

Defence procurement. Green Paper

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The purpose of this Communication from the Commission is to report on the contributions by stakeholders to the consultation launched by the Green Paper on defence procurement. The Commission also presents the actions it intends to take as a follow-up to the Green Paper.

During the six-months consultation period, a series of bilateral meetings, seminars and working group meetings were held which allowed the Commission to explain its initiative and to gain a clearer idea of stakeholders' interests and concerns. At the end of the consultation, the Commission had received 40 contributions from 16 Member States, institutions and industry.

The vast majority of stakeholders shared the Commission's assessment of the Green Paper. They acknowledged the widespread misinterpretation of Article 296 and considered the existing PP Directive often ill-suited for defence procurement, despite the recent adaptations. Almost all stakeholders supported a Community initiative in the field of defence procurement and ruled out the "no action" option.

As for the instruments presented as possible solutions, stakeholders expressed a variety of opinions. Even if it is very difficult to draw a general conclusion or a single general trend, it does appear that a majority of stakeholders are in favour of an interpretative communication, and not against a directive. There is some disagreement about the timing of the latter. Preferences for an interpretative communication or a directive, also as far as timing is concerned, do not follow the traditional dividing lines between big and small, producing and non-producing Member States. The same is true for industry, with differences being seen between European and national associations and between defence industry associations and non-defence industry association. The European Parliament expressed clear support for a comprehensive approach combining an interpretative communication and a new directive adapted to the specificities of defence (combined with the development of an intergovernmental code of conduct).

The Commission's assessment is that the whole consultation process shows that the current legislative framework on defence procurement is not functioning properly. The appropriate initiatives therefore have to be taken, in order to improve a situation which is almost unanimously regarded as unsatisfactory.

-On one hand, the dividing line between defence acquisitions concerning essential security interests according to Article 296 and defence acquisitions which do not concern essential security interests is not clear, or at least is not perceived in the same way by all Member States. As a consequence, the application of the derogation remains problematic. The Commission will therefore adopt in 2006 an "Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement." This Communication will recall the principles governing the use of the derogation, in the light of the case law of the Court of Justice, and will clarify the criteria on the basis of which Member States have to decide when the conditions for the application of the derogation are met and when they are not. While providing additional legal certainty and guidance for Member States, an Interpretative Communication will not alter the current legal framework. It will simply clarify the existing one, with the objective of making its implementation more uniform. As the Interpretative Communication will also concern issues related to free movement of goods, it could have further consequences e.g. on intra-EU transfers for defence goods. This will be duly taken into account in the drafting of such Communication.

-On the other hand, a simple clarification may be insufficient. The consultation also confirmed that the current PP Directive, even in its revised version, may be ill-suited to many defence contracts, since it does not take into account some special features of those contracts. The Commission therefore considers that a directive coordinating national procedures for the procurement of defence goods (arms, munitions and war

material) and services, would be the appropriate instrument to improve the situation described. This directive could take into account all the specific needs of defence procurement, and offer new, more flexible rules for defence procurement, to be followed in cases where the derogation in Article 296 does not apply.

The Commission will also follow with great interest the development of the Code of Conduct under preparation by the EDA. This code, voluntary and non-binding would aim at increasing transparency and competition also in a different segment of the market, since it would apply in cases where the conditions for the application of Articles 296 are met. This kind of intergovernmental initiative would usefully complement the initiatives taken at Community level.