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► **B** Commission notice on guidance on cooperative procurement in the fields of defence and security  
(Defence and Security Procurement Directive 2009/81/EC)

(Text with EEA relevance)

(2019/C 157/01)

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**Commission notice on guidance on cooperative procurement in the fields of defence and security (Defence and Security Procurement Directive 2009/81/EC)**

(Text with EEA relevance)

(2019/C 157/01)

**1. INTRODUCTION**

The importance of strengthening European defence cooperation, including in the area of procurement, was underlined on many occasions in the past few years. The European Council, in its conclusions from December 2013 <sup>(1)</sup>, and the EU-NATO Joint Declaration from July 2016 <sup>(2)</sup> stressed, inter alia, that defence cooperation would be the right response to mounting security challenges, increasing costs of new defence systems and budgetary constraints of Member States, as well as high levels of duplication and fragmentation in the EU defence sector.

The Commission Report on the evaluation of the Defence Procurement Directive 2009/81/EC <sup>(3)</sup> (hereinafter: ‘the Directive’), published on 30 November 2016 <sup>(4)</sup> concluded that the Directive does not hinder cooperative procurement. This conclusion was based on discussions with Member States' experts and on the results of stakeholder consultations. It also took into account the assessment of the European Defence Agency (EDA) <sup>(5)</sup>, according to which problems with the launch of defence cooperation initiatives are rather due to other elements such as defence budget cuts, insufficient synchronisation of budget cycles, and lack of harmonisation of requirements.

At the same time, the evaluation announced that the Commission will provide guidance to that end. The same announcement was made in the European Defence Action Plan (EDAP) <sup>(6)</sup>, also adopted in November 2016. With this Notice, the Commission follows up to the commitment made in the Report on the evaluation of the Directive and in the EDAP.

<sup>(1)</sup> European Council Conclusions EUCO 217/13 of 20 December 2013, <http://data.consilium.europa.eu/doc/document/ST-217-2013-INIT/en/pdf>.

<sup>(2)</sup> Joint declaration by the President of the European Council, the President of the European Commission and the Secretary-General of the North Atlantic Treaty Organization of 8 July 2016, [https://www.nato.int/cps/en/natohq/official\\_texts\\_133163.htm](https://www.nato.int/cps/en/natohq/official_texts_133163.htm).

<sup>(3)</sup> Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 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 (OJ L 216, 20.8.2009, p. 76).

<sup>(4)</sup> Report from the Commission to the European Parliament and the Council on the implementation of Directive 2009/81/EC on public procurement in the fields of defence and security, to comply with Article 73(2) of that Directive, COM/2016/0762 final.

<sup>(5)</sup> Discussed with Member States at expert and National Armaments Directors level.

<sup>(6)</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, European Defence Action Plan, COM/2016/0950 final.

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The Commission also believes that clarifying a range of options for cooperative procurement by two or more Member States is needed in order to encourage Member States' authorities to fully use the possibilities, which exist under the Directive, in the area of defence and sensitive security.

As announced in the EDAP in June 2017, the Commission issued a Communication launching the European Defence Fund <sup>(7)</sup> consisting of research and capability strands.

The European Council Conclusions of 22 and 23 June 2017 <sup>(8)</sup> endorsed the above-mentioned initiatives, based on European defence industrial cooperation. Following the agreement reached by the co-legislators, the Regulation establishing the EDIDP was adopted on 18 July 2018 <sup>(9)</sup>, while the Preparatory Action on Defence Research (PADR), supporting collaborative defence research, has been delivering since 2017 with the first two work programmes adopted on 11 April 2017 and on 9 March 2018.

On 13 June 2018 the Commission has adopted the proposal for a Regulation establishing the European Defence Fund <sup>(10)</sup> for the Multi-annual Financial Framework for 2021-2027, proposing an overall budget of EUR 13 billion over this period, in order to support collaborative defence research and development projects.

Having these developments in mind, the Commission reaffirms that more cooperation among Member States in defence procurement is needed. This Notice provides guidance on various possibilities of cooperative defence procurement, based on the relevant provisions of the Directive. Where appropriate, provisions of Directive 2014/24/EU of the European Parliament and of the Council <sup>(11)</sup> (hereinafter: 'Directive 2014/24/EU') on public procurement are considered in so far as they could provide a guidance on how to approach certain matters that are not completely addressed in the Directive. By publishing this Notice, the Commission seeks to provide clarifications to the Member States'

<sup>(7)</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Launching the European Defence Fund, COM(2017) 295 final.

<sup>(8)</sup> <http://www.consilium.europa.eu/media/23985/22-23-euco-final-conclusions.pdf>

<sup>(9)</sup> Regulation (EU) 2018/1092 of the European Parliament and of the Council of 18 July 2018 establishing the European Defence Industrial Development Programme aiming at supporting the competitiveness and innovation capacity of the Union's defence industry (OJ L 200, 7.8.2018, p. 30). <https://eda.europa.eu/docs/default-source/documents/2018-07-18-edidp-regulation-eu-2018-1092.pdf>.

<sup>(10)</sup> Proposal for a Regulation of the European Parliament and of the Council establishing the European Defence Fund, COM/2018/476 final — 2018/0254 (COD).

<sup>(11)</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).

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contracting authorities, to increase legal certainty and minimise the risks (including perceived risks) of non-compliance with EU public procurement law. The Commission considers that this will have a positive effect on cooperative defence procurement among Member States.

This Notice looks at possibilities, which the Defence Procurement Directive and Directive 2014/24/EU on public procurement offer to Member States for pursuing cooperative procurement. It attempts to put forward examples of cooperative defence procurement scenarios, which could be enabled by the provisions of both Directives. Such scenarios are different in certain respects, but have a very important common element, i.e. they refer to situations in which two or more Member States (possibly in cooperation with one or more third countries) work together, through *ad hoc* or structured arrangements, to purchase military equipment (or services) for their use.

It is worth noting that the scenarios of cooperative procurement covered in this Notice can, in principle, apply both in the area of military equipment and in the area of sensitive security equipment, given that the Directive applies to both areas <sup>(12)</sup>.

This Notice focuses on the provisions of the Defence Procurement Directive. It does not address other issues, such as alignment of technical requirements, synchronisation of national budget cycles, and other legal and administrative issues, that may have a very significant impact on cooperative defence procurement. The EDA is working with Member States on many of these issues. The Notice also takes into account EDA's Vademecum on Cooperative Defence Procurement (originally from April 2015).

The Notice is not legally binding. Only the Court of Justice of the European Union is competent to give a legally binding interpretation of EU law.

Section 3 of this Notice replaces Section 3.3) 'Cooperative programmes' of the 2010 Guidance Note 'Defence- and Security- specific exclusions' <sup>(13)</sup> and replaces point 6 of the 2010 Guidance Note 'Research and Development' <sup>(14)</sup>, and Section 4 replaces Section 2.4) 'Contract award rules of international organisations' of the 2010 Guidance Note 'Defence- and Security- specific exclusions' <sup>(15)</sup>.

## 2. PROCEDURES WHEN MEMBERS STATES PROCURE TOGETHER

This Section looks at various possibilities of joint procurement by contracting authorities from different Member States. Joint procurement could be realised with or without the use of a Central Purchasing Body (CPB). Pursuant to Article 1(18), a CPB can be a European Public Body or a contracting authority/entity of a Member State (the 'lead nation' scenario).

<sup>(12)</sup> The scope of application of the Directive is defined in its Article 2.

<sup>(13)</sup> <http://ec.europa.eu/DocsRoom/documents/15408/attachments/1/translations/>

<sup>(14)</sup> [http://ec.europa.eu/DocsRoom/documents/14833/attachments/1/translations](http://ec.europa.eu/DocsRoom/documents/14833/attachments/1/translations/)

<sup>(15)</sup> <http://ec.europa.eu/DocsRoom/documents/15408/attachments/1/translations/>

**▼B****2.1. Joint procurement without the use of a Central Purchasing Body (CPB)**

While the Directive does not provide any rules specifically related to the joint procurement procedures involving contracting authorities from two or more Member States, the regulatory context, provided by Directive 2014/24/EU (in particular, Article 39 thereof), shows that the possibility of organising such joint procedures is not incompatible with the objectives of the Directive, provided that certain requirements are respected. In particular, the use of a joint procurement procedure should not result in a circumvention of the requirements laid down in the Directive. In this regard, it would appear that to the extent the contracting authorities base their joint procurement procedures on the procedures provided for in Article 39 of Directive 2014/24/EU, for their procurement falling within the scope of the Directive, such procedures would be compatible with the Directive.

Article 39 of Directive 2014/24/EU provides the elements which shall be determined in joint procurement agreements or arrangements: the responsibilities of the parties to the joint procurement, the relevant applicable national provisions (including on remedies) and the internal organisation of the procurement procedure. For the sake of transparency and legal certainty, the allocation of responsibilities and the applicable national law should be referred to in the procurement documents.

Where two or more contracting authorities jointly conduct a procurement procedure in its entirety, they will be jointly responsible for fulfilling their obligations pursuant to the Directive. This means, in practice, that all contracting authorities will bear the responsibility for any possible irregularities or errors in the procedure, in light of the obligations stemming from the Directive.

However, the economic operators which would like to exercise their rights under the Directive will not need to turn to all contracting authorities that participate in the joint procurement, but only to the contracting authority which is responsible for running the tendering procedure. Thus, economic operators only deal with one contracting authority.

**2.2. Joint procurement with the use of a Central Purchasing Body (CPB)**

Article 10 of the Directive regulates the purchase of works, supplies or services from or through a Central Purchasing Body. Although Article 10 does not provide any rules specifically related to situations involving several Member States that purchase together through one CPB, the regulatory context shows that the possibility of organising such joint procedures is not incompatible with the objectives of the Directive, provided that certain requirements are respected. In particular, the use of one CPB should not result in a circumvention of the requirements laid down in the Directive. Hence, joint procurement by several contracting authorities from different Member States, performed through a CPB, seems to be a fully valid tool of public procurement in the defence sector, provided that an agreement between/among the Member States involved makes such joint procurement possible.

Article 1(18) of the Directive defines a CPB as a contracting authority/entity or a European Public Body which:

— acquires supplies and/or services intended for contracting authorities/entities, or

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- awards contracts or concludes framework agreements for works, supplies or services intended for contracting authorities/entities<sup>(16)</sup>.

Thus, the CPB could be the CPB of one of the Member States participating in the joint procurement or a European Public Body.

### 2.2.1. *A European Public Body as CPB*

As mentioned above, Article 1(18) of the Directive recognises that a European Public Body which is not itself a contracting authority/entity can act as a CPB within the meaning of Article 10. The Directive does not define the notion of ‘European Public Body’. However, Recital 23 indicates that ‘Member States should be free to designate European public bodies not subject to this Directive, such as the European Defence Agency, as central purchasing bodies, provided that such bodies apply procurement rules compliant with all the provisions of this Directive to those purchases’.

In case the CPB is not itself a contracting authority, the contracting authorities using it are obliged to make sure that the rules applied by the CPB comply with those of the Directive. Besides this specificity, the rules governing the use of a European Public Body as CPB are the same as those related to the use of a CPB that is a contracting authority/entity, as described in the paragraph below.

### 2.2.2. *The lead nation scenario*

The lead nation scenario refers to a situation where two or more Member States will make a joint purchase and organise this purchase by designation of the contracting authority/entity of one of the participating Member States as the CPB.

#### a) *Applicable law and responsibilities of CPBs and their users*

While the Directive does not contain specific provisions on the lead nation scenario, the Commission is of the opinion that the regulatory context, provided by Directive 2014/24/EU (in particular, Article 39 thereof), shows that the possibility of organising joint purchases according to the lead nation scenario is not incompatible with the objectives of the Directive, provided that certain requirements are respected. In particular, the use of the lead nation scenario should not result in a circumvention of the requirements laid down in the Directive. In this regard, the

<sup>(16)</sup> The corresponding definition in the General Public Procurement Directive 2014/24/EU is different in certain respects. According to Article 2(1)(16) of the said Directive a ‘central purchasing body’ is a contracting authority providing centralised purchasing activities and, possibly, ancillary purchasing activities while according to Article 2(1)(14) of the same Directive ‘centralised purchasing activities’ are activities conducted on a permanent basis, in one of the following forms:

- (a) the acquisition of supplies and/or services intended for contracting authorities,
- (b) the award of public contracts or the conclusion of framework agreements for works, supplies or services intended for contracting authorities.

Certain organisational aspects of the involvement of CPBs are defined in Directive 2014/24/EU and an obligation of electronic communication is imposed therein.

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Commission is of the view that such circumvention is excluded in situations where the contracting authorities follow *mutatis mutandis* the procedures provided for in Article 39 of Directive 2014/24/EU for their procurement falling within the scope of the Directive.

Thus, in a situation where two or more Member States will make a joint purchase and organise this purchase by designation of the contracting authority/entity of one of the participating Member States as the CPB, the joint purchase shall be conducted in accordance with the national provisions of the Member State where the CPB is located (Article 39(4) Directive 2014/24/EU). Furthermore, by analogy to Article 39(4) Directive 2014/24/EU, agreements or arrangements between the participating Member States will have to determine the following: the responsibilities of the CPB and of the other contracting authorities, the relevant applicable national provisions (including on remedies) and the internal organisation of the procurement procedure. For the sake of transparency and legal certainty, the allocation of responsibilities and the applicable national law should be referred to in the procurement specifications and documents.

b) **The responsibility for compliance with the Directive**

With regard to the issue of dividing the responsibility for compliance with the Directive, Article 10 prescribes that ‘the contracting authorities/entities which purchase works, supplies and/or services from or through a central purchasing body shall be deemed to have complied with the Directive insofar as the central purchasing body has complied with it’. This means that a contracting authority purchasing works, supplies or services from or through a CPB fulfils its obligations under the Directive, as long as the CPB from or through which the purchase is made applies the Directive via the transposing national legislation.

There can be situations in which the CPB only carries out some parts of the procurement procedure for the other contracting authorities. This can be the case, for instance, where the CPB is responsible for awarding a framework agreement and the individual contracting authorities are responsible for the reopening of competition for the award of specific contracts, based on this framework agreement. In such situations, the contracting authorities using the CPB will have sole responsibility for fulfilling the obligations under the Directive in respect of the parts of the procurement procedure they conduct themselves.

An agreement between/among the Member States involved shall make such joint procurement possible.

**3. COOPERATIVE PROGRAMMES FOR THE DEVELOPMENT OF NEW PRODUCTS — ARTICLE 13(C) OF THE DIRECTIVE**

Article 13(c) of the Directive relates to a specific category of defence cooperation initiatives. It lays down a specific exclusion for cooperative programmes based on research and development. The Directive shall not apply to ‘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 and, where applicable, the later phases of all or part of the life-cycle of this product’.



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This exclusion acknowledges the particular importance of cooperative programmes for strengthening European military capabilities and establishing a strong and competitive European Defence Technological and Industrial Base (EDTIB), since such programmes ‘help to develop new technologies and bear the high research and development costs of complex weapon systems’ (Recital 28 of the Directive).

Article 11 of the Directive makes clear that: ‘None of the rules, procedures, programmes, agreements, arrangements or contracts referred to in this section may be used for the purpose of circumventing the provisions of this Directive.’ This also concerns the application of Article 13(c) of the Directive.

### 3.1. ‘Based on Research & Development’

For Article 13(c) to be applicable, a cooperative programme must be based on research and development (hereinafter ‘R&D’). For the purpose of Directive 2009/81/EC, research and development is defined in Article 1(27), whereas Recital 13 provides further explanations.

According to Article 1(27), ‘research and development means all activities comprising fundamental research, applied research and experimental development, where the latter may include the realisation of technological demonstrators, i.e. devices that demonstrate the performance of a new concept or a new technology in a relevant or representative environment’.

Recital 13 reads ‘For the purposes of this Directive, research and development should cover fundamental research, applied research and experimental development. Fundamental research consists in experimental or theoretical work undertaken mainly with a view to acquiring new knowledge regarding the underlying foundation of phenomena and observable facts, without any particular application or use in view. Applied research also consists of original work undertaken with a view to acquiring new knowledge. However, it is directed primarily towards a particular practical end or objective. Experimental development consists in work based on existing knowledge obtained from research and/or practical experience with a view to initiating the manufacture of new materials, products or devices, establishing new processes, systems and services or considerably improving those that already exist. Experimental development may include the realisation of technological demonstrators, i.e. devices demonstrating the performance of a new concept or a new technology in a relevant or representative environment. Research and development does not include the making and qualification of pre-production prototypes, tools and industrial engineering, industrial design or manufacture’.

The condition according to which a cooperative programme must be based on research and development means that the programme must include a research and development phase.

For ease of reference, ‘R&D’ under Article 13(c) would typically cover the Technology Readiness Levels (TRL)<sup>(17)</sup> 1 to 7. These TRLs constitute R & D insofar as they involve acquiring new knowledge or combining, shaping, using and testing existing knowledge and skills with the aim of developing new or improved products, materials, systems, processes and services. For the purposes of Article 13(c), it is not necessary that the cooperative programme includes activities

<sup>(17)</sup> A description of TRLs is provided within the Horizon 2020 Programme: [http://ec.europa.eu/research/participants/data/ref/h2020/wp/2014\\_2015/annexes/h2020-wp1415-annex-g-trl\\_en.pdf](http://ec.europa.eu/research/participants/data/ref/h2020/wp/2014_2015/annexes/h2020-wp1415-annex-g-trl_en.pdf).



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covering all different TRL levels. The preparation of a pre-production prototype (a version tested to find problems and qualify manufacturing processes before starting production) cannot, however, be considered as a research and development activity for the purpose of the Directive.

It should be clarified that the definition of R & D for the purpose of the Directive is without prejudice to definitions of R & D contained in other EU acts.

### 3.2. The development of a new product

One of the conditions for the applicability of Article 13(c) is the purpose of the programme, namely the development of a new product.

In line with the broader objectives of Article 13(c), i.e. to help develop new technologies and bear the high research and development costs of complex weapon systems, cooperative products based on research and development for the upgrade of existing products can, under certain circumstances, also fall within the scope of application of this provision. For Article 13(c) to be applicable, the upgrade in question must lead to substantial changes or substantial improvements of the product. Relevant criteria to assess such changes or improvements may include: significant changes to the existing equipment; the extent of the new functionalities of the equipment; structural changes in platforms.

### 3.3. Later phases of the life-cycle

Next to the development of a new product, Article 13(c) provides that the programme may include the later phases of all or part of the life-cycle of the product, such as pre-production prototyping, production or maintenance. Contracts related to these later phases are covered by the exclusion, provided that these contracts are also awarded in the framework of the cooperative programme. By contrast, a Member State, which participates in the research and development phase, but decides to make its purchases for the later phases of the product life-cycle separately, will have to apply the Directive for the award of these contracts.

### 3.4. Contracts awarded in the framework of a cooperative programme

Article 13(c) applies to all contracts awarded by, or on behalf of, contracting authorities/entities from Member States in the framework of a cooperative programme based on R & D, in so far as the contract fulfils the other conditions of that provision. In this regard, Recital 28 explicitly states that the exception of Article 13(c) should apply to programmes based on R & D that are managed by international organisations, such as the *Organisation Conjointe de Coopération en matière d'Armement* (OCCAR) or NATO agencies, or by agencies of the Union such as European Defence Agency (EDA), which then award contracts on behalf of Member States. The same applies to contracts awarded by contracting authorities/entities of one Member State under the 'lead nation' model, acting on their own behalf and on behalf of at least one other Member State.

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Contracts are awarded ‘in the framework of a cooperative programme’, where they are awarded by the entity or entities designated to that effect by the arrangements governing the cooperative programme, and in accordance with the rules and procedures contained in such arrangements. The existence of several arrangements, each covering different phases of the programme, or changes in the configuration of participating Member States (provided that at least two are part of the programme), do not preclude the fulfilment of this condition for the applicability of Article 13(c).

### 3.5. Programmes ‘conducted jointly by at least two Member States’

Cooperative programmes must be ‘conducted jointly by at least two Member States’. Participation may or may not be restricted to EU Member States. In other words, cooperative programmes with third country participation are also covered by the exemption, as long as at least two Member States are also participating. In any case, and in line with Article 11, the terms ‘conducted jointly’ and ‘cooperative programme’ imply that the programme must be based on a genuinely cooperative concept. Participation in a cooperative programme is therefore interpreted as meaning more than just the purchase of the equipment, but includes in particular the proportional sharing of technical and financial risks and opportunities, participation in the management of, and the decision-making on, the programme. Given the differences between Member States’ defence budgets and the needs of their respective armed forces, the size of individual contributions to cooperative programmes may vary considerably. Therefore, the assessment of whether a programme is based on a genuinely cooperative concept, for the purpose of the application of Article 13(c), needs to focus on the cooperative nature of the programme and the quality of each Member State’s participation, rather than on a quantitative approach.

An R & D programme managed by EU institutions or agencies, i.e. implemented in accordance with EU rules and funded from the EU budget (or by another international organisation to which at least two Member States are parties), would constitute a cooperative programme conducted jointly by at least two Member States in the sense of Article 13(c). Such a programme could – as any R & D programme – be continued for the phases after R & D, in which case contracts awarded in the framework of the follow-up programme may also be excluded under Article 13(c) (see Section 3.3 above).

### 3.6. Member States joining later

With the purpose of stimulating the participation of Member States in cooperative programmes based on R & D, the exclusion under Article 13(c) should be interpreted as allowing a Member State to join such a programme after the end of the R & D phase for the later phases of the life-cycle of the product, provided that it becomes a fully-fledged member of the programme. This means that its participation is formalised in an agreement or arrangement with the other participating Member States and it implies that the new Member State enjoys the specific rights and obligations which are reserved for members of the cooperative programme. In line with Article 11 of the Directive, the participation of the Member State(s) joining later needs to be a genuine participation in the programme, avoiding any circumvention of the rules of the Directive. In this case, the Member State concerned must also notify its accession to the programme.

**▼B****3.7. Notification to the Commission**

The final part of Article 13(c) lists the information which Member States must communicate to the Commission upon conclusion of the programme<sup>(18)</sup>. Although it does not specify how detailed the information on the R & D share, cost-sharing and intended share of purchases must be, on the basis of the general meaning of this provision, it should be interpreted as requiring sufficient information to demonstrate:

- (1) that the programme concerns the development of a new product, or an upgraded product fulfilling the conditions mentioned in paragraph 3.2 above;
- (2) that the participation of Member States in line with Article 11 of the Directive is more than just a symbolic contribution to a national programme and that it concerns a genuine participation.

In order to do so, the notification should at least indicate the share of research and development expenditure relative to the overall cost of the programme and the cost-sharing agreement. The intended share of purchases per Member State should be provided, only to the extent that such information is already available at the time of the notification.

All participating Member States are responsible for their own notification. Member States joining a cooperative programme after its initial phases, including after the end of the R & D phase, must also notify to the Commission their accession to the programme (with, as an option, the other participating Member States in copy).

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Notifications can be sent either by post or by email to the Directorate-General for Defence Industry and Space (DG DEFIS). The email address for the notifications is: EC-DEFENCE-PROCUREMENT@ec.europa.eu

The postal address is:

European Commission  
 Directorate-General for Defence Industry and Space (DG DEFIS)  
 Defence and Security Procurement  
 1049 Bruxelles/Brussel  
 BELGIQUE/BELGIË

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In terms of timing of the notification, Article 13(c) clearly indicates that it should take place ‘upon the conclusion of a cooperative programme’. This means that the notification should take place soon after conclusion of the cooperative programme between the various Member States. In any event, the notification should take place before contracts are awarded.

<sup>(18)</sup> This information needs to be notified to the Commission when a cooperative programme is concluded between Member States only.

**▼B****4. PROCUREMENT THROUGH INTERNATIONAL ORGANISATIONS  
— ARTICLE 12(C) OF THE DIRECTIVE**

The term ‘international organisation’ is not defined in the Directive. The 2010 Guidance Note ‘Defence- and Security- specific exclusions’<sup>(19)</sup> referred to ‘a permanent institution with separate legal personality, set up by a treaty between sovereign states or intergovernmental organisations and having its own organisational rules and structures’. The definition of the UN International Law Commission<sup>(20)</sup> is: ‘an organisation established by a treaty or other instrument governed by international law and possessing its own international legal personality’.

Article 12(c) of the Directive sets out two exceptions.

Pursuant to the first exception, the Directive does not apply to contracts governed by the specific procedural rules of an international organisation purchasing for its purposes. The last sentence of Recital 26 of the Directive clarifies that this refers to ‘contracts awarded by international organisations for their purposes’. Since the Directive is addressed to Member States and cannot bind international organisations, pursuant to Article 12(c), the rules of the Directive do not apply to purchases made by an international organisation on its own behalf and for its own account.

Purchases made by an international organisation for its purposes should be understood to cover purchases of defence equipment/services which were made by an international organisation for (the achievement of) its purposes or missions, as normally defined in the relevant founding instruments. In other words, there should be a clear link between the purposes and missions of the international organisation and what is purchased and determined in the contract award.

Pursuant to the second exception, set out in Article 12(c), the Directive does not apply to ‘contracts which must be awarded by a Member State’ in accordance with the procedural rules of an international organisation. This can be the case, for example, when a Member State acts on behalf of an international organisation or receives a financial contribution from that international organisation for the execution of the contract which obliges it to apply the specific procedural public procurement rules of the international organisation.

Article 11 makes it clear that Member States may not use contract awards via international organisations for the purpose of circumventing the provisions of the Directive. Reliance on the exception of Article 12(c) requires that the Member State wishing to rely on it should be able to justify such a decision (i.e. to demonstrate that the conditions of Article 12(c) are fulfilled).

<sup>(19)</sup> Directive 2009/81/EC on the award of contracts in the fields of defence and security: Defence-and security-specific exclusions, Guidance Note, Directorate-General Internal Market and Services, <http://ec.europa.eu/DocsRoom/documents/15408/attachments/1/translations/>.

<sup>(20)</sup> Yearbook of the International Law Commission 2011, Volume II Part Two, [http://legal.un.org/docs/?path=../ilc/publications/yearbooks/english/ilc\\_2011\\_v2\\_p2.pdf&lang=EF5](http://legal.un.org/docs/?path=../ilc/publications/yearbooks/english/ilc_2011_v2_p2.pdf&lang=EF5).

**▼B****5. CONVERGENCE OF EXISTING CAPABILITIES BETWEEN STATES**

Certain provisions of the Directive explicitly cover situations where at least two Member States set up a defence cooperation initiative. An example of such a provision is Article 13(c), which deals with cooperative programmes for the development of a new product based on R & D conducted jointly by at least two Member States (as illustrated in Section 3).

There could also be situations where the decision to cooperate and start a process of capability convergence (e.g. ‘pooling and sharing’) with other Member State or a third country is made when the military capability in question is already in service in this State or country.

**5.1. Defence cooperation set up at a later stage**

Establishing defence cooperation may require the purchase by a Member State of a capability that is already owned by another Member State or a third country. If the purchase is made from the stock of this other State or country, Article 13(f) provides that the Directive does not apply to this purchase. The Commission Notice on government-to-government contracts explains the rules and best practices applicable in such a situation <sup>(21)</sup>.

**5.2. Negotiated procedure without the publication of a contract notice — Article 28(1)(e)**

Beside government-to-government purchases, it is also possible to make the purchase directly from the producer of the equipment in question. Article 28(1)(e) of the Directive stipulates that the contracting authorities/entities may award contracts for works, supplies and services by a negotiated procedure without prior publication of a contract notice ‘when, for technical reasons or reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator’.

The use of this procedure needs to be justified in the contract award notice, as required by Article 30(3) of the Directive <sup>(22)</sup>.

<sup>(21)</sup> Commission Notice of 30 November 2016— Guidance on the award of government-to-government contracts in the fields of defence and security (Article 13(f) of Directive 2009/81/EC of the European Parliament and of the Council), C(2016) 7727 final (OJ C 450, 2.12.2016, p. 1).

<sup>(22)</sup> Contracting authorities/entities which have awarded a contract or concluded a framework agreement shall send a notice of the results of the award procedure no later than 48 days after the award of the contract or the conclusion of the framework agreement.

In the case of framework agreements concluded in accordance with Article 29, the contracting authorities/entities shall not be bound to send a notice of the results of the award procedure for each contract based on that agreement.

Certain information on the contract award or the conclusion of the framework agreement may be withheld from publication where release of such information would impede law enforcement or otherwise be contrary to the public interest, in particular defence and/or security interests, would harm the legitimate commercial interests of economic operators, public or private, or might prejudice fair competition between them.

**▼B**

Recital 52 of the Directive contains further explanations relating to Article 28(1)(e) of the Directive and examples of situations in which the contract can be awarded only to a specific economic operator. The said Recital reads: ‘it may be the case for certain purchases within the scope of this Directive that only one economic operator is able to execute the contract because it holds exclusive rights, or for technical reasons. In such cases, the contracting authority/entity should be allowed to award contracts or framework agreements directly to that economic operator. However, technical reasons for only one economic operator being able to execute a contract should be rigorously defined and justified on a case-by-case basis. They could include, for instance, strict technical impracticability for a candidate other than the chosen economic operator to achieve the required goals, or the necessity to use specific know-how, tools or means which only one operator has at its disposal. This may be the case, for example, for the modification or retrofitting of particularly complex equipment. Technical reasons may also derive from specific interoperability or safety requirements which must be fulfilled in order to ensure the functioning of the armed forces or security forces.’

Given that the purchase takes place on the basis of Article 28(1)(e) of the Directive, the contract award by the purchasing Member State will be subject to the provisions of the Directive on review procedures (Article 55 *et seq.*). Furthermore, in each situation the presence of technical reasons which preclude the publication of the contract notice must be well explained and justified, also bearing in mind that the applicability of the exception is to be considered on a case-by-case basis and narrowly interpreted.

In situations of cooperation between States in the defence sector, where a Member State buys (directly from the producer) a defence capability that is already owned by another Member State or a third country participating in the cooperation, ‘technical reasons’ in the meaning of Article 28(1)(e) could, for example, occur if the following conditions are met:

- A genuine defence cooperation initiative (e.g. ‘pooling and sharing’, joint maintenance and in-service support, or joint operation) is established by an international agreement or arrangement between the purchasing Member State and other Member States or third countries;
- This is done prior to the definition of the procurement strategy by the buying Member State;
- After having assessed whether like products/equipment on the market would make it possible to implement the defence cooperation initiative, the buying Member State justifies that the procurement of equipment that is the same as that already in service in the other Member State or a third country is the only one allowing the implementation of the defence cooperation initiative. This assessment could e.g. take the form of the market analysis foreseen in Chapter 3 of the Commission Notice providing guidance on the award of government-to-government contracts in the fields of defence and security (Article 13.f of Directive 2009/81/EC).

The above ‘reasons’ for the use of Article 28(1)(e) do not apply to the original procurement of the Member State that first acquired the capability in question.