

EVALUATION ROADMAP			
TITLE OF THE EVALUATION/FC	Evaluation of Directive 2009/81/EC (Defence Procurement Directive)		
LEAD DG – RESPONSIBLE UNIT	GROW G3	DATE OF THIS ROADMAP	10/03/2016
TYPE OF EVALUATION	Evaluation	PLANNED START DATE	11 / 2015
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	Internal	PLANNING CALENDAR	http://ec.europa.eu/smart-regulation/evaluation/evaluation_planning_en.htm
This indicative roadmap is provided for information purposes only and is subject to change.			

A. Purpose
(A.1) Purpose
<p>The purpose of this evaluation is to evaluate the functioning of Directive 2009/81/EC¹, including the assessment of whether, and to what extent, its objectives “<i>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 (EDTIB), having regard, inter alia, to the situation of small and medium-sized enterprises</i>” (Article 73(2)).</p> <p>This evaluation will be the basis for the report on the implementation of Directive 2009/81/EC foreseen in Article 73(2) thereof.</p>
(A.2) Justification
<p>Article 73(2) of Directive 2009/81/EC stipulates that the Commission shall review the implementation of Directive 2009/81/EC and report thereon to the EP and the Council by 21 August 2016.</p>

B. Content and subject of the evaluation
(B.1) Subject area
<p>The Directive 2009/81/EC regulates public procurement procedures for the award of certain works, supply and service contracts in the fields of defence and security. In the area of defence, the scope of the Directive is based on the list of arms, munitions and war material adopted by the Council in its Decision 255/58 of 15 April 1958. It covers, subject to the relevant exclusions and Treaty-based derogations, all contracts for the procurement of military equipment, works and services that are above the applicable thresholds. Moreover, the Directive also applies to all sensitive purchases which have a security purpose and involve classified information.</p> <p>The directive introduces at EU level: i) fair and transparent rules to help companies access defence and security markets in all EU countries; ii) flexibility for contracting authorities to negotiate in detail all features of complex contracts; iii) the option for contracting authorities to require safeguards (from suppliers) to ensure the protection of classified information and to address security of supply concerns.</p>
(B.2) Original objectives of the intervention
Prior to Directive 2009/81/EC (the Defence Procurement Directive), public contracts awarded in the fields of

¹ 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, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32009L0081&rid=1>.

defence and security fell within the scope of Directives 2004/18/EC (the Classical Directive) and 2004/17/EC (the Utilities Directive) on public procurement, subject to the relevant Treaty-based derogations, in particular Article 346 TFEU (Article 296 TEC before 2009).

The problem identified in the Impact Assessment² – which led to the Commission's proposal for a Directive on Defence Procurement³ – was that many Member States used Article 296(1)(b) TEC (now Article 346 (1)(b) TFEU) extensively to exempt the procurement of defence equipment from EU public procurement rules. In the fields of defence and security, Directive 2004/18/EC was rarely applied by the Member States. Thus, derogations which should have been the exception according to the Treaty and Court of Justice case law were, in practice, the rule.

The cause of the problem was deemed to lie in the lack of EU rules suited to the specific features of defence and sensitive security contracts, in particular complexity (which calls for flexibility) and special requirements for security of supply and security of information. This meant that most defence and sensitive security equipment was procured on the basis of uncoordinated national rules, and often without complying with the principles of competition, non-discrimination and transparency.

The general objective of the Defence Procurement Directive is to contribute to the establishment of an open and competitive European Defence Equipment Market (EDEM). The gradual establishment of EDEM is essential for strengthening the European Defence Technological and Industrial Base (EDTIB) and developing the military capabilities that Member States need, including in support of the Common Security and Defence Policy.

In the field of public procurement, this requires a properly functioning regulatory framework at EU level for the award of contracts in the field of defence and security.

The operational objective of the Defence Procurement Directive is to limit the use of the exemptions, in particular under Article 346 TFEU, to exceptional cases, in accordance with the case law of the EU Court of Justice. The majority of contracts in the field of defence and security, including those for the procurement of arms, munitions and war material, should thus be awarded on the basis of EU rules in order to enhance equality of treatment, transparency and non-discrimination. At the same time, Member States' security interests must be ensured.

(B.3) How the objectives were to be achieved

As it results from the Impact Assessment, the overall underlying approach of the Defence Procurement Directive is to coordinate the diverging rules existing at national level on defence and security procurement and to lay down rules tailor-made to the specificities of the defence sector, thereby leading to reduced reliance on Article 346 TFEU.

The key element of these tailor-made rules cover: i) the procedures: the negotiated procedure with publication of a contract notice is authorised without the need for specific justification in order to allow the flexibility required to award sensitive defence and security contracts; ii) 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; iii) security of information: similarly, the often 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.

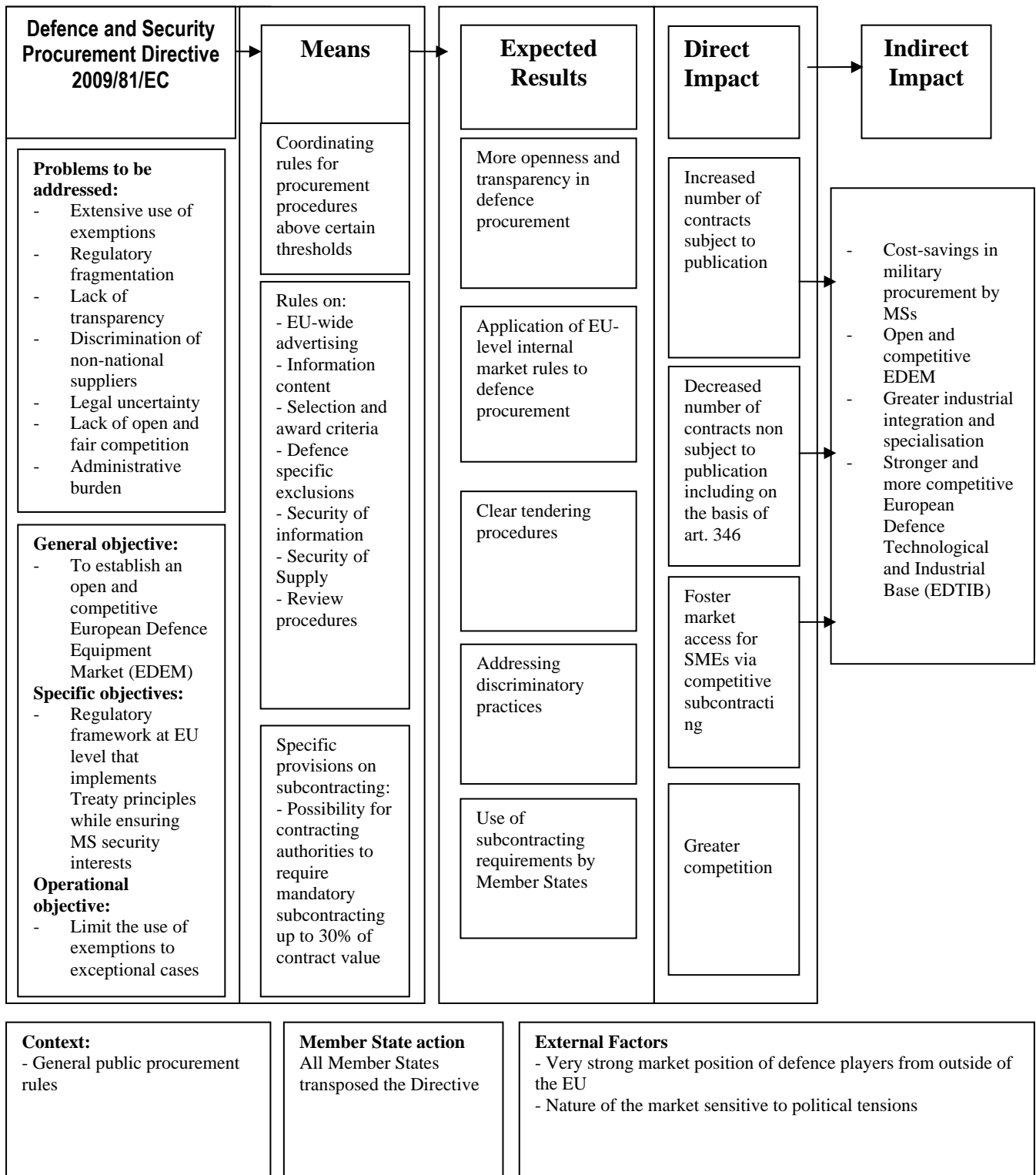
Availability of tailor-made EU public procurement rules and reduced use of Treaty-based derogations such as Article 346 TFEU should directly contribute to the increase of the number of defence and security contracts awarded according to transparent and competitive tendering procedures, thereby strengthening market openness and efficiency.

Competition should encourage suppliers to optimise production capacity and help to lower costs, thus saving scarce public finances. All this should, in turn, strengthen the competitiveness of European defence industry, by helping to reduce duplication, and enhancing industrial integration and specialisation.

See also the diagram below:

² Commission staff working document - Accompanying document to 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 - Impact Assessment, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52007SC1598&from=EN>.

³ 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, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52007PC0766&from=EN>.



C. Scope of the evaluation

(C.1) Topics covered

The whole Defence Procurement Directive is subject to evaluation. The evaluation will cover the period from before the transposition of the Directive 2011-2012 until the latest moment for which data are available (end of 2015, beginning of 2016). The geographical scope covers the 28 Member States of the EU and the 3 EEA countries.

(C.2) Issues to be examined

The topic of the evaluation is the functioning of the Directive, including i) the extent of the use of competitive tendering procedures under the Directive; ii) the openness of the market including in terms of cross-border trade; iii) the situation of the defence market and industrial base (including intermediate companies and SMEs) based on available data, setting out the main trends in their evolution over a given period of time, and identifying the main factors that may have contributed to such trends and developments.

1. Relevance

To what extent is the intervention still relevant?

In what way has the initial problem evolved?

Have any new issues that need to be taken into account emerged since the adoption of the Directive and what are they?

2. Effectiveness

To what extent have the objectives of the Directive been achieved?

- To what extent have competition, transparency and non-discrimination in the defence procurement market in Europe increased as a result of the Directive?
- To what extent has the extensive use of the essential security interest exemption been limited as a result of the Directive?
- Have there been any major structural changes in the European Defence Equipment Market (EDEM) and the European Defence Technological and Industrial Base (EDTIB), including with regard to SMEs and to what extent can they be attributed to the Directive?
- To what extent the rules of the Directive safeguard sufficiently Member States security concerns?

What are the factors, if any, affecting the implementation of the Directive?

3. Efficiency

To what extent has the intervention been cost-effective?

To what extent are the costs proportionate to the benefits achieved?

4. Coherence

To what extent is the Directive coherent with the framework of EU Public Procurement law and of internal market legislation and policies related to defence (e.g. Directive 2009/43/EC on Intra-EU transfers of defence-related products; Communication "Towards a more competitive and efficient defence and security sector", etc.)?

How does the Defence Procurement Directive fit into the framework of other EU instruments and policies in particular in the area of CSDP?

5. Added value of the EU intervention

To what extent do the issues addressed continue to require action at EU level?

What has been the EU added value of the Directive compared to what could have been achieved by Member States at national (or regional) level (is the principle of subsidiarity respected)?

(C.3) Other tasks
N.A.

D. Evidence base

(D.1) Evidence from monitoring

The main sources of evidence and data on the functioning of the Defence Procurement Directive will be:

- Notices and information published on the Tender Electronic Daily (TED) – Supplement to the EU Official Journal;
- Notices and information published on the Electronic Bulletin Board (EBB) of the European Defence Agency (EDA) – active from 2006 to 2012;
- Statistical reports that Member States provide annually to the Commission under Article 65 of the Directive;
- Other sectorial databases and data e.g. gathered by non-governmental institutions.

These sources would be sufficient to estimate the number and value of defence and security contracts awarded in the EU before and after the entry into force of the Directive. As far as the publications under the Directive are concerned, the analysis will look into more specific aspects e.g. concerning cross-border penetration, the use of procedures, subcontracting arrangements, SMEs participation, competition levels, etc.

These data should allow for quantitative analysis to be carried out at a sufficient level of confidence and robustness.

The evaluation will also aim at providing a picture of the situation of the defence market (EDEM) and industrial base (EDTIB), including the situation of SMEs, and to describe any major structural changes that may have occurred over a given period of time. To this end, the evaluation will draw on: data contained in TED, specialised databases, academic literature, existing studies, specialised press, and other relevant publicly available information.

These data sources will be complemented by information and inputs collected through the consultation activities described below under point D4.

(D.2) Previous evaluations and other reports

There was no previous evaluation.

The evaluation will take into account the elements contained in the Impact Assessment at the basis of the Commission's proposal on the Defence Procurement Directive.

The evaluation will also build on the indications set out in the Staff Working Document⁴ accompanying the Commission Communication "Towards a more competitive and efficient defence and security sector" of July 2013⁵, Implementation Roadmap to the Communication⁶, the Progress Report following the Communication⁷, as well as the final report of the study on the "Openness of Member States' defence markets" done by Europe Economics Chancery House for the Commission services in 2012.

(D.3) Evidence from assessing the implementation and application of legislation (complaints, infringement

⁴ COMMISSION STAFF WORKING DOCUMENT On Defence Accompanying the document Communication Towards a more competitive and efficient defence and security sector, SWD/2013/0279 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52013SC0279&rid=1>.

⁵ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Towards a more competitive and efficient defence and security sector, COM/2013/0542 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52013DC0542&rid=1>.

⁶ Implementation Roadmap, A New Deal for European Defence (COM 2014/387) in June 2014, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2014:387:FIN>

⁷ Progress Report on the implementation of the Communication adopted in May 2015, http://ec.europa.eu/growth/sectors/defence/files/communication-implementation-report_en.pdf

procedures)
<p>The evaluation will also draw on the Commission's report of 2012 on the transposition of the Directive⁸ as well as subsequent reviews of the transposition of the Directive by Member States.</p> <p>Other information available to the Commission services in the context of their activities to oversee the application of EU law in the field of defence procurement may also provide relevant elements for the evaluation.</p>
(D.4) Consultation
<p>A 12-week internet-based public consultation will be carried out between the first and the second quarter of 2016. This will be based on an online questionnaire: http://ec.europa.eu/yourvoice/consultations/.</p> <p>This public consultation will aim at giving to all potential stakeholders an opportunity to respond: Member States' procurement authorities active in the fields of defence and security, other public authorities, businesses operating in the defence and security markets, business associations, social partners, NGOs, consultancies, academics, other relevant stakeholders and citizens.</p> <p>This will be complemented by the following activities to be carried out in parallel:</p> <ul style="list-style-type: none"> • Consultations with Member States' experts via the Commission's governmental expert group on defence and security procurement; • Interviews and consultations with key actors (such as the European Defence Agency) and stakeholders including industry. • With specific regard to the situation of SMEs, consultations with Member States and industry experts will also take place in the context of the Commission's Advisory Expert Group on cross-border access for SMEs to defence and security contracts, which was established in April 2015.
(D.5) Further evidence to be gathered
N.A.

E. Other relevant information/ remarks
N.A.

⁸ REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on transposition of directive 2009/81/EC on Defence and Security Procurement, COM/2012/0565 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52012DC0565&from=EN>.