

Defence procurement – Frequently Asked Questions

1) What is the purpose of Directive 2009/81/EC?

Directive 2009/81/EC constitutes the cornerstone of a truly European Defence Equipment Market. Up until now, defence markets in the EU have remained fragmented along national lines. This has led to a lack of openness and competition, with negative effects on the efficiency of public spending and the competitiveness of European industry. The new Directive will introduce at the European level fair and transparent rules for defence procurement, which will make it much easier for defence companies to access defence markets of other Member States. This openness will be to the benefit of all: industries will get a much bigger European “home” market, armed forces will get better value for money, and taxpayers’ money will be spent in a more efficient way.

2) What are the main innovations of the Directive?

Directive 2009/81/EC is tailor-made to the specificities of defence and security procurement contracts, namely complexity and sensitivity. To cope with these specificities, the new Directive offers a series of new elements: 1) The negotiated procedure with publication can be used without restriction. This gives contracting authorities the flexibility to negotiate with suppliers in detail all features of complex procurement contracts. 2) Specific provisions on security of information are included, which ensure that sensitive information will remain protected against unauthorised access; 3) Special clauses on security of supply will make sure that armed forces will be delivered in time, in particular in times of crisis or armed conflict. 4) Specific rules on subcontracting make it possible to drive competition into the supply chain and improve market access for SMEs. On top of that come specific provisions for research and cooperative projects, which are particularly important in the defence sector. All this makes Directive 2009/81/EC a perfectly suited instrument for the procurement of defence and sensitive security equipment.

3) Will the Directive cover all procurement contracts awarded in the field of security and defence?

Directive 2009/81/EC will cover only specific contracts in the fields of security and defence, to which the current public procurement Directive is ill-suited. These contracts concern namely the procurement of military equipment (i.e. arms, munitions and war material) and security equipment which is particularly sensitive and has similar features to defence equipment. Procurement of non-sensitive and non-military equipment remains covered by the current public procurement Directive (2004/18/EC), even if it is procured by awarding authorities in the field of defence and security.

At the same time, Directive 2009/81/EC – like Directive 2004/18/EC – will apply subject to Article 296 of the Treaty, which means that Member States can still exempt defence and security contracts if this is necessary for the protection of their essential security interests.

4) Which contracts will come under Directive 2009/81/EC and which under Article 296 of the Treaty?

Directive 2009/81/EC applies to arms, munitions and war material, subject to Article 296. This means that, in principle, all military equipment which is on the list of 1958 comes under the new

Directive. Only in cases where the rules of Directive 2009/81/EC are not sufficient to safeguard Member States essential security interests, Member States may use Article 296 to exempt the procurement of such equipment from the Directive. Whether this is the case or not must be assessed on a case-by-case basis. The criteria for this assessment have been explained in the Interpretative Communication of December 2006 and remain valid.

5) What impact will the Directive have on arms trade with third countries?

Directive 2009/81/EC will not change the situation for arms trade with third countries, which remain governed by WTO rules and in particular the Government Procurement Agreement (GPA). It remains Member States' decision to open or not to open competition to non-EU suppliers, in compliance with the GPA. Awarding authorities will still be free to invite EU companies exclusively, or to include non-EU companies.

6) Why does Directive 2009/81/EC apply also to security?

The emergence of transnational and asymmetric security threats has blurred the dividing line between external and internal, military and non-military security. Today, armed forces and (non-military) security forces often work closely together, for example to protect borders or during crisis management operations. Therefore they increasingly use equipment which must be interoperable and which is often based on the same technology. At the same time, the protection against threats such as terrorism or organised crime often necessitates the use of sensitive equipment and access to confidential information. For all these reasons, non-military procurement can be as sensitive as military procurement and require the same security safeguards during the award process. In such cases, it is only coherent to make the same procurement rules applicable.

7) What is the relationship between Directive 2009/81/EC and the Code of Conduct of the European Defence Agency?

The two instruments have the same objective, i.e. to enhance openness of defence markets between Member States, but they differ in scope and nature: Directive 2009/81/EC is a 'first pillar' instrument, which sets legally binding EU (secondary) law and coordinates national procurement rules. It covers the procurement of arms munitions and war material, as well as sensitive non-military security procurements.

The Code of Conduct, by contrast, is a non-binding political agreement which includes a set of general principles for defence (not security) procurement. Member States may apply these principles to the award of defence contracts which are exempted from Community rules on the basis of Article 296. The Code therefore comes into play only in cases where the Directive does not apply.

8) Does Directive 2009/81/EC deal with offsets?

Offsets usually entail discrimination by their very nature and therefore stand in direct contrast to the Treaty. Consequently, Directive 2009/81/EC can neither allow nor regulate them. On the other hand, offset practices differ so much that any attempt to forbid them explicitly in the Directive would have faced serious definition problems. Consequently, Directive 2009/81/EC limits itself to setting the rules and procedures for the award of defence contracts and leaves it up to Member States to ensure that possible offset requirements stay in line with the rules of the Directive and the Treaty. This is particularly important since offsets, in particular civil offsets, are legally problematic also when they are required for contracts which are exempted under Article 296.