

Public procurement in the fields of defence and security

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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.