

Procedure file

| Basic information | |
|---|---------------------------------------|
| COD - Ordinary legislative procedure (ex-codecision procedure) Directive | 2007/0280(COD) Procedure completed |
| Public procurement in the fields of defence and security Amending Directive 2004/18/EC 2000/0115(COD) Amending Directive 2004/17/EC 2000/0117(COD) See also 2019/2204(INI) | |
| Subject 2.10.02 Public procurement 3.40.09 Defence and arms industry 6.10.02 Common security and defence policy (CSDP); WEU, NATO | |

| Key players | | | |
|-------------------------------|---|--|------------|
| European Parliament | Committee responsible | Rapporteur | Appointed |
| | IMCO Internal Market and Consumer Protection | | 22/01/2008 |
| | | ALDE LAMBSDORFF Alexander Graf | |
| European Parliament | Committee for opinion | Rapporteur for opinion | Appointed |
| | AFET Foreign Affairs | | 29/01/2008 |
| | | PPE-DE VON WOGAU Karl | |
| | ITRE Industry, Research and Energy | The committee decided not to give an opinion. | |
| Council of the European Union | Council configuration | Meeting | Date |
| | Economic and Financial Affairs ECOFIN | 2954 | 07/07/2009 |
| | Competitiveness (Internal Market, Industry, Research and Space) | 2910 | 01/12/2008 |
| | Competitiveness (Internal Market, Industry, Research and Space) | 2852 | 25/02/2008 |
| European Commission | Commission DG | Commissioner | |
| | Financial Stability, Financial Services and Capital Markets Union | MCCREEVY Charlie | |

| Key events | | | |
|------------|---|-------------------------------|---------|
| 05/12/2007 | Legislative proposal published | COM(2007)0766 | Summary |
| 17/01/2008 | Committee referral announced in Parliament, 1st reading | | |
| 25/02/2008 | Debate in Council | 2852 | |
| 07/10/2008 | Vote in committee, 1st reading | | Summary |

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|------------|---|---|---------|
| 17/10/2008 | Committee report tabled for plenary, 1st reading | A6-0415/2008 | |
| 01/12/2008 | Debate in Council | 2910 | |
| 13/01/2009 | Debate in Parliament |  | |
| 14/01/2009 | Results of vote in Parliament |  | |
| 14/01/2009 | Decision by Parliament, 1st reading | T6-0016/2009 | Summary |
| 07/07/2009 | Act adopted by Council after Parliament's 1st reading | | |
| 09/07/2009 | End of procedure in Parliament | | |
| 13/07/2009 | Final act signed | | |
| 20/08/2009 | Final act published in Official Journal | | |

Technical information

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|----------------------------|---|
| Procedure reference | 2007/0280(COD) |
| Procedure type | COD - Ordinary legislative procedure (ex-codecision procedure) |
| Procedure subtype | Legislation |
| Legislative instrument | Directive |
| | Amending Directive 2004/18/EC 2000/0115(COD) Amending Directive 2004/17/EC 2000/0117(COD) See also 2019/2204(INI) |
| Legal basis | EC Treaty (after Amsterdam) EC 095; EC Treaty (after Amsterdam) EC 055; EC Treaty (after Amsterdam) EC 047-p2 |
| Stage reached in procedure | Procedure completed |
| Committee dossier | IMCO/6/57415 |

Documentation gateway

| | | | | | |
|---|-------------|-------------------------------|------------|-----|---------|
| Legislative proposal | | COM(2007)0766 | 05/12/2007 | EC | Summary |
| Document attached to the procedure | | SEC(2007)1598 | 05/12/2007 | EC | |
| Document attached to the procedure | | SEC(2007)1599 | 05/12/2007 | EC | |
| Committee draft report | | PE407.844 | 03/07/2008 | EP | |
| Amendments tabled in committee | | PE412.008 | 29/08/2008 | EP | |
| Committee opinion | AFET | PE406.137 | 12/09/2008 | EP | |
| Committee report tabled for plenary, 1st reading/single reading | | A6-0415/2008 | 17/10/2008 | EP | |
| Economic and Social Committee: opinion, report | | CES1661/2008 | 23/10/2008 | ESC | |
| Text adopted by Parliament, 1st reading/single reading | | T6-0016/2009 | 14/01/2009 | EP | Summary |
| Commission response to text adopted in plenary | | SP(2009)693 | 11/02/2009 | EC | |

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|--------------------|--|--------------------------------|------------|-----|---------|
| Draft final act | | 03609/2009/LEX | 13/07/2009 | CSL | |
| Follow-up document | | COM(2012)0565 | 02/10/2012 | EC | Summary |
| Follow-up document | | COM(2016)0762 | 30/11/2016 | EC | Summary |
| Follow-up document | | SWD(2016)0407 | 30/11/2016 | EC | |

Additional information

| | |
|----------------------|-------------------------|
| National parliaments | IPEX |
| European Commission | EUR-Lex |

Final act

[Directive 2009/81](#)
[OJ L 216 20.08.2009, p. 0076-0076](#) Summary

Delegated acts

| | |
|--------------------------------|------------------------------|
| 2019/2906(DEA) | Examination of delegated act |
| 2021/2967(DEA) | Examination of delegated act |
| 2023/2982(DEA) | Examination of delegated act |

Public procurement in the fields of defence and security

PURPOSE: to coordinate procedures for the award of certain public works contracts, public supply contracts and public service contracts in the fields of defence and security.

LEGISLATIVE ACT: Directive of the European Parliament and of the Council.

CONTENT: in spite of ECJ case law to the contrary, most defence and security equipment is purchased on the basis of uncoordinated national contract award procedures and rules. These provisions can differ significantly in terms of publication, tendering procedures, selection and award criteria. Such a lack of legal uniformity constitutes a major obstacle to the establishment of a European defence equipment market and opens the door to the non-compliance of Treaty principles, in particular the principles of transparency, non-discrimination and equal treatment, in wide sections of Europe's defence markets. Public contracts awarded in the fields of defence and security currently fall within the scope of [Directive 2004/18/EC](#) other than exceptions arising in situations provided for by Article 30, 45, 46, 55 and 296 of the Treaty. The Court of Justice has consistently ruled, in its case law, that recourse to derogations from Community law, including those covered by Article 296 should be restricted to exceptional and clearly defined cases only. The current national practice of relying on derogations is largely due to the fact that Directive 2004/18/EC does not take sufficient account of specific requirements that have to be met by certain purchases of goods and services in the fields of defence and security.

The purpose of this proposal, therefore, is to establish a new legislative public procurement framework unique to the field of defence and security. In presenting this proposal the Commission's stated objective is to circumscribe the use of exemptions, from both the Treaty and Directive 2004/18/EC, to exceptional cases only, whilst at the same time respecting the security interests of the Member States. The proposal, thus, aims to introduce a new legal instrument tailored to the specific nature of 'sensitive' purchases for which specific requirements and precautions govern the award of contract. Once approved, the Member States will have at their disposal a common public procurement framework that not only ensures the application of EU principles, but one that will simultaneously guarantee security of information, security of supply and flexible procedures.

This proposal forms part of a package of defence related proposals:

- On public procurement, (the subject of this summary).
- On transfers of defence-related products. See [COD/2007/0279](#).

In addition the Commission has prepared a Communication for a stronger and more competitive defence industry. See [COM/2007/0764](#).

The proposed Directive would apply to sensitive public supply contract, public service contracts and public works contracts in the fields of defence and security only. The proposed thresholds are the same as those currently applied by Directive 2004/18/EC. Indeed, for the most part, this proposal is based on the design and rationale of Directive 2004/18/EC, but has a certain number of specific features tailored to the characteristics of sensitive public defence and security contracts. These features provide, on the one hand, greater flexibility for the contracting authorities, whilst at the same time, safeguarding security of information and supply. The main provisions being proposed are as follows:

Procedures: The negotiated procedure with publication of a contract notice will be authorised without the need for specific justification in order to allow for enhanced flexibility. The restricted procedure and competitive dialogue may also be used. However, in view of the need for confidentiality and security of information, the Commission has decided not to propose the 'open procedure'.

Security of supply: The specific needs of the Member States, with respect to security of supply for sensitive public contracts in the fields of defence and security justify specific provisions, in terms of both contractual requirements and the criteria for selecting candidates is being proposed.

Security of information: Similarly, the confidential nature of the information relating to sensitive public defence and security contracts calls for safeguards applying to the award procedure itself, the criteria for selecting candidates and the contractual requirements imposed by the contracting authorities.

On a final point, the Directive will have an impact on the Community's budget. Financing will be needed for:

- the daily publication of notices in the Official Journal of the European Union;
- annual monitoring of the Directive's implementation;
- medium-term assessment (not before five years) of the administrative impact of the Directive by the contracting authorities and in businesses;
- long-term assessment (not before 10 years) of the economic impact of the Directive.

The measures listed above (in the field of monitoring and assessment) may require the services of external service providers.

Public procurement in the fields of defence and security

The Committee on the Internal Market and Consumer Protection adopted a report drafted by Alexander Graf LAMBSORFF (ADLE, DE), and amended the proposal for a directive of the European Parliament and of the Council on the coordination of procedures for the award of certain public works contracts, public supply contracts and public service contracts in the fields of defence and security.

The main amendments ? adopted in 1st reading of codecision procedure ? are as follows :

Scope: Members state that the Directive shall apply to public contracts relating to the supply of goods and services which are used in order to guarantee the security and defence of the Union or its Member States and entailing, requiring or containing sensitive information, and public works and services contracts strictly related to such supply. These comprise public contracts for, inter alia: a) the supply of arms, munitions and/or war material, including, but not limited to, the list of military equipment referred to in the Council Decision of 15 April 1958; (d) works, supplies and/or services which are necessary for the security of the EU and/or in order to protect the security interests of the Member States.

Calculation of value of contract: Members introduced an amendment which is intended to prevent authorities from dividing contracts which extend over a relatively long period of time into separate contracts relating to different periods in such a way that they fall below the thresholds above which a public procurement procedure is required.

Limit to Member States' use of Article 296 of the Treaty: the committee clarified that the directive is without prejudice to Article 296(1)(a) of the Treaty and that the Member States remain free to use the exemption provided for in substantiated and justified exceptional cases. It stated that the provision for derogations pursuant to Article 296(1)(a) of the EC Treaty remains in force notwithstanding this proposal, but is incorporated in Article 9 in a form appropriate to public procurement law in order to improve legal certainty and prevent abusive or avoidable application of Article 296 of the Treaty. The Directive shall not apply if in the opinion of a Member State the disclosure of information which is necessary in order to award a contract is contrary to the essential security interests of that Member State. This amendment will improve legal certainty and is intended to make it possible for those who accept public contracts to invoke secondary law in relation to the conditions for a derogation.

Contract notices: the proposal provides that, when a public contract contains sensitive technical specifications that may only be communicated to the successful tenderer, these specifications may not be set out in the contract notice, contract documents or additional documents, provided that knowledge of the details of such specifications is not required in order to prepare tenders. Members added that, in this case, the contract notice shall inform the candidates of the situation, giving general information as to the nature or type of the missing sensitive technical specifications. This amendment aims to ensure that sufficient information is provided to allow a fair process in these particular, but not uncommon, circumstances.

Security of information: Members state that it is important to contracting authorities to obtain from tenderers commitments which are as reliable as possible. However, a tenderer cannot in every case provide proof or a definitive commitment, particularly regarding the conduct of a subcontractor or in relation to a transit entitlement. They propose amendments which will make it easier for tenderers to comply with the requirements in practice. Rather than proof, contractors must provide : a) a sufficient information about proposed subcontractors to enable the contracting authority to determine whether each subcontractor possesses the capabilities required to protect the confidentiality of, and to safeguard, the sensitive information to which they will have access; b) a commitment to provide the same information about any new subcontractors that may be involved during performance of the contract; c) a commitment to protect the confidentiality of, and to safeguard, all sensitive information in the possession of the tenderer for the entire duration of the contract and after termination or conclusion of the contract.

Within one year of publication of this Directive in the Official Journal of the European Union, the Commission shall submit to the European Parliament and to the Council a proposal for an EU security of information system that will allow the exchange of information between contracting authorities and European undertakings

Security of supply: the Commission's proposal had provided that the contracting authority may require of the tenderer that the tender submitted contain evidence that it will be able to honour its obligations regarding the security of supply, including by means of a commitment from the Member State(s) concerned. However, despite the interest in guaranteed security of supply for the contracting authority, it is often not possible for candidates/contractors to provide binding evidence regarding security of supply. Members suggest that the tender submitted contain, inter alia: (a) certification or documentation regarding the export, transfer and transit of goods which confirms that the products and services or any deliverable resulting from those products or services are not subject to restrictions regarding disclosure, transfer or use by the originating Member State resulting from export control or security arrangements; (b) a commitment to meet additional needs required by the contracting authority as a result of a crisis, under terms to be agreed between the contracting authority and the contractor; (c) a commitment that the contracting authority will obtain a license for the production of spare parts, components, specific fittings, specific tests for equipment, including the design and transfer of know-how, and instructions in the event that the contractor is no longer able to supply and transport them.

Mutual confidence: the contracting authorities shall work to increase the level of mutual confidence amongst them. For this purpose and within

one year of publication of this Directive in the Official Journal of the EU, the Commission shall submit to the European Parliament and to the Council a proposal for a common regime of appropriate guarantees, backed up by verification possibilities, with a view to a stable security of supply.

Personal situation of the candidate: Members felt that the Commission's general derogation to requirements seriously undermines their credibility. They provided that Member States may decide to admit candidates or tenderers convicted for any reason listed in the text if they prove to the satisfaction of the contracting authority that they have taken all specific technical, organisational and personnel-related measures to eliminate the reasons for the action or actions for which they were convicted, and that such measures are fully operational and effective at the time the tender is submitted. Moreover, economic operators may be excluded from participation in the procurement procedure if information is available about them, including from protected data sources, indicating that the products which they manufacture or supply display dubious characteristics which give rise to doubts about the suitability of the economic operator.

Use of electronic auctions: a new article provides that Member States may allow contracting authorities to use electronic auctions. In negotiated procedures, the contracting authorities may decide that the award of a public contract shall be preceded by an electronic auction when the contract specifications can be established with precision. Contracting authorities which decide to hold an electronic auction shall state that fact in the contract notice.

Review procedures: a new Title IIA sets out the review procedures. The inclusion of a review procedure, along the lines of Directive 2007/66/EC, in this Directive is intended to achieve genuine market opening, provide effective legal protection for tenderers and ensure transparency and non-discrimination in the award of contracts without prejudice to Member States' need to protect secret information. The system of legal remedies provided for in the proposal basically adopts the same approach as the standard legal remedy directives, but at the same time takes account of the special interests of the Member States in relation to the award of defence and security contracts.

Public procurement in the fields of defence and security

The European Parliament adopted by 597 votes to 69 with 33 abstentions, a legislative resolution amending the proposal for a directive of the European Parliament and of the Council on the coordination of procedures for the award of certain public works contracts, public supply contracts and public service contracts in the fields of defence and security. The report had been tabled for consideration in plenary by Alexander Graf LAMBSDORFF (ADLE, DE), on behalf of the Committee on the Environment, Public Health and Food Safety.

The amendments were the result of a compromise between Parliament and Council. The main amendments - adopted under 1st reading of the codecision procedure - were as follows:

Scope: the Directive shall apply to contracts awarded in the fields of defence and security for: (a) the supply of military equipment, including any parts, components and/or subassemblies thereof; (b) the supply of sensitive equipment, including any parts, components and/or subassemblies thereof; (c) works, supplies and services directly related to the equipment referred to in (a) and (b) for any and all elements of its life cycle; (d) works and services for specifically military purposes, or sensitive works and sensitive services.

Definition of "military equipment": this is defined as equipment specifically designed or adapted for military purposes, intended for use as an arm, munition or war material. However, a recital states that military equipment should be understood in particular as the product types included in the list of arms, munitions and war material adopted by the Council Decision of 15 April 1958, and Member States may limit themselves to this list only when transposing this Directive. This list includes only equipment which is designed, developed and produced for specifically military purposes. However, the list is generic and is to be interpreted in a broad way in the light of the evolving character of technology, procurement policies and military requirements leading to the development of new types of equipment, for instance on the basis of the Common Military List of the European Union. The term "military equipment" should also cover products which, although initially designed for civilian use, were later adapted to military purposes to be used as arms, munitions or war material.

Article 296 of the Treaty: the compromise text states that Article 296(1)(a) of the Treaty gives Member States the possibility to exempt contracts in the fields of both defence and security from the rules of this Directive if the application of the latter would oblige them to supply information the disclosure of which they consider contrary to the essential interests of their security. This can be the case in particular where contracts are so sensitive that their very existence must be kept secret.

Operators from third countries: in the specific context of defence and security markets, Member States retain the power to decide whether or not their contracting authority/entity may allow economic operators from third countries to participate in contract award procedures. They should take that decision on grounds of value for money, recognizing the need for a globally competitive European defence technological and industrial base, the importance of open and fair markets, and the obtaining of mutual benefits.

Threshold amounts for contracts: the Directive shall apply to contracts which have a value excluding value-added tax (VAT) estimated to be no less than the following thresholds: EUR 412 000 for supply and service contracts; and EUR 5 150 000 for works contracts.

Specific exclusions: the compromise text establishes a list of specific exclusions which are outside the scope of the directive. The list includes contracts for which the application of the rules of the Directive would oblige a Member State to supply information the disclosure of which it considers contrary to the essential interests of its security; contracts for the purpose of intelligence activities; and contracts awarded in a third country, including for civil purchases; . It also includes contracts awarded in the framework of a cooperative programme based on R&D, conducted jointly by at least two Member States for the development of a new product and, where applicable, the later phases for all or parts of the life-cycle of this product. This provision ensures that the Commission might judge whether the provisions of the directive are being unfairly evaded.

Protection of classified information: contracting authorities/entities may impose on economic operators requirements aimed at protecting the classified information they communicate throughout the tendering and contracting procedure. They may also request these economic operators to ensure compliance with such requirements by their subcontractors.

Central purchasing bodies: Member States may stipulate that contracting authorities/entities may purchase works, supplies and/or services from or through a central purchasing body.

Reserved contracts: they may reserve the right to participate in contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are handicapped persons. Subcontracting: the text contains a clearer definition of subcontracting and states that the successful tenderer is free to select its

subcontractors for all sub-contracts that are not covered by certain requirements mentioned in the directive, and shall in particular not be required to discriminate against potential sub-contractors on grounds of nationality. The directive does not include specific rules on offsets, also called "industrial compensations". The provisions on subcontracting do not prohibit offsets but will help in preventing illegal offsets. They will also facilitate market access for SMEs.

Security of information: the contracting authority/entity may require that the tender contain certain particulars to ensure the security of such information at the requisite level. A list of such particulars is stated in the text. It includes a commitment from the tenderer and the sub-contractors already identified to appropriately safeguard the confidentiality of all classified information in their possession or coming to their notice throughout the duration of the contract and after termination or conclusion of the contract, in accordance with the relevant laws, regulations and administrative provisions.

Security of supply: similarly the contracting authority/entity may require that the tender contain certain particulars in order to ensure its security of supply requirements. This list includes the indication of any restriction on the contracting authority/entity regarding disclosure, transfer or use of the products and services or any result of those products and services, which would result from export control or security arrangements;

Official lists of approved economic operators and certification by bodies established under public or private law : Member States may introduce either official lists of approved contractors, suppliers or service providers or certification by certification bodies established in public or private law. Economic operators registered on the official lists or having a certificate may, for each contract, submit to the contracting authority/entity a certificate of registration issued by the competent authority or the certificate issued by the competent certification body.

Use of electronic auctions: a new clause states that Member States may provide that contracting authorities/entities may use electronic auctions. In restricted and negotiated procedures with publication of a contract notice, the contracting authorities/entities may decide that the award of a contract shall be preceded by an electronic auction when the contract specifications can be established with precision. The text gives a list of the matters on which the electronic auction shall be based.

Transparency: the new legislation strengthens transparency requirements to contractors, and does not allow combined research and production contracts for national procurements without a competitive stage.

Review procedure: the compromise text introduces a new review procedure, which provides the possibility of challenging the award procedure before the contract is signed. It also provides the guarantees necessary for the efficiency of this review such as the standstill period. It also provides that a contract will be considered ineffective under certain circumstances specified in the text. Under some conditions, however, the review body may not consider a contract ineffective, even though it has been awarded illegally, if it finds that overriding reasons relating to a general interest, first and foremost in connection with defence and/or security interests, require that the effects of the contract should be maintained.

Review and reporting: the Commission will review the functioning of the Directive and report after 5 years. It shall evaluate in particular whether, and to what extent, the purposes of this Directive have been achieved with regard to the functioning of the Internal Market and to the development of a European defence equipment market and a European defence technological and industrial base, including the situation of small and medium-sized enterprises.

Public procurement in the fields of defence and security

PURPOSE: to further open and enhance the competitiveness of public procurement in the fields of defence and security with a view to gradual creation of a European market for defence equipment.

LEGISLATIVE ACT: Directive 2009/81/EC of the European Parliament and of the Council on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC.

CONTENT: following an agreement with the Parliament under the second reading of the codecision procedure, the Council adopted a directive on public procurement in the fields of defence and security that seeks to further open and enhance the competitiveness of the EU's defence equipment market. It is closely linked with [Directive 2009/43/EC of the European Parliament and of the Council simplifying terms and conditions of transfers of defence-related products within the Community](#), adopted by the Council on 23 April 2009.

This directive will reduce the current regulatory fragmentation in this field and increase competition and transparency, thus enabling European companies, including small and medium-sized enterprises, to tender for contracts throughout the EU. The text states that national security remains the sole responsibility of each Member State, in the fields of both defence and security.

Under the new harmonised rules applicable to the procurement of arms, munitions and war material, exceptional cases where the member states may apply restrictions to access to public tender will be limited to certain cases, such as those affecting the interests of its national security. The new rules take into account the specific features of the market, namely security of supply and security of information.

Arms concerned: ?military equipment? means equipment specifically designed or adapted for military purposes and intended for use as an arm, munitions or war material and covered by the Council in its Decision of 15 April 1958. Member States may limit themselves to this list only when transposing this Directive. However, the list is generic and is to be interpreted in a broad way in the light of the evolving character of technology, procurement policies and military requirements which lead to the development of new types of equipment. For the purposes of this Directive, military equipment should also cover products which, although initially designed for civilian use, are later adapted to military purposes to be used as arms, munitions or war material.

Scope: the Directive recalls that Article 296(1)(a) of the Treaty gives Member States the possibility to exempt contracts in the fields of both defence and security from the rules of this Directive if the application of this Directive would oblige them to supply information, the disclosure of which they consider contrary to the essential interests of their security. This can be the case in particular where contracts are so sensitive that their very existence must be kept secret.

Subject to Article 296 of the EC Treaty, the directive shall apply to contracts awarded in the fields of defence and security for:

- the supply of military and sensitive equipment, including any parts, components and/or subassemblies thereof;
- works, supplies and services directly related to the military, or sensitive equipment for any or all of its life cycles;

- works and services for specifically military purposes or sensitive works and sensitive services.

Thresholds: This directive applies to contracts which have a value estimated to be no less than EUR 412 000 for supply and services contracts and EUR 5 150 000 for works contracts.

Specific exclusions: the directive provides a list of the contracts that do not fall within its scope. This list includes:

- contracts where the directive would oblige a Member State to supply information the disclosure of which it considers contrary to the essential interests of its security;
- contracts for the purposes of intelligence activities;
- contracts awarded in the framework of a cooperative programme based on research and development, conducted jointly by at least two Member States for the development of a new product;
- contracts awarded in a third country, including for civil purchases, carried out when forces are deployed outside the territory of the Union where operational needs require them to be concluded with economic operators located in the area of operations;
- service contracts for the acquisition or rental, under whatever financial arrangements, of land, existing buildings or other immovable property, or concerning rights in respect thereof;
- contracts awarded by a government to another government relating to the supply of military or sensitive equipment.

Subcontracting: the rules in this regard have been clarified. The directive states that the successful tenderer shall be free to select its subcontractors for all subcontracts that are not covered by certain requirements in the directive and shall, in particular, not be required to discriminate against potential subcontractors on grounds of nationality.

The contracting authority/entity may ask or may be required by a Member State to ask the tenderer: i) to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractor, as well as the subject-matter of the subcontracts for which they are proposed; and/or, ii) to indicate any change occurring at the level of subcontractors during the execution of the contract.

Use of electronic auctions: the directive allows for the possibility for contracting authorities to use electronic auctions. In restricted and negotiated procedures with publication of a contract notice, the contracting authorities/entities may decide that the award of a contract shall be preceded by an electronic auction when the contract specifications can be established with precision. Contracting authorities/entities which decide to hold an electronic auction shall state that fact in the contract notice.

Transparency: in order to ensure transparency, provision should be made for rules on publication by the contracting authorities/entities of appropriate information prior to, and at the end of, the award procedure. In addition, further specific information should be provided to candidates and tenderers regarding the results of that procedure. However, contracting authorities/entities should be allowed to withhold some of the information so required when and insofar as its release would impede law enforcement or otherwise be contrary to the public interest, harm the legitimate commercial interests of economic operators or might prejudice fair competition between them. The compromise also makes provision for the use of the negotiated procedure without the prior publication of a contract notice in certain cases.

Review procedure: the directive provides for review procedures, the aim of which is to guarantee effective legal protection of tenderers involved, to encourage transparency and non-discrimination in the award of contracts without compromising Member States' need for confidentiality. The judicial review system provided for is, for the most part, based on the classic directives in the field, in particular Directive 2007/66/EC, although taking into account the specific interests of Member States with regard to procurement in the areas of defence and security.

Review and reporting: by 21 August 2012, the Commission shall report on the measures taken by Member States with a view to the transposition of this Directive. The Commission shall review the implementation of this Directive and report thereon to the European Parliament and the Council by 21 August 2016. It shall evaluate in particular whether, and to what extent, the objectives of this Directive have been achieved with regard to the functioning of the internal market and the development of a European defence equipment market and a European Defence Technological and Industrial Base, having regard, inter alia, to the situation of small and medium-sized enterprises. Where appropriate, the report shall be accompanied by a legislative proposal.

ENTRY INTO FORCE: 21/08/2009.

TRANSPPOSITION: 21/08/2011.

Public procurement in the fields of defence and security

The Commission presents a report on the transposition of Directive 2009/81/EC on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security. Together with Directive 2009/43/EC on simplifying terms and conditions of transfers of defence-related products within the Community on intra-EU transfers of defence products, this Directive is an important element of the Commission's policy to create a truly European Defence Equipment Market and a European level playing field for defence procurement. For the first time it subjects defence and sensitive procurement to the specific rules of the Internal Market, fostering transparency and competition and ensuring the satisfaction of procurement needs in an ever tightening financial framework.

The report assesses the general state of transposition of the Directive by Member States, before addressing the crucial provisions for the creation of a European Defence Equipment Market:

- the scope of application (Article 2);
- the exclusions from the application of the Directive (Articles 12 and 13);
- the subcontracting provisions (Articles 21 and 50-54); and
- the review procedures (Articles 55-64).

It also highlights the situation concerning offsets whose continuing existence is a major risk to the correct application of the Directive.

Transposition: the Directive had to be transposed by Member States by 21 August 2011. Member States transposed late and infringement

proceedings were instituted. Most of the 23 Member States who have transposed the Directive as of July 2012 have prima facie done so correctly. The vast majority of Member States have also transposed the non-mandatory provisions on sub-contracting which aim in particular at enhancing competition in the supply chains of successful tenderers. By July 2012, four Member States had still not notified any transposition measure to the Commission. The Commission intends to refer the cases of missing or only partial transposition to the European Court of Justice in due course.

Scope: it is crucial for the effective implementation of the Directive that the Member States' national implementing measures apply to all procurements falling within the scope of the Directive. The correct transposition of Article 2 is therefore a key element. Sixteen Member States have transposed Article 2 by using in essence a similar wording to that of the Directive. However, six Member States have used a different wording. Of those, only some have the potential materially to change the scope of application of the Directive.

One Member State, for example, has restricted the application of the national implementing measure to specific contracting authorities.. Such a differentiating approach constitutes a risk for a European level playing field for the procurement of all contracts covered by the Directive and is incompatible with the Directive.

Some Member States use specific national lists to define the field of application of the Directive in the area of defence. This will be subject to further detailed assessment.

On the whole, the Commission is nonetheless satisfied that most Member States have correctly transposed Article 2. It will have to review carefully what action will be required in order to ensure the complete application of this particular provision in all Member States.

Exclusions from the application of the Directive: the paper looks at national implementing rules on exclusions and notes that since exclusions have to be interpreted strictly, the Commission will monitor closely the use of exclusions by Member States and verify that none of them, especially the exclusions under Article 12 and the exclusion of government to government sales, Article 13 (f), is used to circumvent the rules of the Directive.

Provisions relating to subcontracting: a preliminary assessment suggests that Member States' transpositions of the subcontracting provisions are generally compatible with the Directive. The Commission is satisfied that a majority of Member States have seized this opportunity to enhance competition in the supply chains and is confident that this will have a positive impact on the internal market. Since the subcontracting provisions are an important tool for the creation of a European level playing field in the defence market, the Commission will closely monitor their use by Member States.

Review mechanism: a preliminary assessment suggests that Member States' transpositions of the review provisions in general are compatible with the Directive. The Commission, therefore, expects that procurement in the field of defence and security will be subject to effective national review.

Impact of the Directive on Member States' offset provisions: in the past, 18 Member States maintained offset policies requiring compensation (offsets) from non-national suppliers when they procured defence equipment abroad. Such offset requirements are restrictive measures that go against the basic principles of the Treaty. They discriminate against economic operators, goods and services from other Member States, and they impede the free movement of goods and services.

EU law can tolerate offsets only on the basis of a Treaty-based derogation, in particular Article 346 (1)(b) TFEU, i.e. if an offset requirement is necessary for the protection of the essential security interests of a Member State. The use of the derogation, however, has to be justified by the Member State concerned on a case-by-case basis.

The Commission has, therefore, been in close contact with the 18 Member States concerned, helping them to abolish or revise their offset rules. As a result, most of these Member States have either abolished the respective rules or revised their legislation. Major legal changes have been implemented. In addition, the European Defence Agency and its participating Member States clarified that its Code of Conduct on Offsets may be applied only to offsets that are justified on the basis of Article 346 TFEU.

The Commission will now monitor whether these changes will bring about a change in practice. It is convinced that a rapid phasing out of the discriminatory practice of offsets is necessary to create a truly European Defence Equipment Market. It will, take appropriate action where this is not the case and where Member States continue to have offset rules that are clearly incompatible with EU law.

The Commission notes that a consistent and correct application of the Directive is necessary to strengthen the European Defence Technological and Industrial Base. Therefore, it will closely monitor especially the use of exclusions and derogations as well as the phasing out of offsets. In general, the report is without prejudice to the power of the Commission to bring infringement proceedings against individual Member States whose national implementing measures are not in compliance with the provisions of the Directive.

Moreover, the Commission will pay particular attention to the impact of the Directive on the openness of the Defence market and the strength of the European Defence Industrial Base. By 21 August 2016 the Commission will report on this subject to the European Parliament and the Council.

Public procurement in the fields of defence and security

The Commission has presented a report on the implementation of Directive 2009/81/EC on public procurement in the fields of defence and security.

The main objective of the Directive is to ensure that procurement in the field of defence and certain sensitive purchases related to security in this market is carried out in compliance with EU rules on competition, transparency and equal treatment.

The report assesses the functioning of the Directive and, as far as possible, its impact on the defence market and the defence industrial base.

Following the evaluation, the Commission considers that, overall, the Directive is adapted to its objectives, that it is on track to meet its objectives and that it does not require modification. Consequently, no legislative proposal accompanies the report. Given the short period since the Directive was actually transposed, efforts should instead focus on the effective implementation of the Directive.

The main conclusions are as follows:

Competition: the Directive has led to an initial increase in competition, transparency and non-discrimination on the European defence market, and a corresponding reduction in the use of exemptions.

The Directive has more than doubled the value of defence and security markets published in the EU and awarded after a call for competition. Between 2011 and 2015, the total value of contracts awarded in accordance with the Directive amounted to approximately EUR 30.85 billion.

However, the Directive's application remains uneven between Member States. In particular, the Directive continues not to be applied to a significant part of the expenditure incurred in the award of defence contracts. It has thus been applied very little to markets for high-value, strategic and complex defence systems.

In addition, Member States always rely on the requirements of industrial compensation / benefits (presumably based on Article 346 of the TFEU). Industry stakeholders expressed concerns about the uncertainties associated with the practical use of such requirements.

In order to assist Member States to apply the Directive more consistently, the Commission will (i) provide guidance on the interpretation / application of the provisions of the Directive on exclusions; (ii) intensify dialogue with Member States and stakeholders on the application of the Directive; (iii) publish statistics on the use of the Directive periodically; (iv) open infringement proceedings where serious infringements of EU law are detected.

Subcontracting: the subcontracting provisions of the Directive permit the contracting authority to request the successful tenderer to subcontract part of the contract to third parties via competitive bidding. These provisions have not been used and are considered ineffective.

Consequently, the Commission will revise the guidelines on subcontracting provisions so that the contracting authorities of the Member States are encouraged to use these provisions and can bring competition into the supply chains.

Strengthening European cooperation: The Directive does not hamper cooperation-based procurement. However, in order to encourage the authorities of the Member States to make full use of the flexibility offered by the Directive, the Commission will provide guidance to clarify all the possibilities for co-operation in procurement.

Impact on the European defence industrial and technological base (EDTIB): given the short period since the end of the transposition deadline and the even shorter time span since the actual transposition by the Member States, it was impossible to establish a causal link between the effects of the Directive and developments in the EDTIB.

Lastly, the Commission recalls that the proposals of the European defence action plan to promote cross-border market access for subcontractors and SMEs should also help to improve cross-border penetration levels and increase SME participation to defence contracts.