. More emphasis is laid on the relational approach adopted in the Treaty than on its institutional approach<sup>2</sup>. Great care has to be taken in unravelling the competence which – in contrast to the case of the European Communities – is implicit in the modified Brussels Treaty.

47. There is of course the Rome document, which was signed between WEU and three states that were not members of the Organisation (20 November 1992) at a meeting of the ministers of the then nine WEU countries and those of the three NATO member states which had been invited to become "associate" members of WEU and had accepted.

48. The ministers took care not to call the instrument encompassing the invitation and its acceptance an international "agreement". They referred to a "document", that is, an *instrument with no label*. There is no provision in the modified Brussels Treaty or the Paris Agreement for the status of associate member. And the document is careful to point out that it does not entail any changes to the modified Brussels Treaty. Thus there was no implicit revision of the Treaty as a result of signature of the document (see paragraph 3 of the document). It would therefore be difficult to argue that the Rome "document" sets an (implicit) precedent and is the first step towards recognising that WEU's international legal personality extends to international legal persons other than its member states, the European organisations and NATO.

<sup>2</sup> Another example of the relational approach concerns the admission of new members. It is not the Council that invites countries to join WEU but the High Contracting Parties which *reach agreement* with an applicant on the conditions for its accession (see Article XI of the modified Brussels Treaty).

49. Neither do any consequences for WEU's international legal personality arise from the precedent set by the "document" signed in Luxembourg on 9 May 1994 at the meeting between the WEU Council of Ministers and the foreign affairs ministers of the three Baltic states and the six former Warsaw Pact states, whereby those countries that are not members of NATO became "associate partners of WEU"

50. No provision was made in the modified Brussels Treaty for such associate partner status and the "document" also states that "This status does not entail any changes to the modified Brussels Treaty" (last line of the preamble). According to the communiqué issued at the close of the Luxembourg meeting, in respect of which the states accepting the status "of association" "associated themselves with the relevant passages", ministers "adopted solemnly the document".

51. This precedent does not constitute a development in the recognition of WEU's international legal personality.

52. It is against the background of a legal personality that is limited because it is based on a specific decision that the exchange of letters of 30 March 1994 and 19 November 1996 (Ostend) between the WEU Chairman-in-Office and the respective ministers of Denmark, Norway and Turkey – three countries that are not members of WEU but are participating in WEAO – have to be examined

53. There are grounds for doubts about the legal value of the agreement constituted by the exchange of letters between the three participants and the WEU Chairman-in-Office

54. Another striking feature is the fact that on the basis of a mandate from the Council, *and outside its framework proper*, the Chairman-in-Office proceeded with the exchange of letters necessary to give formal expression to the agreement reached on the full and equal participation of the three non-WEU states in WEAO, which was created following the adoption of its Charter by a decision of the Council (the 10).

55. The apparently insurmountable legal problem of the WEU Council making WEAO a subsidiary body of WEU has been described earlier (see paragraph 19) and needs no further discussion here.

56. However, another difficulty of the same order concerns the application of the Agreement on the status of Western European Union (in particular as regards privileges and immunities accorded to member countries, national representatives and the international staff) to the countries participating in WEAO that are not contracting parties to the modified Brussels Treaty or, *a fortiori*, signatories of the Agreement in question.

57. In reply to the letters from the ministers of the countries participating in WEAO but not members of WEU, giving notification of their governments' acceptance of application of the Paris Agreement, the Chairman-in-Office of the Council confirmed, on the basis of the mandate he had received, that the terms of the Agreement applied to WEAO activities. It should be noted that the exchange of letters was not the subject of any ratification or parliamentary approval. This calls for a number of comments.

58. In the first place the Council does not have the power to decide to apply the Agreement to third parties. Its competence in this respect has not been proved. The Chairman's replies to the letters from the three participating states, non-members of WEU, required a legal basis because the High Contracting Parties could not conduct an exchange of letters making provision for application of the Agreement to the representatives of those three states and to their nationals belonging to the international staff of WEU

59. The Council's competence to conclude additional agreements for the purpose of implementing the Paris Agreement is confined to those concluded with the member states of WEU (see Article 27 of the Agreement)

60. The Council had even less authority to extend the Agreement, in so far as WEAO activities were concerned, to the three participating states in question given that since the exchange of letters was not subject to a ratification process, it could not have any binding effects that could be invoked before the national courts and parliaments of the modified Brussels Treaty powers. The rights of the three WEAO participating states therefore go no further than what is known as *comitas gentium* in international circles. But in terms of the law and its application, their privileges and immunities have no legal basis, except perhaps in the United King-

dom where, by a simple decision of the Executive, an international organisation may, merely by virtue of being included on a given list, enjoy the privileges and immunities specified in a national law of a general nature (see the *International Organisation Act* of 1968).

61. All this means that the privileges and immunities of the three participating states cannot be invoked before any judicial body in the member states. The replies of the Chairman-in-Office to the letters addressed to him by the three countries bear the stamp of what could be described as going beyond the bounds of authority (*ultra vires*) or as an "invalidating factor of consent" especially as notification of application of the Agreement by the Chairman-in-Office was in response to prior notification on the part of the participating states.

62. It should also be noted that of the three countries, only Turkey made its agreement to apply the Paris Agreement conditional upon meeting national legislative requirements, thereby complying with the law. However, this was not matched by a reciprocal commitment on the part of the High Contracting Parties.

63. It is true that some precautions were taken to prevent a matter being submitted to national jurisdiction.

64. Thus under paragraph 11(b) of the Charter, a contract concluded by WEO with a firm has to contain an arbitration clause whereby any disputes concerning such contracts are subject to arbitration by a tribunal and are excluded from national jurisdiction. The content of this "standard" arbitration clause is set out in Annex III to the WEO Charter.

65. Similarly, the Charter makes provision for the settlement of WEO disputes of a private character and "of an origin other than contractual" in accordance with Article 26 of the Paris Agreement, and of disputes involving WEO staff who do not enjoy the privileges and immunities accorded by the Paris Agreement.

66. Lastly, an even more exceptional feature is that the Memorandum of Understanding signed in Ostend by the 13 defence ministers of the participating states prevents WEO disputes from being referred to any national or international tribunal (Section 14 1)

67. The scope of this provision is probably far more extensive than might be imagined at first sight. The Memorandum of Understanding contains many references to the Charter, thereby incorporating the provisions of the latter in the MOU by virtue of the referral procedure. It is therefore likely that a number of problems involving contradictions or incompatibilities between the Charter and the Memorandum of Understanding will arise for as long as no rules or procedures have been established to settle them.

68. Furthermore, the clauses ruling out recourse to national tribunals, which have no consequences for disputes other than those for which provision is made, cannot produce any legal effects in respect of those tribunals given that none of them is subject to the ratification procedure.

69. In addition, the provision of the Charter subsuming WEO's legal personality in that of WEU (paragraph 8) has no effect in the national laws of the member states and certainly has none in the laws of countries that are not members of WEU given that the Charter has not been subject to a ratification procedure that would make it applicable under the laws of the participating states or enable it to be invoked before national tribunals.

70. All this shows how precarious the legal status of WEO is, as established by its Charter, Memorandum of Understanding and the exchange of letters between the Chairman-in-Office and each participating country not a member of WEU.

71. The situation is equally precarious in respect of the full participation and equal rights and obligations confirmed by the Chairman-in-Office of WEU in his reply to the ministers of the participating countries that are not members of WEU, with regard to the Assembly of WEU which is called upon to perform its duties vis-à-vis WEO as an integral part of WEU.

72. Since WEO is an integral part of WEU, sharing in the juridical personality of the latter (paragraph 8 of the Charter), its Board of Directors has to provide the WEU Council of Ministers with an annual report (paragraph 36 of the Charter). In addition, as WEO was created as a subsidiary body of WEU (paragraph 3) irrespective of whether or not this was correct, the Council's annual report to the Parliamentary As-

sembly of WEU must, in accordance with Article IX of the modified Brussels Treaty, contain a section on WEAO.

73. This section may or may not correspond to the WEAO Board of Directors' report referred to in paragraph 36 of the Charter. But in any event an appropriate description of its activities must be included in the ministers' report to the Assembly

74. The annual report is the subject of a debate in the Assembly which replies to it (Article V of the Charter of the Assembly). The report may prompt the Assembly to give an opinion or make a recommendation (see Rule 30 of the Assembly's Rules of Procedure).

75. But representatives of the associate member countries cannot take part in Assembly debates on the annual report (see Rule 16.2 (d) of the Rules of Procedure). They cannot even speak during debates on the Council's report, either at the plenary session or in committee, and nor can they vote on or move amendments to the Assembly's reply to the Council (see Rule 16.2 (e)).

76. This situation of "inferiority" in which such representatives to the Assembly find themselves applies *a fortiori* to representatives of the observer countries. According to the definition of WEU in the Paris Agreement (Article 1), the Assembly is one of the components of the Organisation

77. The fact that WEU associate member and observer countries participating in WEAO are in this inferior situation is in total contradiction with the undertakings given to them in the exchange of letters between their ministers and the Chairman-in-Office of WEU that are annexed to the WEAO Charter. That exchange of letters provided the associate members with a guarantee as to their equal rights and obligations in WEAO, a subsidiary body of WEU

78. Moreover, full participation and equal rights for the 13 IEPG (later WEAG) countries were founded in the Petersberg Declaration of 19 June 1992 according to which the transfer of IEPG activities to WEU would not affect their equal rights. For WEAO activities they were to have the same rights and obligations as full members of WEU. This therefore made the Paris Agreement applicable to them. Provision for the

application of all other WEU texts was also made in the reply of the WEU Chairman-in-Office, of 14 March 1994, to the letter from the Danish Minister, given that the Paris Agreement was considered to be an example of the texts governing Western European Union that were to apply to non-member countries in relation to WEAO activities transferred from WEAG. Furthermore, this equality of status for WEAO participants that are members of WEU and non-member countries of WEU alike was the subject of a formal request by the 13 WEAG countries that WEAO be granted the status of a WEU subsidiary body (see the second recital of the preamble to the WEAO Charter) and was established in paragraph 1 of the WEAO Charter

79. That paragraph, referring to the Petersberg Declaration of 19 June 1992 and the Bonn communiqué of 4 December 1992<sup>3</sup>, confirmed the equality of WEU members and non-members in the new institutional framework of WEAG as a result of its transfer from NATO to WEU, with all rights acquired in NATO remaining in force despite the transfer and being subject to new practical arrangements for their application in view of the specific characteristics of WEU

80. However, the inequality inherent in this status is to be found not only in the Assembly of WEU but in the Council as well.

81. Indeed, under the terms of the Rome "document" associate members may be excluded from participating in the WEU Council at the request of a majority of full member states; they cannot block a decision once it is the subject of consensus among the member states, any association on their part with a decision taken by the Council may be refused by a majority of member states or by half the member states including the Presidency (see paragraph 3 of the Rome document).

<sup>3</sup> It should be noted that the Petersberg Declaration of 19 June 1992 and the Bonn communiqué of 4 December 1992 are proper international agreements with mandatory effects (see Article 2 of the UN Vienna Convention on the Law of Treaties) whereas the Rome document on the status of member countries has been considered as supposedly being mainly political in nature. As such the Rome document of 20 November 1992 is clearly devoid of any legal force



82. In the case of WEO, its status and Charter were adopted by the WEU Council which alone can revise the Charter and dissolve WEO (paragraph 5 of the Charter)

83. It is true that before the Council can exercise this authority, a joint request has to be made for it to do so by the WEO participating states.

84. However, should the non-member countries want a revision of the Charter against the wishes of other countries that are members of WEU, no such revision can take place even if those opposing it are in a tiny minority. Similarly, countries that are participants in WEO but are not members of WEU may be excluded, subject to the abovementioned Rome "document", from any decisions the WEU Council has authority to take concerning WEO as a subsidiary body within the meaning of Article VIII.2 of the modified Brussels Treaty.

85. The same applies to decisions the WEU Council has to take concerning WEO, in pursuance of its Charter and in particular paragraphs 10, 11 (c), 35 and 40

86. It follows from the foregoing that in legal situations there is no equality between WEU members and non-members either in the Council of Ministers or in the Parliamentary Assembly despite all the undertakings of the WEU member states that have been repeated, confirmed and declared.

87. It would appear that no systematic concern for full legality is to be found in the texts adopted by the WEU Council as regards the status of the WEO participating countries that are not members of WEU

88. As has been said earlier, the same shortcoming applies to the modified Brussels Treaty and the Paris Agreement when it comes to the status of a subsidiary body and the privileges and immunities of WEO

89. But this is not all. In the WEU Council's decision adopting the WEO Charter, the Council put a (statutory) limit on its powers. The terms of paragraph 5 of the Charter shackle its freedom to act as it cannot dissolve WEO or amend or revoke the decision by which it adopted its Charter unless it receives a joint request from all the participating states to do so.

90. This constitutes a self-restriction amounting to a conditional constraint imposed on the Council's exercise of its powers as defined in the modified Brussels Treaty. It remains to be proved that such an innovation is consistent with the law.

### *Conclusions*

91. To sum up, WEO's legal situation as defined in Ostend on 16 November 1996 is not consistent with general public international law or with the law deriving from the modified Brussels Treaty. This is because:

(a) WEO, composed of WEU member countries and non-member countries, cannot be considered as a subsidiary body of WEU as generally understood and particularly within the meaning of Article VIII.2 of the modified Brussels Treaty.


(b) Its Charter has no more than diplomatic value – it cannot produce its full effects without being ratified by the national parliaments or without formal revision of the 1954 modified Brussels Treaty.

Some national parliaments may not consider contributions to WEO to be mandatory expenditure for their countries given that they were not involved in the Organisation's creation or in the procedure authorising the conclusion of its Charter

(c) The WEU Council cannot extend application of the 1955 Paris Agreement on the privileges and immunities accorded to WEU to countries that are not members of the latter but that participate in WEO. In this respect the Charter could simply be ignored by national tribunals of participating states in a situation calling for its application in a lawsuit

(d) The assurance of equal rights and full participation given to the associate member and observer countries is an artificial one because of the status of those countries in the Council and Assembly of WEU.

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IMPRIMERIE  ALENÇONNAISE  
Rue Édouard-Belin : 4<sup>e</sup> trimestre 1997  
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