European Commission

Defence and sensitive security procurement

DG GROW G3

These slides accompany the explanation of the acquis to Albania and North Macedonia and can only be used for that purpose. Their content is subject to further development of the acquis and interpretation by the Court of Justice of the European Union

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Directive 2009/81/EC on defence and sensitive security procurement

Adopted on 13 July 2009

Transposition into the national laws of the Member States by 21 August 2011

Why a specific Directive for the defence sector?

Wide consultation in 2004 through Green Paper on defence procurement and Communication on the results of the consultation in 2005

Follow-up to the Interpretative Communication on the application of Article 296 (now 346) of the Treaty

Defence package 2007:

- **Communication on 'a strategy for a stronger and more competitive European defence industry'**
- **Proposal for a Directive on intra-EU transfers of defence products**
- **Proposal for a directive on defence procurement**

Problems to be addressed through the Directive

Cause of the problem: general EU PP rules not suitable for defence

Almost automatic exemption of military procurement from EU PP rules

Non-compliance with the principles of the Treaty Article 346(1)(b) TFEU

Article 346 TFEU

Allows Member States…

- **To take measures derogating from EU law**

…BUT:

- **Must be interpreted strictly**
- **Only applicable to specifically military products**
- **Only in exceptional circumstances and on a case-by-case basis**
- **When necessary for the protection of essential security interests**
- **Burden of proof on Member States**

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Directive 2009/81/EC: main objectives

Integrate defence and security in the Internal Market

- **Create a harmonised framework**
- **Overcome market fragmentation**
- **Reduce inefficiencies and duplication**
- **Open additional business opportunities**

Introduce transparent and competitive procedures…

…while taking account of the specificities of defence and respecting MS prerogatives

Directive 2009/81: scope (I)

The supply of military/sensitive equipment

Works, supplies and services directly related to this equipment

Works and services for specifically military purposes or sensitive works and sensitive services

Scope (II)

Military equipment and related works and services; works and services for specifically military purposes

- **Equipment specifically designed or adapted for military purposes and intended for use as arm, munitions or war material (1958 Council Decision list)**

Sensitive security equipment and related works and services; sensitive works and sensitive services

- **Equipment, works and services for security purposes, involving, requiring and/or containing classified information**

Scope (III): Application to sensitive security procurement

Covers procurements which have features similar to those of defence procurements and are equally sensitive (where military and non-military forces cooperate to fulfil the same missions and/or where the purpose of the procurement is to protect the security of the Union and/or the Member States, on their own territory or beyond it, against serious threats from non-military and/or non-governmental actors, e.g. border protection, police activities and crisis management missions)

Directive 2009/81: thresholds

supply and service contracts of no less than EUR 443 000

works contracts of no less than EUR 5 548 000

Same thresholds as in the Utilities Directive 2014/25/EU

Revised biyearly, together with other procurement thresholds

Directive 2009/81/EC: main specificities

Tailor-made rules

- **Specific exclusions**
- **Rules on Security of Supply (SoS)**
- **Rules on Security of Information (SoI)**
- **No open procedure. Negotiated procedure with publication and restricted procedure as basic options**
- **Rules on subcontracting**
- **Defence procurement not subject to the Remedies Directives, instead a specific chapter on remedies in Directive 2009/81 (Title IV, Articles 55-64)**

Directive 2009/81/EC: Specific exclusions

International rules/organisations (for contracts governed by specific procedural rules of an international organisation)

Government to government

Intelligence activities

Cooperative programmes for the development of new products based on R&D (at least 2 Member States + participation of 3rd countries possible)

All exclusions: interpreted strictly + no circumvention

Directive 2009/81/EC: SoS / SoI

Security of Supply

- **Exclusion of candidates - Article 39(2)(d)**
- **Selection of candidates**
- **Award of contract**
- **Contract execution clauses**

Security of Information

- **Exclusion of candidates - Article 39(2)(d)**
- **Selection of candidates**
- **Contract execution clauses**

2016 Evaluation of the Directive

Article 73(2) of the Directive

Adopted on 30/11/2016 Report and Staff Working document

Increase in uptake of Directive

- **Ten-fold from 2011 to 2015**
- **Over two-fold compared to situation prior to Directive (OJ/TED for Directive 2004/18 +)**
- **From 3.3% to 7.6-9.5% defence procurement expenditure**

Main conclusions of the evaluation

Legal framework generally fit for purpose (except subcontracting)

Objectives and rationale relevant today

Need for strong focus on implementation

- **Stable legal framework**
- **No legislative proposal with the Report**

Significant share of defence procurement expenditure still outside the Directive

Commission Recommendation (EU) 2018/624 of 20 April 2018 on cross-border market access for sub-suppliers and SMEs in the defence sector

Public procurement by national authorities

Early information; voluntary publication; dividing procurement contracts into lots; reduce hurdles for bidders; qualitative selection with proportionate and non-discriminatory criteria; training and capacity building

Industrial policy at national and European level

National and European funding for SMEs and intermediate companies; review databases on defence-related companies; support development of defence clusters at various levels; encourage SMEs' involvement; address skills needs and gaps; help SMEs and sub-suppliers' capacity for cross-border bidding

Commission guidance on application of provisions of the Directive

Government to government contracts 2016 (G2G)

Planned:

Cooperative defence procurement and more

Defence procurement web page

http://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/defence_en