

**Directive 2009/81/EC on the award of contracts
in the fields of defence and security**

**Guidance Note
*Field of application***

Directorate General Internal Market and Services

1) Principles

1. Directive 2009/81/EC (hereinafter “the Directive”) is applicable to the award of certain contracts in the fields of defence and security by contracting authorities and entities. Contracts awarded by contracting authorities and entities in these fields which are not covered by Directive 2009/81/EC will in principle continue to be subject to Directives 2004/17/EC and 2004/18/EC¹.

2. The definition of the contracts covered by the Directive is based on a twofold approach: In the area of defence, the scope of the Directive is based on that of Article 346 TFEU and covers, in principle, all contracts for the procurement of military equipment, works and services. Moreover, the Directive also applies to all sensitive purchases which have a security purpose and involve classified information.

2) The exception of Article 346 TFEU (ex Article 296 EC Treaty)

3. The Directive – as an instrument of secondary EU law – does not change the Treaty and must abide by the Treaty (primary EU law). Its application is therefore also subject to the exceptions provided for by the Treaty on the Functioning of the European Union, in particular Articles 36, 51, 52, 62 and 346 TFEU (ex Articles 30, 45, 46, 55 and 296 EC Treaty).

In the context of defence, Article 346 TFEU is the most relevant Treaty-based derogation. This means in particular that contracts may be awarded without applying the Directive in cases where this is necessary for the protection of essential security interests of a Member State.

Article 346 TFEU refers to measures which a Member State “*considers necessary for the protection of the essential interests of its security*” or to “*information the disclosure of which it considers contrary*” to those interests. The definition of their essential security interests is the sole responsibility of Member States². However,

¹ See, for details, Article 22a of Directive 2004/17/EC and Article 10 of Directive 2004/18/EC, as amended by Directive 2009/81/EC

² Recital 16 of the Directive; see also judgment of 30 September 2003 in Case T-26/01 *Fiocchi Munizioni SpA*, paragraph 58.

according to ECJ case-law, Article 346 TFEU does not allow Member States to depart from the provisions of the Treaty by nothing more than simply referring to such interests.³ The ECJ has also stated that the derogation under Article 346 TFEU is limited to exceptional and clearly defined cases, and that the measures taken must not go beyond the limits of such cases.⁴ Like any other derogation from fundamental freedoms, it has to be interpreted strictly.⁵

4. Therefore, if a Member State intends to rely on Article 346 TFEU to award a contract covered by the Directive (or by Directives 2004/17/EC or 2004/18/EC) without observing the procedural requirements laid down by those Directives, it must ensure that the measure chosen – for example the direct award of the contract to a specific producer – is necessary in order to protect its essential security interest.⁶ The decision to use Article 346 TFEU must therefore be based on a case-by-case assessment which identifies the essential security interests at stake and evaluates the necessity of the specific measure, i.e. the non-application of the Directive, taking into account the principle of proportionality and the need for a strict interpretation of Article 346 TFEU.

In this context, it is important to be aware that EU law now provides, through Directive 2009/81/EC, a legal instrument that has been specifically created to meet the specific needs and requirements of defence and security procurement.

However, there may still be contracts which, for example, necessitate such extremely demanding requirements in terms of security of supply, or which are so confidential and/or important for national sovereignty, that even the specific provisions of Directive 2009/81/EC would not be sufficient to safeguard a Member State's essential security interests.⁷ In these cases, the Member State concerned must ensure and, if necessary, be able to demonstrate that the concrete measure taken is objectively suitable for the protection of the essential security interest identified and that, in qualitative and quantitative terms, it does not go beyond what is strictly necessary for that purpose.

It follows that the contract award procedures provided for in Directive 2009/81/EC should be considered as the standard procedures for defence and sensitive security procurement, and that recourse to Article 346 TFEU should be limited to clearly exceptional cases.

³ See recently judgments of 15 December 2009 in Cases C-284/05 *Commission v Finland*, paragraph 47, C-294/05 *Commission v Sweden*, paragraph 45, C-372/05 *Commission v Germany*, paragraph 70, C-387/05 *Commission v Italy*, paragraph 47, C-409/05 *Commission v Greece*, paragraph 52, C-461/05 *Commission v Denmark*, paragraph 53 and C-239/06 *Commission v Italy*, paragraph 48.

⁴ See judgment in Case C-414/97 *Commission v Spain*, paragraph 22, and judgments of 15 December 2009, for instance Case C-239/06, paragraph 68.

⁵ See judgments of 15 December 2009, for instance Case C-239/06, paragraph 69.

⁶ See judgments of 15 December 2009, for instance Case C-239/06, paragraph 72.

⁷ See recital 16.

3) Personal scope

5. The Directive is applicable to contract awards made by **contracting authorities or entities**. Article 1 (17) defines these terms by reference to Article 1 (9) of Directive 2004/18/EC and Article 2 of Directive 2004/17/EC.

Accordingly, **contracting authorities** are the **State, regional or local authorities, bodies governed by public law** and associations formed by such authorities or bodies. A **body governed by public law** means a body established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character that has legal personality and is closely dependent on the State, regional or local authorities or other bodies governed by public law⁸. This might be the case, for example, for science, research and development establishments, emergency services or police forces.

The term “**contracting entities**” covers, besides contracting authorities, **public undertakings**⁹ that pursue activities in the sectors referred to in Articles 3 to 7 of Directive 2004/17/EC, as well as other entities, **including private undertakings**, that perform sectoral activities and operate **on the basis of special or exclusive rights** granted by a Member State. The sectors referred to in the Directive include the supply of gas, heat, electricity and water, transport services and postal services, as well as the provision of ports and airports¹⁰. The Directive might therefore apply to port and airport operating companies and operators of networks for the distribution of gas, heat, electricity or water or public transportation networks.

4) Material scope

6. The Directive covers the award of the following categories of contracts above the thresholds set out in Article 8:

- **Supply contracts for military equipment**, including any parts, components and/or subassemblies (Article 2 (a));
- **Supply contracts for sensitive equipment**, including any parts, components, and/or subassemblies (Article 2 (b));
- **Works, supplies and services contracts directly related to the equipment** mentioned above for any and all elements of its life cycle (Article 2 (c));
- **Works contracts and services contracts for specifically military purposes or sensitive works and sensitive services** (Article 2 (d)).

The terms “contracts”, “works contracts”, “supply contracts” and “service contracts” are defined in Article 1 (2), (3), (4) and (5) of the Directive.

⁸ See, for details, the definition in Article 1 (9) of Directive 2004/18/EC.

⁹ “Public undertakings” are undertakings over which contracting authorities exercise directly or indirectly a dominant influence by virtue of ownership, financial participation or of the rules governing such undertakings, see Article 2 (1) (b) of Directive 2004/17/EC.

¹⁰ See, for details, the definitions in Articles 3 to 7 of Directive 2004/17/EC.

4.1) Military purchases

4.1.1) Supply of military equipment

7. According to Article 2 (a), the Directive applies to contracts awarded for "*the supply of military equipment, including any parts, components and/or subassemblies thereof*".

Military equipment is defined in Article 1 (6) as "*equipment specifically designed or adapted for military purposes and intended for use as an arm, munitions or war material*." Recital 10 specifies that military equipment "*should be understood in particular as the product types included in the list of arms, munitions and war material adopted by the Council in its Decision 255/58 of 15 April 1958*".¹¹

With regard to the supply of military equipment, the material scope of the new Directive is therefore defined on the basis of the same list which also determines the field of application of Article 346 TFEU. This reflects the basic conception of the European legislator: the Directive is intended as a general procurement regime adapted to the specific requirements of contract awards for the supply of military equipment, while Article 346 TFEU provides a derogation for exceptional situations where even the specific provisions of the Directive are not sufficient to safeguard the essential security interests of the Member States.

8. However, the 1958 list does not necessarily give an exhaustive description of the scope of the Directive with regard to the supply of military equipment.

First, recital 10 introduces some flexibility in the use of the 1958 list for the application of the Directive. It states in particular that the list "*is to be interpreted in a broad way in the light of the evolving character of technology, procurement policies and military requirements which lead to the development of new types of [defence] equipment*". Such flexibility seems appropriate, in particular since the list is rather generic and over 50 years old. It may therefore be the case, for example, that military equipment is not explicitly mentioned in the list simply because it did not exist in 1958 when the list was drawn up (e.g. IT soft- and hardware). Nevertheless, procurement of such equipment is covered by the Directive, provided that the equipment is *specifically designed or adapted for military purposes*.

Second, recital 10 states further that, "*for the purpose of this Directive, military equipment should be understood in particular [not exclusively] as the product types [not simply products] included in the list of 1958*. It specifies explicitly that "*Member States may limit themselves to this list only when transposing this Directive*". This implies that Member States can also use other lists, such as the (explicitly mentioned) Common Military List of the EU, for a modern interpretation of the 1958 list. The latter list is thus the most important, but not the exclusive reference for describing the field of application.

¹¹ The 1958 list was translated in November 2008 into all languages of the EU and is publicly available since then (<http://register.consilium.europa.eu/pdf/en/08/st14/st14538-re04.en08.pdf>).

Moreover, for the purposes of this Directive, military equipment means not only equipment specifically *designed*, but also specifically *adapted*, for military purposes. Also in this regard, the scope of the Directive is broader than the scope of Article 346 (1) (b) TFEU. Whereas Article 346 (1) (b) TFEU covers "*only equipment which is designed, developed and produced for specifically military purposes*", the Directive also covers *products which, although initially designed for civilian use, are later adapted to military purposes to be used as arms, munitions or war material*" (Recital 10).¹² This can be the case, for example, for a "militarised" version of a helicopter which was initially developed for the civil market. However, to qualify as "military equipment" in the meaning of this Directive, the helicopter would have to have distinguishable military technical features (weapon systems, avionics, etc.) enabling it to carry out missions that are clearly military (e.g. armed reconnaissance, fire support, air-to-air combat).

4.1.2) Works, supplies and services directly related to military equipment

9. The Directive covers not only military equipment, but also *works, services and supplies directly related to [such] equipment*" (Article 2 (c)). This provision highlights the comprehensive nature of the Directive's scope. *Supplies directly related to military equipment* include, for example, special tools and machines which are necessary for the production or maintenance of such equipment. It can also mean additional equipment, such as special suits and helmets for pilots of combat aircraft. *Services directly related to military equipment* may include, for example, the overhaul and repair of military aircraft, tanks, warships, etc. *Works directly related to military equipment* may concern, for example, the construction of test facilities for military equipment.

Moreover, the Directive applies to the award of such contracts "*for any and all elements of [the] life cycle*" of military equipment. According to recital 12, this covers "*research and development, industrial development, production, repair, modernisation, modification, maintenance, logistics, training, testing, withdrawal and disposal. These stages include, for example, studies, evaluation, storage, transport, integration, servicing, dismantling, destruction and all other services following the initial design.*"

10. It should be noted that the term "*directly related*" signifies that there must be a close connection between the works, services or supplies in question and the military equipment. Such a connection may result, *inter alia*, from the purpose or the conditions of use. In principle, the connection must be so close that the works, services or supplies may not be put to a meaningful use without the military equipment to which it is related.

¹² See also Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement, Com (2006) 779 final.

4.1.3) Services and works for specifically military purposes

11. The Directive also applies to services and works for “*specifically military purposes*” Article 2 (d). This concerns services and works which are not directly related to military equipment but have a specific military purpose. Such “stand alone” services can include, for example, the transport of troops. Works for specifically military purposes can relate, for example, to the construction of a runway or air raid- and fall-out shelters.

It is clear from the wording that the services and works in question must be procured for specifically military purposes. It follows that all contracts for works and services for which this is not the case have to be awarded under Directives 2004/18/EC and 2004/17/EC.¹³ The decisive element is thus the purpose assigned to the works or services by the contracting authority/entity at the beginning of the award procedure.

4.2) Security

4.2.1) Supply of sensitive equipment, sensitive works and sensitive services

12. According to Article 2, the Directive applies to contracts awarded for “*the supply of sensitive equipment, including any parts, components and/or subassemblies thereof*” (b), and for “*sensitive works and sensitive services*” (d).

In this area, the definition of the scope is inevitably more generic than in defence, since the concept of “security” itself is generic. In today's strategic environment, security covers a broad range of very different areas, missions and actors. Moreover, in certain areas, the dividing line between defence and security is blurred, which multiplies the similarities between military and non-military security needs and purchases. The aim of the Directive is to cover these “grey” areas in particular.

Recital 11 specifies the purpose of sensitive procurement covered by the Directive and gives some examples of areas in which such procurement is most likely to occur: “*In the specific field of non-military security, this Directive should apply to procurements which have features similar to those of defence procurements and are equally sensitive. This can be the case in particular in areas where military and non-military forces cooperate to fulfil the same missions and/or where the purpose of the procurement is to protect the security of the Union and/or the Member States, on their own territory or beyond it, against serious threats from non-military and/or non-governmental actors. This may involve, for example, border protection, police activities and crisis management missions.*”

Since security is a broad concept, the Directive concerns a large number of contracting authorities in different areas (police, customs services, civil protection, etc.), which may belong to the national, regional or even local level. It may also happen that contracting authorities in the field of defence procure sensitive

¹³ See judgment in Case C-337/05, *Commission v Italy*,

equipment, works and services which are not of a military nature or purpose. Moreover, Directive 2009/81/EC also applies to contracts awarded by contracting entities as defined in Directive 2004/17/EC. This may concern in particular operators of critical infrastructures in sectors such as transport or energy, who often need protection against the threats mentioned in recital 11.

13. Article 1 (7) defines sensitive equipment, works and services as "*equipment, works and services for security purposes, involving, requiring and/or containing classified information*". Classified information, in turn, is defined in Article 1 (8), as "*any information or material, regardless of the form, nature or mode of transmission thereof, to which a certain level of security classification or protection has been attributed, and which, in the interests of national security and in accordance with the laws, regulations or administrative provisions in force in the Member State concerned, requires protection against any misappropriation, destruction, removal, disclosure, loss or access by any unauthorised individual, or any other type of compromise*".

Thus, the definition is based on two aspects: The equipment, works and services in question must:

- (1) have a security purpose and
- (2) involve, require and/or contain classified information.

Security purpose: This requirement means that the equipment, works and services must be procured for a (military or non-military) security use. Unlike the definition of military equipment in Article 1 (6), the present definition does not require that equipment has been "specifically designed or adapted" for security purposes.

Classified information: The reference to classified information forms the core element of the definition. The equipment, works or services must involve access to classified information. According to Article 1 (8), classified information requires protection "in the interests of national security and in accordance with the laws, regulations or administrative provisions in force in the Member State concerned". Thus, the classification or protection must result from the application of legislation, regulation or administrative provisions. In the absence of such a regulatory basis, the contracting authority/entity may not decide on its own initiative to declare certain information as classified or protected. Furthermore, the classification or protection must have been assigned in the interest of national (military or non-military) security. This includes also EU classified information (whether it is classified as such by EU institutions or by national authorities). However, it excludes information that is classified or protected for other reasons such as protection of privacy, data protection or economic interests.

4.2.2) Works, supplies and services directly related to sensitive equipment

14. This hypothesis is subject to the conditions already described under point 3.1.2. The works, supplies and services in question must be so closely connected to the sensitive equipment that they may not be put to a meaningful use without that equipment.

5) Mixed contracts

15. Article 3 of the Directive contains a set of rules dealing with so-called “mixed contracts”, i.e. contracts that have as their subject different supplies, works or services, with some of them coming under Directive 2009/81/EC and some not. This provision is inspired by Article 9 (2) and (3) of Directive 2004/17/EC. It distinguishes between two situations:

- (1) The contract combines items falling under Directive 2009/81/EC and items falling under Directive 2004/17/EC or Directive 2004/18/EC. This can be the case, for example, if a contracting authority/entities purchases sensitive equipment and non-sensitive equipment in a single contract.
- (2) The contract covers items falling under Directive 2009/81/EC and items that are outside the scope of the procurement Directives (Directives 2009/81/EC, 2004/17/EC and 2004/18/EC). This may happen if part of a large order of military equipment falls under Article 346 TFEU.

In both cases, the same principle applies: The contracting authority/entity may apply the less strict procedure to the whole contract, provided that the decision to award a single contract is justified for objective reasons and has not been taken for the purpose of excluding contracts from the application of Directive 2009/81/EC or of Directives 2004/18/EC and 2004/17/EC. Therefore, in case (1), the whole contract shall be awarded under Directive 2009/81/EC, while in case (2) the whole contract is not subject to the Directives.

It has to be pointed out, however, that the effect of the application of these rules is that contracts are withdrawn from the scope of Directives which would normally apply to them. Article 3 therefore has to be interpreted strictly. Contracting authorities/entities relying on this provision have to demonstrate that the various components of the mixed contract are objectively linked in a way that makes it necessary to award a single contract to a single partner.¹⁴ Strict interpretation is particularly important in cases where the use of Article 3 would lead to the mixed contract being exempted from EU law on the basis of Article 346 TFEU. In such a case, the proportionality of the measure as a whole, i.e. the non-application of the Directive to the entire procurement, will have to be ensured.

This guidance note reflects the views of the services of DG MARKT and is legally not binding. Only the Court of Justice is competent to give a legally binding interpretation of EU law.

¹⁴ See judgment of 6 May 2010 in Joined Cases C-145/08 and C-149/08 Club Hotel Loutraki AE, paragraphs 45 to 64.