

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

**Guidance Note
*Security of Supply***

Directorate General Internal Market and Services

1) Introduction

1. In general terms, Security of Supply can be defined as a guarantee of supply of goods and services sufficient for a Member State to discharge its defence and security commitments in accordance with its foreign and security policy requirements.¹ This includes the ability of Member States to use their armed forces with appropriate national control and, if necessary, without third party constraints. Such a broad concept can cover a wide range of different industrial, technological, legal and political aspects.

The Directive recognises the particular importance of Security of Supply for defence and security procurement². Security of Supply is crucial, particularly in times of crisis, when reliable and in-time delivery can literally be vital. Moreover, Security of Supply is particularly challenging, because of the extremely long life-cycle of most military equipment, which necessitates logistical support, upgrades, modernisation etc for many years.

2. The capacity of a supplier to fulfil the Security of Supply requirements of contracting authorities depends on its industrial capacities (to deliver products and services ordered by contracting authorities/entities in time). However, if the performance of a contract implies cross-border movements of goods and services, the contractor's capacity also depends on the authorisation of national authorities to transfer the equipment/services to the purchasing Member State. This is the case not only for the initial purchase, but also for all follow-on supplies and services which occur until the end of the life cycle of a product. The situation becomes even more complex when the supply chain of the prime contractor is organised internationally. Transfer and export licences are then needed not only for the delivery of the final product to the contracting authority/entity, but also for the delivery of components and sub-systems from sub-suppliers to the system integrator.

3. Although licences for transfers among EU Member States are hardly ever refused, there is always at least a possibility that they *could* be refused, excessively delayed or linked to conditions that could compromise Security of Supply needs (if not for the purchase, then possibly later during the in-service time). By introducing a system of

¹ See Lol Framework Agreement and Implementing Arrangement.

² See recitals 8 and 9 of the Directive.

general and global licences for intra-EU transfers at EU level, Directive 2009/43/EC will improve this situation. However, it will not create a licence-free zone. Moreover, suppliers established in the EU may use sub-systems and components from non-EU sources and may therefore be obliged to comply with export restrictions imposed by third countries. Last but not least, Article 346 TFEU remains in place and can be used in exceptional cases to justify the refusal of transfer licences. Security of Supply will therefore remain not just an industrial, but also a political issue which is by definition difficult to resolve in the Directive.

4. Moreover, Security of Supply concerns may go beyond specific equipment and may include industrial capabilities more generally. Given the predominance of national governments as sole (launching) or main customers, their procurement decisions can have a direct impact on the technological capacity of a Member State's defence industrial base. In certain cases, the non-award of contracts for development, production or logistic support for specific equipment could in fact lead to the loss of industrial capacities (or mean that these capacities are not built up). In the defence domain, this has not only economic, but also strategic and political implications. Member States may therefore consider it as an essential security interest to have in certain strategic sectors key industrial capabilities on their own territory in certain strategic sectors, and not to depend on non-national suppliers.

2) Security of supply in the Directive

2.1) Security of supply requirements

5. Security of Supply requirements within the meaning of the Directive are contractual requirements imposed by contracting authorities/entities to ensure reliable and in-time delivery of sufficient quantities of defence and security equipment and services, as well as continuous availability of maintenance and repair capabilities, spare parts and other support in all conditions, especially in crisis situations.

6. According to Article 23, contracting authorities/entities shall specify their Security of Supply requirements in the contract documentation (contract notices, contract documents, descriptive documents or supporting documents). These requirements may typically take the form of conditions for the performance of a contract. They can also be used in the award procedure as selection criteria or award criteria.

The Directive indicates the areas that Security of Supply requirements may cover, but it does not give a comprehensive definition of the concrete content of these requirements. Recital 44 only mentions '*internal rules between subsidiaries and the parent company with respect to intellectual property rights*' and '*the provision of critical service, maintenance and overhaul capacities to ensure support for purchased equipment throughout its life-cycle*' as examples for such requirements. Article 23 provides a list of particulars which contracting authorities/entities may require for inclusion in the tender. However, this list is not exhaustive and most particulars actually describe rather what information to provide and what commitment to take than the

concrete requirements. The same is true for Article 42, which describes the means by which candidates or tenderers can furnish evidence of their technical capacities, but not directly the selection criteria formulated by the contracting authority/entity.

This leaves contracting authorities/entities with the flexibility to define their Security of Supply requirements. Such flexibility is necessary in order to adapt these requirements to the specificities of each procurement project and to cope with all kinds of Security of Supply risks (which may differ depending on the individual situation of each tenderer).

2. 2) Importance of the principle of non-discrimination

7. Given the specificities of the defence market (where the movement of goods and services is highly regulated), it is particularly important for contracting authorities/entities to ensure that their Security of Supply requirements comply with the principle of non-discrimination.

8. The European Court of Justice has repeatedly stated that, in public procurement, the principle of equal treatment of candidates and tenderers is intended to afford equality of opportunity to all tenderers when formulating their tenders, regardless of their nationality.³ This means first and foremost that, within the EU, the nationality of a supplier or the Member State of establishment of a company cannot be by itself considered as a Security of Supply requirement.

9. The principle of non-discrimination not only prohibits overt discrimination by reason of nationality or establishment, but also all indirect forms of discrimination which, by the application of other criteria of differentiation operating mainly to the detriment of foreign suppliers, lead to the same result.⁴ Accordingly, Security of Supply requirements must not be formulated in a way that only national suppliers can fulfil them. This means in particular that contracting authorities/entities may not use the mere fact that suppliers from other Member States need transfer licences as an argument to exclude them from the award procedure.

10. Furthermore, even if Security of Supply requirements do not entail direct or indirect discrimination, they still have to comply with the principle of proportionality, if they restrict market access for suppliers from other Member States.⁵ Where a Security of Supply requirement implies such restrictions, the contracting authority/entity must be prepared to demonstrate that the requirement in question was appropriate to attain its Security of Supply objective and that it was not possible to attain this objective by less restrictive requirements. This justification must always be based on the specific features of the individual procurement project concerned.

³ See judgment of 13 October 2005 in Case C-458/03 Parking Brixen GmbH, paragraph 48.

⁴ See judgments of 26 September 2000 in Case C-225/98 Commission v France, paragraph 80, of 13 November 2007 in Case C-507/03 Commission v Ireland, paragraphs 30-31.

⁵ See judgment of 16 December 2008 in Case C-213/07 Michaniki AE, paragraphs 47 to 48 and 60 to 63.

11. Security of supply requirements should therefore be described as neutrally and objectively as possible, using technical and operational terms. They will usually be expressed in time-limits and quantities (indication of quantities to deliver to specific locations within a given timeframe), but can also refer to information or commitments which the contracting authority may need in order to ensure the long-term support of defence equipment (IPRs, technical information, etc.). Any decision to exclude specific tenderers must be justified on the basis of the individual situation of the tenderer in question.

In this context, it is also important to note that any decision concerning the award of a contract must be communicated to the candidate or tenderer concerned *‘at the earliest opportunity’* (Article 35 (1)). Moreover, unsuccessful candidates and tenderers can request to be informed of the reasons for rejection. This also includes the reasons for the decision of non-conformity with Security of Supply requirements (Article 35 (2)). Where release would be contrary to the public interest, in particular defence and security interests, contracting authorities/entities may withhold certain information (Article 35 (3)).

3) Security of Supply during the award procedure

12. The Directive provides for different possibilities to assess a candidate’s or tenderer’s ability to meet Security of Supply requirements. Depending on the phase of the award procedure, Security of Supply requirements are used in different ways. First, they are used to select suitable tenderers and candidates, then to examine whether the tenders meet the mandatory Security of Supply requirements set by the contracting authority/entity, and finally, to evaluate, on the basis of specific contract award criteria, which tender offers the best performance in terms of Security of Supply.

In certain situations, Security of Supply aspects can even determine the subject-matter of the contract. This can be the case when a contracting authority/entity wants to find, in addition to an already established supply relationship, a second supplier, for example, for certain ammunition frequently used in crisis management operations. In such a case, it might define the contract to be awarded as a second source contract. On that basis, it could declare its existing supplier(s) as ineligible to participate in the award procedure. However, such a restriction would have to be justified by the need to ensure an adequate level of Security of Supply. It would also have to meet the proportionality test described in point 10 above.⁶

3.1) Contract notice

13. Contracting authorities/entities launch the formal contract award procedure by publishing a contract notice in TED (Tenders Electronic Daily)⁷, the online version of

⁶ If a contracting authority intends to award a new supply contract right from the outset to two or more suppliers for reasons of Security of Supply, it can do so by concluding a framework agreement or by subdividing the contract into lots with the condition that economic operators can only tender for one (or a limited number) of these lots.

⁷ <http://ted.europa.eu>.

the 'Supplement to the Official Journal of the European Union'. The contract notice has two basic functions:

1. Ensure effective competition: Contract notices must therefore *'enable economic operators in the Community to determine whether the proposed contracts are of interest for them. For this purpose, they must be given adequate information as regards the subject-matter of the contract and the conditions attached thereto'* (recital 58). The contracting authority/entity should therefore give in the contract notice⁸ a general description of the products, works or services with an indication of the main contract performance conditions and the contract award criteria. This should also include the main features of the Security of Supply requirements for the products, works or services to be procured. The information given in the notice may be complemented in contract documents to be sent at the latest with the invitation to tender or to negotiate.
2. Give economic operators interested a sound basis for the preparation of their request to participate: This is particularly important, since, in restricted procedures, negotiated procedures with publication and competitive dialogue procedures, the qualitative selection is typically done on the basis of the requests to participate. The contract notice must therefore provide sufficient information about:
 - grounds for exclusion of economic operators and the relevant information required to prove that these are not fulfilled;
 - selection criteria for the assessment of participants' capacity, including the indication of minimum levels of standards, and information/documentation requested for this assessment;
 - if the contracting authority/entity intends to limit the number of suitable candidates to be invited to tender or negotiate: minimum and, where appropriate, maximum number of candidates to be invited and criteria or rules used for this limitation.

3.3) Selection Criteria: Security of Supply in the selection of suitable candidates and tenderers

14. Articles 38 to 46 of the Directive deal with qualitative selection of candidates and tenderers. At this stage of the procedure, the contracting authority/entity has to assess the capacity and suitability of the economical operators on the basis of exclusion criteria and criteria of economic and financial standing, professional and technical knowledge or ability.

15. In this context, it is particularly important to distinguish selection criteria clearly from award criteria. What matters for the selection of suitable tenderers and candidates is not the characteristics of specific equipment which they may offer, but their standing, qualifications and professional capacity. Especially in the case of off-the-shelf procurement, contracting authorities/entities may often already have an idea of the products that could fulfil their requirements. However, at this stage of the procedure,

⁸ For a full list of the information to be included in the contract notice, see Annex IV of Directive 2009/81/EC.

the assessment does not concern the products, works or services to be procured, but the tenderer's or candidate's ability to perform the contract in question.⁹

16. Qualitative selection is done in several steps: First, contracting authorities/entities exclude operators that are not suitable for participation in a contract award procedure. In a second step, they assess the economic and financial standing and the technical and professional capacity of the remaining operators on the basis of the criteria referred to in Articles 41 and 42. In this respect, contracting authorities/entities may apply minimum capacity levels which must be related and proportionate to the subject-matter of the contract. Finally, contracting authorities/entities may also decide to invite only a limited number of suitable candidates to tender or negotiate (see Article 38 (3)). In this case, they establish a ranking on the basis of qualitative selection criteria designated for that purpose.

17. The Directives acknowledges explicitly that Security of Supply criteria might be relevant in the phase of qualitative selection. Recital 67 states that: *'given the sensitive nature of the defence and security sectors, the reliability of economic operators to which contracts are awarded is vital. This reliability depends, in particular, on their ability to respond to requirements imposed by the contracting authority/entity with respect to Security of Supply and security of information'*.

3.3.1) Grounds for exclusion of candidates or tenderers

18. Article 39 provides a list of cases where a candidate or tenderer may be excluded from participation in a contract award procedure. While the first paragraph contains mandatory exclusions related to convictions by final judgment of certain offences, the second paragraph gives the contracting authority a margin of discretion in deciding whether to exclude candidates or tenderers who have committed specific forms of professional misconduct.

Article 39 (2) contains two exclusion criteria related to Security of Supply. It provides that *'any economic operator may be excluded from participation in a contract where that economic operator:*

...

- (d) *has been guilty of grave professional misconduct proven by any means which the contracting authority/entity can supply, such as a breach of obligations regarding security of information or Security of Supply during a previous contract;*
- (e) *has been found, on the basis of any means of evidence, including protected data sources, not to possess the reliability necessary to exclude risks to the security of the Member State'.*

⁹ See judgment of 24 January 2008 in Case C-532/06 Lianakis, paragraphs 25 to 32.

19. Point (d) refers explicitly to the breach of Security of Supply-related obligations during previous contracts. This covers also breaches of obligations vis-à-vis other contracting authorities/entities, irrespective of the Member State in which they are located. Although the provision does not require a conviction by final judgment, the rather strong terms '*has been guilty*' and '*proven*' indicate that the contracting authority/entity has to rely on objective and verifiable information if it wants to exclude a candidate/tenderer from the procedure on these grounds.

20. Point (e) addresses the link between Security of Supply and the reliability of the candidate or tenderer that appears also in recital 67. In view of the particular sensitivity of certain defence and security contracts, the provision allows the contracting authority/entity to prove the lack of reliability '*by any means of evidence, including protected data sources.*' Recital 65 specifies that '*it should ... be possible to exclude economic operators if the contracting authority/entity has information, where applicable provided by protected sources, establishing that they are not sufficiently reliable so as to exclude risks to the security of the Member State. Such risks could derive from certain features of the products supplied, or from the shareholding structure of the candidate.*'

Reliability issues and the use of protected data sources will probably be more relevant in the context of security of information. However, they may also play a role in Security of Supply, since the latter depends clearly on both the reliability of the supplier and the quality of the equipment to be delivered. On the other hand, the use of protected data sources as a means of evidence will certainly be limited to very exceptional cases.

In any case, point (e) does not give unlimited discretion to contracting authorities/entities. Any exclusion of a candidate or tenderer must be based on risks to the security of the Member State. The contracting authority/entity must be prepared to demonstrate, if necessary in special review procedures, that there are objective and verifiable elements indicating a lack of reliability that causes risks to the security of the State.

21. In this context, it should also be noted that, according to ECJ case-law, the list of grounds for exclusion of candidates and tenderers in Article 39 (1) and (2) is exhaustive. It would therefore not be possible for Member States or contracting authorities/entities to exclude a candidate or tenderer on the basis of other criteria relating to their professional qualities.¹⁰

By contrast, Member States are free to determine the procedural treatment of the grounds for exclusion. They may, in particular, provide conditions for the reinstatement of candidates and tenderers that have prior convictions excluding them from participation in public procurement.¹¹ Such rules on 'self-cleaning' must, of course, comply with the basic principles of European Union law, particularly with the principles of equal treatment and non-discrimination.

¹⁰ Judgment of 16 December 2008 in Case C-213/07 *Michaniki AE*, paragraph 43.

¹¹ See Article 73 (3) on the review of the application of Article 39 (1) by the Commission which mentions explicitly a possible future legislative proposal for the harmonisation of such national rules.

3.3.2) Criteria of technical and/or professional ability

22. Article 42 (1) describes different means by which economic operators may furnish evidence of their technical abilities. Contracting authorities/entities can use the means mentioned in this Article as a basis for establishing their selection criteria.

According to Article 38, contracting authorities/entities may use selection criteria in two ways:

- First, they may require candidates to meet minimum capacity levels. *‘The extent of the information (...) and the minimum levels of ability required for a specific contract must be related and proportionate for the subject-matter of the contract.’*
- Second, they can use them as the basis for their ranking if they decide to limit the number of suitable candidates they invite to tender.

23. In the context of Security of Supply, points (c) and (h) of Article 42 (1) are particularly important:

Point (c) refers to *‘a description of the technical facilities and measures used by the economic operator to ensure quality and the undertaking’s study and research facilities, as well as internal rules regarding intellectual property’*. This last element (internal rules regarding intellectual property) was added to the text taken from Article 48 (2) (c) of Directive 2004/18/EC. According to recital 44, *‘internal rules between subsidiaries and the parent company with respect to intellectual property rights’ can be an element of Security of Supply*. This means, for example, that a contracting authority/entity may define as a selection criterion the requirement that the candidate has IP management standards ensuring a specific level of protection.

24. Point (h) mentions *‘a description of the tools, material, technical equipment, staff numbers and know-how and/or sources of supply — with an indication of the geographical location when it is outside the territory of the Union — which the economic operator has at its disposal to perform the contract, cope with any additional needs required by the contracting authority/entity as a result of a crisis or carry out the maintenance, modernisation or adaptation of the supplies covered by the contract’*;

This means that the contracting authority may define as a selection criterion the requirement that the candidates demonstrate in detail their technical capacity to perform the contract. The explicit reference to the *‘indication of the geographical location when it is outside the territory of the Union’* implies that location in third countries can be relevant for the assessment of a candidate’s or tenderer’s capability to perform the contract. A contracting authority/entity can therefore exclude a candidate or tenderer from the procedure if it considers that the geographical location of non-EU sources could compromise their ability to comply with its requirements, in particular those related to Security of Supply. In addition, if a successful tenderer is obliged to award subcontracts in accordance with the rules set out in Title III of the Directive, any sub-contractor can be excluded on the same grounds. However, any such decision has

to be based on the individual circumstances of each procurement case and must be proportionate and related to the subject matter of the contract.

3.4) Invitation to tender, negotiate or participate in a dialogue

25. Once the contracting authority/entity has finished the qualitative selection, it will formally invite the selected candidates to submit their tenders, to negotiate or to take part in a competitive dialogue. According to Article 34 (2) of the Directive, this invitation must include a copy of the contract documents (or a reference to accessing these documents if they are made available by electronic means).

The documents sent with the invitation are the basis for the preparation of the tender. They must therefore contain a detailed description of the Security of Supply requirements for the products, works or services that are the subject-matter of the contract, together with an indication of the specific commitments and all certification, documentation or information to be provided in the tender.

3.5) Contract performance conditions: Security of Supply in the assessment of tenders

26. According to Article 20 of the Directive, *‘contracting authorities/entities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract documentation.’* These conditions may, in particular, seek to ensure *‘the Security of Supply required by the contracting authority/entity’*, in accordance with Article 23. Recital 41 recalls that *‘contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents.’* These conditions will typically take the form of contract clauses creating specific obligations for the successful tenderer.

27. The second subparagraph of Article 23 contains a non-exhaustive list of particulars which the contracting authority/entity may require for inclusion in the tender. These particulars consist in some cases of documents (certification/documentation), in others, of information or specific commitments.

28. In the examination of tenders, contracting authorities/entities will check whether the tenders submitted are complete and in conformity with the requirements set out in the contract documents, including the Security of Supply requirements. Tenders in which required particulars are missing or considered unsatisfactory will be rejected. However, if a contracting authority/entity considers that particulars submitted by a tenderer are not sufficient to demonstrate to its satisfaction that the relevant Security of Supply requirements will be met, it should give the tenderer the opportunity to provide further explanations and clarifications before a possible rejection.¹² It can do so by requesting the tenderer to provide additional information for clarification purposes. In this case, the

¹² See, for the importance of the tenderer's right to provide explanations, ECJ judgment *Michaniki AE*, paragraph 62, and judgment of 15 May 2008 in Cases C-147/06 and C-148/06 *SECAP*, paragraph 24,.

contracting authority/entity has to make sure that the request complies with the principle of equal treatment of tenderers (Article 4). This means in particular that all tenderers who have submitted insufficient particulars on Security of Supply are offered the opportunity to provide additional information under the same conditions.

3.5.1) Export, transfer and transit of goods associated with the contract

(a) certification or documentation demonstrating to the satisfaction of the contracting authority/entity that the tenderer will be able to honour its obligations regarding the export, transfer and transit of goods associated with the contract, including any supporting documentation received from the Member State(s) concerned;

29. The requirement formulated in point (a) is a safeguard against Security of Supply risks which are specifically related to the cross-border movement of defence equipment. These risks particularly concern the possible refusal, withdrawal or delay of relevant export and transfer authorisations, but also possible conditions linked to these authorisations which could have an adverse impact on the supplier's ability to fulfil the contracting authority's Security of Supply requirements (e.g. the latter's ability to operate, maintain or modify the purchased equipment).

Since this requirement by definition concerns mainly suppliers from other Member States, it is particularly important to keep it in line with the standards on non-discrimination described in point 2.2.

This means in particular that a contracting authority/entity cannot require that the equipment to be supplied may not be subject to licensing requirements, because such a condition would lead to general exclusion of suppliers established in other EU Member States.

30. Furthermore, at the moment when the tender is prepared, the authorisation to transfer the equipment which is to be supplied will (usually) not yet have been granted. Once directive 2009/43/EC on intra-EU transfers applies, this situation will change for equipment covered by a general licence (since general licences will be published and individual licence requests will no longer be necessary for such equipment). However, until then (and for all other equipment not covered by a general licence), contracting authorities can only require tenderers to provide elements indicating that they will be able to obtain the required licences if the contract is awarded to them.

For this purpose, tenderers could furnish, for example:

- a record of past transfers of the same equipment to the same or other Member States (to illustrate that the relevant authorities do not normally refuse such transfer licences), or
- any documents obtained from national authorities through explanatory enquiries or other official contacts.

31. In order to ensure that contractors correctly process licences expeditiously, contracting authorities may also require tenderers to provide evidence showing their planning and resources for obtaining any necessary transfer and/or export licences. Moreover, they can insert into the contract documents conditions which will improve and expedite the export licensing process. This could include requirements for the contractor to:

- Notify all licensing requirements or other transfer restrictions applicable to the products to be delivered and to any parts, sub-systems thereof, in particular if these have to be provided from third countries,
- Notify the contracting authority of export-controlled content;
- Institute timely action to obtain export licences;
- Liaise fully with the contracting authority and/or other relevant authorities on the export licensing process to ensure that all requirements are met;
- Ensure that contractual requirements are passed down to any subcontractor who may have to apply for export/transfer licences.

32. Article 23 (a) also allows contracting authorities/entities to include in the contract documents requirements concerning possible conditions put on export and transfer licences, for example, constraints on access to certain technical information. To counter such risks, contracting authorities/entities could require as a contract condition, for example, access to source codes or to IPRs associated with the design of key systems and subsystems.

33. What contracting authorities/ entities may not require from the tenderer, by contrast, is *'to obtain a commitment from a Member State that would prejudice that Member State's freedom to apply ... its national export, transfer or transit licensing criteria in the circumstances prevailing at the time of such a licensing decision'* (Article 23, third subparagraph). In practice, this provision is probably less relevant for the award of the initial supply contract (since suppliers would probably not participate in a tender procedure if they were not certain to obtain the necessary licences). However, it is clearly a caveat, and limits Security of Supply requirements for the in-service phases of the product and possible additional needs in times of crisis (see below point 2.2.4).

In any case, if, subsequent to contract award, necessary licences are not granted, or are granted on terms which mean that the Security of Supply requirements specified in the contract documents are not met, contracting authorities will normally have the right to terminate the contract under conditions determined by the applicable contract law.

34. In any event, any decision to exclude a tenderer from another Member State on the basis of licence requirements would require solid justification as to why the tenderer failed to demonstrate in his tender that

- a) the relevant export control authorities would in all likelihood grant the required licences if the tenderer were awarded the contract, or
- b) the necessary transfer and export licences include no conditions which would impede the Security of Supply requirements as defined in the contract documents.

3.5.2) Restrictions on disclosure, transfer or use

(b) the indication of any restriction on the contracting authority/entity regarding disclosure, transfer or use of the products and services or any result of those products and services, which would result from export control or security arrangements;

35. This point concerns in particular so-called ‘black boxes’ and ‘anti-tamper devices’, i.e. components and sub-systems which are part of the equipment purchased, but which cannot be accessed or modified by the customer. It also concerns items covered by export control regimes or special end-use monitoring such as ITAR, which requires specific authorisation from the US for export to other countries, including transfers between Member States.

The early disclosure of such restrictions is fundamental to ensuring that the contracting authority’s/entity’s Security of Supply requirements can be met, but also to maintaining the possibility to award in competition contracts for downstream equipment support.

36. Article 23 (b) complements the provisions of Article 23 (a), which acknowledges that contracting authorities/entities may require tenderers to demonstrate their ability to obtain the licences they need to honour their contractual obligations. In addition to that, Article 23 (b) provides that contracting authorities/entities may require indications of possible restrictions resulting from export control or security arrangements. All the tenderer has to do to fulfil this condition is to provide complete and sufficiently detailed information about such restrictions (if any).

Contracting authorities/entities can combine the two instruments: under Article 23 (a), they may require the tenderer to demonstrate that he will in all likelihood obtain the necessary export, transfer and transit licences with conditions that enable him to fulfil his mandatory contractual obligations. In addition, they can require, under Article 23 (b), a list of all other restrictions, so that they can deal with them during the negotiation phase and/or take them into account during the award phase (provided that the issue is covered by appropriate contract award criteria).

3.5.3) Organisation of the supply chain

(c) certification or documentation demonstrating that the organisation and location of the tenderer’s supply chain will allow it to comply with the requirements of the contracting authority/entity concerning Security of Supply set out in the contract documents, and a commitment to ensure that possible changes in its supply chain during the execution of the contract will not affect adversely compliance with these requirements;

37. The organisation of the tenderer's supply chain covers all the resources and activities necessary to deliver the supplies, services or works which are the subject-matter of the contract. The analysis of the supply chain has to be based on objective, performance-oriented considerations. Contracting authorities may therefore require evidence that the supply chain is reliable and stable. Moreover, they may wish tenderers to identify key components or potential single points of failure so that measures can be adopted to manage these risks. Point (c) addresses these issues. It consists of two parts: the first refers to the situation at the time of submission of the tender, the second to possible future changes in the supply chain.

38. Under the first part, the contracting authority/entity may require the tenderer to demonstrate that the organisation of its supply chain allows him to comply with Security of Supply requirements set out in the contract documents. In this context, it is particularly important to avoid any discrimination on grounds of nationality when assessing the 'location' of the tenderer's supply chain. For all production sites and facilities established in the EU, geography may play a role, but only in terms of distances and delivery times, not in terms of national territory. Security of supply requirements therefore have to be based exclusively on objective, performance-oriented considerations. They may concern, for example, time-limits and conditions for the availability of spare parts, other materials or maintenance services. The tenderer would then have to submit elements demonstrating that the location and organisation of his supply chain allows him to make the necessary deliveries and/or provide the requested services within the required timeframe under the terms and conditions defined in the contract documents. This might include, for instance, an exact description of the supply chain with an indication of the performances and capacities of the relevant production sites, information on transportation capacities available to the tenderer, and indications of contractual arrangements concerning the capacity available to subcontractors or external suppliers.

The situation is somewhat different with respect to supply chains which are (partly) established in or depend on third countries. To safeguard security interests, the contracting authority/entity may require the tenderer to use only reliable sub-contractors from allied countries, for example, or to avoid subcontractors which have to comply with specific export control regimes in third countries. Such conditions, however, must be appropriate and proportionate.

39. The second part of point c) concerns a more general commitment on the part of the supplier to make sure that the organisation of his supply chain will enable him throughout the execution of the contract to comply with the Security of Supply requirements set by the contracting authority/entity throughout the execution of the contract.

40. In this context, one has also to take into account that the organisation of the tenderer's supply chain might be influenced by the contracting authority/entity, if the latter makes use of Article 21 (3) and/or (4) to oblige the successful tenderer to award subcontracts by a competitive procedure under Articles 51-53. In such a case, both the tenderer and the contracting authority/entity must try to reconcile these two obligations.

The tenderer must make a commitment to impose the relevant Security of Supply requirements on its subcontractors, while the contracting authority/entity must take the uncertainties which come from the subcontracting obligations into account in its assessment of the tenders. Once the contract is awarded, Article 53 (2) allows the successful tenderer to refrain from subcontracting, *‘if it proves to the satisfaction of the contracting authority/entity that none of the subcontractors participating in the competition or their proposed bids meet the criteria indicated in the subcontract notice and thereby would prevent the successful tenderer from fulfilling the requirements set out in the main contract’*.

3.5.4) Additional needs resulting from a crisis

(d) a commitment from the tenderer to establish and/or maintain the capacity required to meet additional needs required by the contracting authority/entity as a result of a crisis, according to terms and conditions to be agreed;

(e) any supporting documentation received from the tenderer’s national authorities regarding the fulfilment of additional needs required by the contracting authority/entity as a result of a crisis;

41. Points (d) and (e) cover risks related to additional needs in crisis situations.¹³ Point (d) states that a contracting authority/entity may require tenderers to establish and/or maintain production capacity in order to cover additional needs in the case of a crisis.

Most of ‘the terms and conditions’ mentioned at the end of the statement will probably be agreed on only when a crisis occurs: Only then will the contracting authority/entity know what exactly its additional needs are, and only in this concrete situation will the successful tenderer be able to see how to cope with these needs (in particular since a crisis may also lead to additional needs from other customers).

Alternatively, the contracting authority/entity might consider providing for options and/or conditional orders in the contract. In that case, it might obtain even more security by agreeing on prices and conditions of delivery already at this stage. On the other hand, it would have to pay for such additional commitments.

42. Official documentation mentioned in point (e) is intended to underpin a commitment by the tenderer under point (d) in order to give additional assurance to the contracting authority/entity. It could typically be based on Security of Supply arrangements such as those concluded by Member States in the framework of the Letter of Intent process or the European Defence Agency. Such arrangements could establish prioritisation systems (which orders to be executed first in case of conflicting orders) or include general commitments (to make best efforts to satisfy urgent needs of partners).

¹³ See also the definition of ‘crisis’ in Article 1 (10) of the Directive. In this context, however, the definition is less relevant, since it does not influence the application of the Directive, but the use of contract conditions after the award of the contract.

However, requirements under points (d) and (e) are again limited by licensing obligations of suppliers from other Member States. In order to avoid possible discrimination, the third subparagraph of Article 23 therefore stipulates that: *‘a tenderer may not be required to obtain a commitment from a Member State that would prejudice that Member State’s freedom to apply, in accordance with relevant international or Community law, its national export, transfer or transit licensing criteria in the circumstances prevailing at the time of such a licensing decision’.*

3.5.5) Maintenance, modernisation and adaptation

(f) a commitment from the tenderer to carry out the maintenance, modernisation or adaptation of the supplies covered by the contract;

43. Point (f) provides that contracting authorities/entities may require a commitment to carry out follow-on work. In practice, it is advisable to specify such a commitment with more detailed stipulations on the nature and content of the maintenance, modernisation or adaptation to be performed, including, if possible, at least a general agreement on prices. A sufficiently detailed definition of follow-on work will not only increase the practical usefulness of the commitment; it also reduces the legal risks attached to the modification or extension of substantial terms of the contract at a later stage during the performance of the contract.¹⁴

3.5.6) Industrial changes

(g) a commitment from the tenderer to inform the contracting authority/entity in due time of any change in its organisation, supply chain or industrial strategy that may affect its obligations to that authority/entity;

44. Point (g) provides for a commitment to inform the contracting authority/entity about changes in the successful tenderer’s organisation, supply chain or industrial strategy. Its purpose is to make sure that the contracting authority is not taken by surprise by business decisions which might affect its Security of Supply, and that it has sufficient time to identify and/or negotiate alternative solutions, if necessary. With regard to possible changes in the supply chain during the contract, point (g) has to be read together with the second part of point (c) which provides for a commitment to ensure that such changes will *‘not affect adversely compliance with’* the Security of Supply requirements set out in the contract documents.

¹⁴ Under ECJ case-law, substantial amendments to essential provisions of a public contract can require a new contract award procedure, if they are materially different in character from the initial contract provisions, see judgments of 19 June 2008 in Case C-454/06 presstext Nachrichtenagentur GmbH, paragraphs 34 to 37, and of 13 April 2010 in Case C-91/08 Wall AG, paragraphs 37 and 38.

3.5.7) Ceasing of production

(h) a commitment from the tenderer to provide the contracting authority/entity, according to terms and conditions to be agreed, with all specific means necessary for the production of spare parts, components, assemblies and special testing equipment, including technical drawings, licences and instructions for use, in the event that it is no longer able to provide these supplies.

45. Point (h) concerns the risk resulting from the ceasing of production of military or security equipment. The contracting authority/entity may ask for a commitment that would allow it to obtain all specific means necessary for the production of the equipment.

As for point (d), most of 'the terms and conditions' mentioned at the end of the statement will probably be agreed on at the moment when the specific situation referred to occurs. This may be the case when a supplier goes bankrupt or decides to give up the specific activity.

3.6) Award criteria: Security of Supply in the award decision

46. Once the contracting authority/entity has excluded those tenders which do not meet minimum contract performance conditions, it will

- in a restrictive procedure, pass directly to the contract award phase, awarding the contract in accordance with Article 47;
- in a negotiated procedure, *'negotiate with tenderers the tenders submitted by them in order to adapt them to the requirements they have set in the contract notice, the contract documents and supporting documents'* (Article 26 (1)). The negotiation phase therefore gives an opportunity for detailed discussions with the tenderers about the Security of Supply requirements and the means to fulfil them. However, contracting authorities have to make sure that the negotiations are carried out in a non-discriminatory manner and do not give some tenderers an advantage over others. The negotiations may be conducted in successive stages in order to progressively reduce the number of tenders, using the award criteria set out in the contract notice or the contract documents (Article 26 (3)). On the basis of adapted offers, the contracting authority/entity will seek out the best tender in accordance with Article 47;
- in a competitive dialogue, possibly require clarification, specification or fine-tuning of the tenders, and then chose the most economically advantageous tender in accordance with Article 47.

47. Contract award decisions have to be made *'on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in a transparent and objective manner under conditions of effective competition'* (recital 69).

Under Article 47 of the Directive, it is up to the contracting authorities/entities to decide whether they want to award the contract to the tender offering the lowest price or to the most economically advantageous tender. Since the contracts covered by the Directive are typically complex and sensitive, award decisions will in most cases be based on the criterion of the most economically advantageous tender.

48. When the award is made to the most economically advantageous tender, the contracting authorities/entities *'shall assess the tenders in order to determine which one offers the best value for money. In order to do this, they shall determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting authority/entity. The determination of these criteria depends on the object of the contract as defined in the technical specifications and the value for money of each tender to be measured'* (recital 71).

Within the limits explained below, the contracting authority/entity is free to choose the award criteria it wants to use to determine the most economically advantageous tender. The award criteria and their relative weighting must be indicated in the contract notice and/or the contract documents¹⁵, so that tenderers know what is expected when they prepare their tenders.¹⁶ The criteria must be formulated, as the Court has put it, in such a way as to 'allow all reasonably well-informed tenderers of normal diligence to interpret them in the same way'.¹⁷

According to Article 47 (1) (a) of the Directive, a contracting authority/entity may use the fulfilment of Security of Supply requirements as a criterion for the award of the contract.¹⁸ Article 23 gives an indication of what these requirements could cover.

49. However, there are three important restrictions resulting from the wording of Article 47 (1) (a) and the relevant ECJ case-law:

1. The award criteria must be linked to the subject-matter of the contract. This means, for example, that only those parts of the supply chain that would be concretely used for the execution of the particular contract in question can be taken into consideration. In the same way, only maintenance and support services for the equipment supplied under the contract can be taken into account.
2. The award criteria must not give the contracting authority/entity unrestricted freedom of choice for the award of the contract.¹⁹ They must be expressed in

¹⁵ See Article 32 (1) in connection with Annex IV and Article 47 (2) of the Directive. According to the third subparagraph of Article 47 (2), indication of the relative weighting of the different criteria may be replaced by a listing of the criteria in descending order of importance, if the contracting authority/entity considers that, for demonstrable reasons, weighting would not be possible.

¹⁶ See judgment of 17 September 2002 in Case C-513/99 Concordia Bus Finland, paragraph 62.

¹⁷ See judgment of 4 December 2003 in Case C-448/01 EVN AG and Wienstrom AG, paragraph 57.

¹⁸ See also judgment EVN AG and Wienstrom AG, paragraph 70, where the Court expressly states that 'the reliability of supplies can, in principle, number amongst the award criteria used to determine the most economically advantageous tender', and judgment of 28 March 1995 in Case C-324/93 Evans Medical Ltd, paragraph 44: 'reliability of supplies is one of the criteria which may be taken into account ... in order to determine the most economically advantageous tender'.

¹⁹ See judgment Concordia Bus Finland, paragraph 61.

concrete and measurable requirements that allow the information provided by the tenderers to be effectively verified.²⁰ The contracting authority/entity therefore has to identify clearly the content of the commitments and to use transparent and verifiable parameters for their assessment.

3. The award criteria must comply with all the fundamental principles of EU law, in particular, the principle of non-discrimination.²¹

50. Furthermore, it should be underlined that, according to established case-law of the ECJ, the contract award decision must be based exclusively on criteria aimed at identifying the most economically advantageous tender. By contrast, criteria linked to the tenderer's ability to perform the contract in question are not acceptable.²² For instance, criteria related to the tenderer's experience, to particular capacities of his staff, specific features of his technical equipment or his sources of supply are strictly limited to the selection phase.²³

4) Primary EU law and Security of Supply

51. Recital 16 states that Articles 36, 51, 52, 62 and 346 TFEU '*make provision for specific exceptions to the application of the principles set out in the Treaty and, consequently, to the application of law derived there from. It therefore follows that none of the provisions of this Directive should prevent the imposition or application of any measures considered necessary to safeguard interests recognised as legitimate by these provisions of the Treaty. This means in particular that the award of contracts which fall within the field of application of this Directive can be exempted from the latter where this is justified on grounds of public security or necessary for the protection of essential security interests of a Member State.*'

Moreover, recital 16 specifies that: '*this can be the case for contracts in the field of both defence and security which necessitate such extremely demanding Security of Supply requirements [...] that even the specific provisions of this Directive are not sufficient to safeguard Member States' essential security interests, the definition of which is the sole responsibility of Member States.*'

52. Hence, Security of Supply is explicitly recognised as a possible justification for Treaty-based derogation for both defence and security procurement. However, in this context, it is important to note that the legal basis for derogation would differ between defence and security: Article 346 TFEU is the most relevant Treaty-based derogation in the field of defence, and Article 346 (1)(b) can also cover Security of Supply requirements. However, the scope of Article 346 (1)(b) is limited to arms, munitions and war material, and does not cover measures connected to non-military security supplies,

²⁰ See judgment EVN AG and Wienstrom AG, paragraph 52.

²¹ See judgment Concordia Bus Finland, paragraph 63.

²² See judgements C-532/06 Lianakis and others , paragraphs 26 to 30 and C-199/07 Commission v Hellenic Republic, paragraphs 51 to 55.).

²³ See above, point 15.

works or services. For the latter cases, derogation for reasons of security of supply would therefore have to be justified on the basis of Article 36 TFEU.

4.1) Article 346 TFEU

53. Recital 16 recognises Security of Supply as a possible justification for the use of Article 346 TFEU. The question is which contracts '*necessitate such extremely demanding Security of Supply requirements that even the specific provisions of this Directive are not sufficient to safeguard Member States' essential security interests*'. In this context, different situations are conceivable, for example:

- The purchased equipment/service is strategically so important that any dependence on authorisation by another Member State is considered as a risk for essential security interests. Given the limited number of cases where licences for Intra-EU transfers are refused, this argument seems acceptable only for extremely sensitive purchases (e.g. cryptology, CBRN equipment, etc.).
- Parts of the activities related to the contract (maintenance, in-service support) have to be executed, particularly during a crisis, on the purchasing Member States' territory, and only by a national supplier. In this case, the Member State concerned would have to be able to demonstrate why less restrictive measures, such as the establishment of a business infrastructure by a non-national supplier at the place of the performance, may not achieve the same result as an award to a national supplier.
- The contract has to be awarded to a specific national supplier in order to maintain or establish a national industrial capability, because a Member State considers it as necessary for its essential security interests not to depend on a non-national supplier in this specific area. In this case, the Security of Supply requirement would concern not only the subject-matter of the contract, but the industrial capability which is necessary to execute the contract. The essential security interest would be to maintain or establish this specific industrial capability on a national basis.

54. In this context, it is crucial to recall that, according to settled ECJ case-law, the derogation under Article 346 TFEU is limited to exceptional and clearly-defined cases, and the measures taken must not go beyond the limits of such cases.²⁴ Like any other derogation from fundamental freedoms, it has to be interpreted strictly.²⁵ Furthermore, economic considerations are not accepted as grounds for justifying restrictions to the freedoms guaranteed by the Treaty. Measures liable to infringe the prohibition of discrimination on the basis of nationality can be allowed only if they are justified by one of the non-economic grounds listed in Articles 36, 51, 52, 62 and 346 TFEU. This

²⁴ 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.

²⁵ See judgment of 2 October 2008 in Case C-157/06 *Commission v Italy*, paragraphs 23 to 25, and judgments of 15 December 2009, for instance Case C-239/06, paragraph 69.

means that the decision to maintain a specific industrial capacity must be based exclusively on security interests, and not on economic or employment-related interests.

These principles are further emphasised by recital 17 of the Directive, which states that *‘the possibility of recourse to such exceptions should be interpreted in such a way that their effects do not extend beyond that which is strictly necessary for the protection of the legitimate interests that those Articles help to safeguard. Thus, the non-application of this Directive must be proportionate to the aims pursued and cause as little disturbance as possible to the free movement of goods and the freedom to provide services.’*

55. Therefore, if a Member State intends to rely on Article 346 TFEU to award a contract without observing the procedural requirements set by the Directive, it must ensure that the concrete measure chosen is necessary to protect its essential security interest.²⁶ The decision to use Article 346 TFEU therefore needs to be based on a case-by-case assessment which identifies the essential security interest at stake and evaluates the necessity of the concrete measure, i.e. the non-application of the Directive or of certain provisions of the Directive, taking into account the principle of proportionality and the need for a strict interpretation of Article 346 TFEU.

This means that in the case of a direct award of a contract to a specific supplier or to exclusively national suppliers on the basis of Security of Supply reasons, the Member State concerned must be prepared to specify the essential security interest that required the award of that contract to that particular supplier. It has also to demonstrate that the award of the contract was an appropriate means to protect that interest, and to explain why it was not possible to achieve the same objective by less restrictive means.

The details of that argumentation will depend on the circumstances of each case. If, for instance, a Member State awards maintenance and repair contracts for specific military equipment to a national supplier in order to maintain a specific industrial capability, it would have to be able to define precisely the industrial capability which is to be maintained, and to illustrate why maintaining this specific industrial capability represents in itself an essential security interest. In this context, a first indication could be, for example, the importance given to this industrial capability in the Member State's Defence White Paper and /or Defence Industrial Strategy. The point here is that although Member States have a large degree of discretion in the definition of their essential security interests, they must be able to make a plausible case as to why a specific industrial capability is essential for their security interests. This is particularly important in order to prove, if necessary, that the grounds for using the derogation are not of an economic nature. Moreover, the Member State would have to demonstrate that the award of these specific contracts was an appropriate measure to maintain the relevant capacity. It would also have to comply with the principle of proportionality and limit the subject-matter, the value and the duration of the exempted contracts strictly to what is necessary to maintain the required industrial capacity. This means in particular that the national supplier holding the relevant capabilities cannot automatically benefit

²⁶ See judgments of 15 December 2009, for instance Case C-239/06, paragraph 72.

from direct awards of all contracts in the sector in which it operates. On the contrary, the Member State concerned must be able to demonstrate on a case-by-case basis why specific contracts must be awarded to maintain which specific industrial capacity.

4.2 Articles 36, 52 and 62 TFEU and public security

56. Articles 36, 52 and 62 TFEU contain derogations for prohibitions or restrictions of basic freedoms²⁷ that are justified by a series of specific reasons, including ‘*public security*’. These derogations are one of the cornerstones of ECJ jurisprudence on the concept and the scope of application of the basic freedoms.

57. In order to rely on these Articles, Member States must demonstrate that the measures taken are justified by objective circumstances corresponding to the needs of public security. In this context, the concept of public security covers both internal and external security.²⁸ The ECJ has also acknowledged that Security of Supply requirements can constitute public security reasons justifying a derogation under Article 36 TFEU.²⁹

58. However, recital 17 of the Directive recalls that, in accordance with the case-law of the ECJ, ‘*the possibility of recourse to such exceptions should be interpreted in such a way that their effects do not extend beyond that which is strictly necessary for the protection of the legitimate interests that those Articles help to safeguard. Thus, the non-application of this Directive must be proportionate to the aims pursued and cause as little disturbance as possible to the free movement of goods and the freedom to provide services.*’

59. As in the case of Article 346 TFEU, measures taken under Articles 36, 52 and 62 TFEU must be limited to what is strictly necessary for the protection of the public security interest at stake.

Therefore, derogation under these Articles is only possible under the following conditions:

1. Security of Supply cannot be sufficiently guaranteed by measures taken under EU law and/or met by action on the Union level;³⁰
2. The measures are taken with the aim of achieving public security objectives, not for economic reasons;³¹
3. The measures taken are objectively capable of ensuring Security of Supply or at least lead to an objective improvement in its Security of Supply situation;³²

²⁷ Article 36 concerns the free movement of goods, Article 52 the right of establishment and Article 62 the freedom to provide services.

²⁸ See judgment of 4 October 1991 in Case C-367/89 Richardt, paragraph 22.

²⁹ See judgment of 10 July 1984 in Case 72/83 Campus Oil, paragraph 34.

³⁰ See judgment Campus Oil, paragraphs 27 to 31.

³¹ See judgment Campus Oil, paragraph 35 and judgment of 25 October 2001 in Case C-398/98 Commission v Greece, paragraph 30.

³² See judgment Campus Oil, paragraph 39.

4. The measures must comply with the principle of proportionality, i.e. there must be no other, less restrictive measure capable of achieving the Security of Supply objective. As has been pointed out in the context of Article 346 TFEU, this concerns the subject-matter, the value and also the duration of contracts awarded without applying the Directive.

60. As for all Treaty-based derogations, the burden of proof that the conditions for the use of Articles 36, 52 and 62 TFEU are met lies with the Member State relying on these derogations.

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.