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

Guidance Note
Defence- and security-specific exclusions

Directorate General Internal Market and Services

1. Section 3 of Chapter II of Directive 2009/81/EC ('the Directive') concerns contracts excluded from the scope of the Directive. While some exclusions have been taken over from Directives 2004/17/EC and 2004/18/EC, others have been adapted or newly created in order to accommodate the specific situation of the defence and security sectors. This note deals with these adapted or new exclusions, namely:

- International rules (Article 12),
- Disclosure of information (Article 13(a)),
- Intelligence activities (Article 13(b),
- Cooperative programmes (Article 13(c)),
- Contract awards in third countries (Article 13(d)), and
- Government to government sales (Article 13(f)).

The exclusion of certain research and development services (Article 13(c) of Directive 2009/81/EC) is not mentioned in this note, since it has been taken over without modification from Directive 2004/18/EC. It is nevertheless dealt with in the note on research and development.

1) Principles

2. Article 11 of the Directive states that *'none of the rules, procedures, programmes, arrangements or contracts referred to in this section may be used for the purpose of circumventing the provisions of this Directive'*. This provision serves as an explicit reminder of the ECJ case-law prohibiting the use of legal structures that are exempt from EU rules on public procurement with the principal aim of avoiding transparent and competitive contract award procedures without objective reasons.[1]

It should also be noted that, under well-established ECJ case-law, provisions which authorise exceptions to EU public procurement rules must be interpreted strictly**.**[2] This means that exclusions from the scope of the Directive provided under Articles 12 and 13 must be confined to contracts of the type described in these provisions. The burden of proving that a procurement case falls within the limits of one of these exclusions lies with the contracting authority/entity seeking to rely on it.

Finally, contracting authorities/entities intending to rely on one of the exceptions provided by Articles 12 and 13 to award a contract without advertising might consider publishing a voluntary ex ante notice under Articles 60(4) and 64 of the Directive. By

[1] See, for instance, judgment of 9 June 2009 in Case C-480/06 Commission v Germany, paragraph 48.

[2] See judgment of 13 December 2007 in Case C-337/06 Bayerischer Rundfunk, paragraph 64.

publishing such a notice, the contracting authority/entity formally announces and justifies its decision to award a contract without prior publication of a contract notice in the Official Journal. If the contracting authority/entity has published such an ex ante notice and observed a standstill period of 10 days following its publication, the contract cannot be considered ineffective by application of Article 60(1) of the Directive.

2) Article 12: International rules

2.1) Principles

3. Article 12 has been adapted from Article 15 of Directive 2004/18/EC. It does not explicitly refer to defence, nor does it exclude security. In practice, however, it mainly concerns the field of defence, since the international arrangements/ agreements and organisations mentioned in the provision typically exist in the defence domain.

The provision excludes contracts awarded by contracting authorities/entities from a Member State in accordance with specific procedural rules set by an international agreement or arrangement or by an international organisation. Its purpose is to preclude the use of award procedures under the Directive in cases where international rules set out procedural requirements for the award of a contract. Consequently, the exclusion can apply only if the contract in question falls within the scope of international rules (as defined in paragraphs a to c) that provide a specific procedure for the award of that contract. In view of the principles set out above under (1), the term 'specific procedural rules' has to be interpreted restrictively. It should be understood as requiring a set of distinct rules that specifically concern the award of contracts and provide a minimum of details setting out the principles and the different steps to be followed in awarding contracts.

An agreement or arrangement that does not set specific rules and procedures for the awarding of contracts would not qualify for the use of Article 12. If, for example, Member States and third countries concluded a Memorandum of Understanding (MoU) on the pooling or sharing of certain capabilities which are still to be procured, these procurements would be covered by Article 12(a) only if the MoU contained specific procurement rules and procedures to be applied to these purchases. If not, the Member States concerned would have to award the relevant procurement contracts following one of the procedures of the Directive.

Article 12 contains no specific requirements regarding the content of the procurement rules in question. However, in this context, it is important to be aware of the Member States' basic obligations under Article 4(3) TEU (ex Article 10 EC Treaty) to *'take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union'*, to *'facilitate the achievement of the Union's tasks'* and to *'refrain from any measure which could jeopardise the attainment of the Union's objectives'*. According to ECJ case-law, it follows from this provision that Member States may not assume obligations under international law that might affect EU rules or alter their scope.[3]

[3] See judgment of 31 March 1971 in Case 22/70 Commission v Council, paragraphs 21 to 22.

Finally, it should also be noted that for the purpose of this Directive, EEA members are not considered as third countries.

2.2) International agreements or arrangements between Member States and third countries

4. Article 12(a) concerns contracts which are awarded following '*specific procedural rules pursuant to an international agreement or arrangement concluded between one or more Member States and one or more third countries'*.

This exclusion is very generic. In contrast to Article 15(a) of Directive 2004/18/EC, it contains no restriction as to the subject matter of the agreement/arrangement, which can therefore concern any defence- or security-related issue. The inclusion of the term 'arrangement' – which also does not appear in Article 15 of Directive 2004/18/EC — makes it very clear that this provision covers not only international treaties ratified by national parliaments but also memoranda of understanding concluded at the level of the ministries concerned. However, the provision is limited to instruments concluded between states and governments; it does not cover agreements or arrangements with other legal persons such as private or public undertakings, even if those are fully owned and/or controlled by the state.

Application of the provision depends, therefore, on three conditions:

(1) The contract to be awarded must be covered by an international agreement or arrangement.
(2) That agreement or arrangement must be concluded between one or more Member States and one or more third countries.
(3) The agreement or arrangement must contain specific procedural rules governing the award of the contract in question.

2.3) International agreements or arrangements relating to the stationing of troops

5. Article 12(b) excludes contracts awarded following *'specific procedural rules pursuant to a concluded international agreement or arrangement relating to the stationing of troops and concerning the undertakings of a Member State or a third country'*.

Apart from the inclusion of international arrangements, this exception has been taken over without modification from Article 15 of Directive 2004/18/EC. Dating from the Cold War, the provision is probably of little relevance today, particularly since Article 12(a) already covers all international agreements and arrangements between Member States and third countries. However, the much narrower Article 12(b) may become of practical relevance in cases where an agreement or arrangement relating to the stationing of troops is concluded between Member States only. According to Recital 26, the provision concerns not only the stationing of troops from a Member State in a third country, or the stationing of troops from a third country in a Member

State, but also the stationing of troops from a Member State in another Member State, be it for a limited or unlimited period of time.

2.4) Contract award rules of international organisations

6. Article 12(c) provides for a specific exception for contracts awarded by contracting authorities/entities pursuant to the procedural rules of an international organisation purchasing for its own purposes.

The term '*international organisation'* is not defined in the Directive. It normally refers to a permanent institution with separate legal personality, set up by a treaty between sovereign states or intergovernmental organisations and having its own organisational rules and structures. In the field of defence, NATO is the most prominent example.

Article 12(c) makes specific mention of *'contracts which must be awarded by a Member State'* in accordance with the procedural rules of an international organisation. This can be the case, for example, when a Member State acts on behalf of an international organisation or receives a financial contribution from that international organisation for the execution of the contract. In such circumstances, the specific procedural rules imposed by the organisation preclude the use of award procedures under the Directive.

7. Purchases made by an international organisation in its own name and for its own purposes are outside the scope of the Directive. However, by referring explicitly to '*specific procedural rules of an international organisation purchasing for its purposes*', the provision points to the fact that purchases made by an international organisation for the purpose of its members or of third parties may not be excluded from the Directive.

This may be the case when an international organisation acts only as an intermediary on behalf of one of its members (with the procurement contract concluded between the member and the supplier), or when the organisation simply resells to one of its members supplies, works or services (which it procured from economic operators at the request of that member). In any case, Member States may not use contract awards via international organisations for the purpose of circumventing the provisions of the Directive (Article 11).

3) Article 13: Specific exclusions

3.1) Disclosure of information

8. According to Article 13(a), the Directive shall not apply to '*contracts for which the application of the rules of this Directive would oblige a Member State to supply information the disclosure of which it considers contrary to the essential interests of its security'*. This exclusion is based on Article 346(1)(a) TFEU, which says that '*no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security*'. The main difference is

that the text of Article 346(1)(a) TFEU mentions only the right not to disclose information but not further measures possibly related to such non-disclosure. Article 13(a), by contrast, explicitly establishes a link between non-disclosure of information and non-application of the Directive. This specification seems particularly important for contracts awarded in the field of non-military security which are not covered by Article 346(1)(b).

9. Recital 27 explains which contracts are covered by the exclusion of Article 13(a), namely '*contracts which are so sensitive that it would be inappropriate to apply this Directive, despite its specificity*'. Recital 27 also mentions security areas which are particularly sensitive, and where procurements may therefore often be highly confidential. This is (…) the case for '*particularly sensitive purchases which require an extremely high level of confidentiality, such as, for example, certain purchases intended for border protection or combating terrorism or organised crime, purchases related to encryption or purchases intended specifically for covert activities or other equally sensitive activities carried out by police and security forces*.'

This list is only indicative and refers to '*certain purchases'*. This means that not all contracts awarded in these areas are automatically covered by the exclusion provided in Article 13(a), but also that equally sensitive cases may occur in other security areas as well. The list in Recital 27 also indicates that Article 13(a) was introduced essentially to allow for the explicit exclusion of highly confidential non-military security contracts.

10. Pursuant to Article 11, Article 13(a) must be interpreted strictly[4], and the burden of proof that a procurement case falls within the limits of the exclusion lies on the contracting authority/entity seeking to rely on it. Moreover, the principle of proportionality applies to the use of both Article 346 TFEU and Article 13(a). This is particularly important because the reasoning for using this exclusion and the Treaty-based exemption may often be very similar.

3.2) Intelligence activities

11. Article 13(b) provides a tailor-made exclusion for a specific category of highly-sensitive contracts, namely '*contracts for the purposes of intelligence activities'*. According to Recital 27, this includes '*procurements provided by intelligence services, or procurements for all types of intelligence activities, including counter-intelligence activities, as defined by Member States'*. This provision is based on the assumption that contracts related to intelligence are by definition too sensitive to be awarded in a transparent and competitive procedure. It covers cases where other public authorities award contracts to intelligence services for specific supplies, works or services (e.g. protection of government IT networks), as well as cases where intelligence services award contracts for the purpose of their intelligence activities.

12. Article 13(b) refers to intelligence activities, not to intelligence services or agencies. Moreover, Recital 27 leaves it up to Member States to define 'intelligence activities, including counter-intelligence activities'. The legislator chose this approach

[4] See judgment of 13 December 2007 in Case C-337/06 Bayerischer Rundfunk, paragraph 64.

for two main reasons. First, not all purchases made by intelligence services are necessarily so sensitive that EU procurement rules cannot be applied; consequently, the exclusion covers only those purchases made for the purpose of intelligence activities. Second, there is no single, commonly agreed, definition of intelligence, and the way intelligence activities are organised differs between Member States. The definition of the scope of Article 13(b) takes this diversity into account and covers purchases for the purpose of all types of intelligence activities, no matter whether the service or the agency concerned is in charge of a specific intelligence function (military, security, criminal or external intelligence) or specialised in the collection of information from certain sources (e.g. imagery or signals intelligence).

13. Like all other exclusions, Article 13(b) must be applied in the light of Article 11 and is to be interpreted strictly.[5] This means that the exclusion must be confined to contracts of the type described in the provision and cannot be applied to other situations by way of analogy.

3.3) Cooperative programmes

14. Article 13(c) provides a specific exclusion for cooperative programmes based on research and development. The Directive shall not apply to '*contracts awarded in the framework of a cooperative programme based on research and development, conducted jointly by at least two Member States for the development of a new product and, where applicable, the later phases of all or part of the life-cycle of this product'*.

This exclusion acknowledges the particular importance of cooperative programmes for the strengthening of Europe's military capabilities and the establishment of a truly European EDTIB (European Defence Technological and Industrial Base), since such programmes '*help to develop new technologies and bear the high research and development costs of complex weapon systems'* (Recital 28).

15. The decisive criterion for the applicability of Article 13(c) is the nature of the programme and its purpose, namely the development of a ***new*** product. Hence, only cooperative programmes *based on research and development* as defined in Article 1(27) and explained in Recital 13 can be excluded on the basis of Article 13(c). By contrast, common purchases of off-the-shelf equipment cannot come under Article 13(c), even if technical adaptations are made to customise the equipment.[6]

Consequently, a cooperative programme within the meaning of Article 13(c) must include a research and development phase. As the term *'where applicable'* indicates, the programme may include later phases of the life-cycle of the product, such as

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5 See judgment of 13 December 2007 in Case C-337/06 Bayerischer Rundfunk, paragraph 64.

6 Under Article 10 of the Directive, such purchases may be made through central purchasing bodies: If the contracts are awarded by a contracting authority/entity of a Member State on behalf of other Member States, the former has to apply the Directive; if contracts are awarded by a European public body, the procurement rules applied must comply with all the provisions of the Directive and the contracts awarded must be subject to efficient remedies comparable to those provided for in Title IV of the Directive.

production and maintenance. If this is the case, contracts related to these later phases are also covered by the exclusion, provided that these contracts are awarded in the framework of the cooperative programme. By contrast, a Member State which participates in the research and development phase but decides to make its purchases for the later phases of the programme separately (i.e. outside of the cooperative framework and via a national contracting authority) will have to apply the Directive for the award of these contracts.

16. Article 13(c) applies to all contracts awarded by, or on behalf of, contracting authorities/entities from Member States in the framework of a cooperative programme. Recital 28 explicitly includes programmes managed by international organisations, such as OCCAR or NATO agencies, or by agencies of the Union such as EDA, which then award contracts on behalf of Member States. The same applies to contracts awarded by contracting authorities/entities of one Member State under the 'lead nation' model, acting on behalf of one or more other Member States.

Cooperative programmes must be *'conducted jointly by at least two Member States'*. Participation may or may not be restricted to EU Member States. In other words, cooperative programmes with third country participation are also covered by the exemption. In any case, and pursuant to Article 11 (see point 1 above), the terms 'conducted jointly' and 'cooperative programme' imply that the programme must be based on a genuinely cooperative concept. Participation in a cooperative programme therefore means more than just the purchase of the equipment, but includes in particular the proportional sharing of technical and financial risks and opportunities, participation in the management of and the decision-making on the programme.

17. In order to ensure that the exclusion remains limited to genuinely cooperative programmes, Article 13(c) stipulates that, *'Upon the conclusion of such a cooperative programme between Member States only, Member States shall indicate to the Commission the share of research and development expenditure relative to the overall cost of the programme, the cost-sharing agreement as well as the intended share of purchases per Member State, if any.'* The first part of this provision implies, on the one hand, that Member States must inform the Commission at the very earliest stage of a cooperative programme, i.e. immediately after the entry into effect of the respective arrangement or agreement, and, on the other, that notification is not necessary if one or several third countries are involved in the programme.

The final part of the provision lists the information which Member States must communicate to the Commission. Although it does not specify how detailed the information on the R&D share, cost-sharing and intended share of purchases must be, the general meaning of this provision makes it clear that the information must be sufficient to demonstrate: (1) that the programme concerns the development of a new product; and (2) that the participation of Member States is more than just a symbolic contribution to a national programme.

Given the differences between Member States' defence budgets, the size of individual contributions to cooperative programmes may vary considerably. The Commission will take this into account in its evaluation of the programme's R&D share, cost share and share of intended purchases. Moreover, the evaluation will not be based primarily on a quantitative approach, but will focus on the cooperative

nature of the programme and the quality of each Member State's participation. In other words, an exclusion under Article 13(c) is considered to comply with Article 11 if a programme is based on a genuinely cooperative concept.

18. A Member State which joins a cooperative programme after the end of the R&D phase can benefit from the exclusion under Article 13(c) for the later phases of the life-cycle of the product, provided it becomes a fully-fledged member of the programme,. This means that its participation is formalised in an agreement or arrangement with the other participating Member States and implies specific rights and obligations which are reserved for members of the cooperative programme. In such a case, the Member State concerned must also notify its accession to the programme.

3.5) Contracts awarded in third countries

19. According to Article 13(d), the Directive does not apply to *'contracts awarded in a third country, including for civil purchases, carried out when forces are deployed outside the territory of the Union where operational needs require them to be concluded with economic operators located in the area of operations'*.

In contrast with Article 12(b), which covers the stationing of troops in and outside the EU on the basis of an international agreement or arrangement, Article 13(d) is tailor-made for crisis-management operations outside the EU. It is aimed at situations where armed forces and/or security forces are deployed on a temporary basis for specific operations, be they civil, military or civil-military in nature. In these situations, contracting authorities/entities deployed in the field of operations are authorised not to apply the rules of this Directive when they award contracts to economic operators located in the area of operations, provided this is imposed by operational requirements.

20. Recital 29 confirms that the exclusion applies only to contracts awarded by contracting authorities/entities deployed in the area of operations, that is to contracts awarded by deployed personnel of contracting authorities/entities.

21. Civil purchases are defined in Article 1(28) as '*contracts not subject to Article 2 covering the procurement of non-military products, works and services for logistical purposes'.* However, these non-military purchases are nevertheless limited. According to Article 1(28), they must be for logistical purposes such as: storage, transport, distribution, maintenance and disposition of materiel; transport of personnel; acquisition or construction, maintenance, operation and disposition of facilities; acquisition or provision of services, medical and health service support; food and water supply, etc. Many of these purchases would probably be subject to Article 2 (in particular letters c) and d), but it cannot be excluded that purely civil purchases could be concerned as well (e.g. purchase of basic supplies and works). In all cases, be they military or not, such purchases must be '*directly connected to the conduct of those operations'* (Recital 29).

22. Operational needs: Although the term 'operational needs' is not defined, it is clear that only requirements arising out of the operation itself justify the use of this

exclusion. This can be the case, for example, when the award of contracts to EU suppliers would overstretch supply lines and imply disproportional transportation costs and delays, or when the involvement of EU suppliers would require additional security measures which weaken the military capabilities of the troops on the ground. In any case, it must be the conduct of the operation which makes it necessary to award contracts to local operators, therefore excluding the possibility of using the procedures of the Directive. Moreover, the wording of both Article 13(d) (‘*needs’, ‘require’*) and Recital 29 (*‘imposed by’, ‘requirements’*) suggest a narrow interpretation and a restrictive use of the exclusion.

23. Area of operations: According to the Commission statement annexed to the minutes of the Council adopting the Directive, the area of operation (in which economic operators are located) *'should be understood, for the purposes of this Directive, as being the third country(ies) in which a defence or security operation is being undertaken, together with those third countries in the surrounding geographic zone'.* This definition takes into account the reality of such operations, where the situation on the ground may be so difficult that the nearest operator to which contracts can be awarded are located outside the country in which the operation itself takes place. The surrounding zone may extend beyond directly bordering countries, but should be limited to the geographical neighbourhood in order to limit the risk of abuse and misinterpretation. If operational reasons do not exclude the award of contracts to far-off economic operators, there is no justification for not applying the Directive.

The same logic applies to the interpretation of the phrase *'operators located in the area of operations'.* This refers to a geographical criterion, but does not say anything about the ownership or the status of the operator chosen. In principle, it could be concluded that the local operator may also be a subsidiary of a company established in a Member State or another far-off third country. Article 11 is important in this context. It explicitly states that none of the contracts referred to in Article 13 may be used for the purpose of circumventing the Directive. This would be the case, however, if a contract awarded to a local subsidiary were to be executed de facto by its far-off mother company. Such an award would have a direct impact on the functioning of the Internal Market and would not be covered by the exclusion provided for in Article 13(d).

3.6) Contracts awarded between governments

24. Recital 30 states that ‘*given the specificity of the defence and security sector, purchases of equipment as well as works and services by one government from another should be excluded from the scope of this Directive*.’

Consequently, Article 13(f) provides for the exclusion of contracts awarded by a government to another government relating to:
(i) the supply of military equipment or sensitive equipment,
(ii) works and services directly linked to such equipment, or
(iii) works and services specifically for military purposes, or sensitive works and sensitive services.

25. The term 'government' is defined in Article 1(9) as meaning *'the State, regional or local government of a Member State or third country'*. Therefore, technically speaking, the contracts in question must be concluded by, or on behalf of, a Member State or a third country or, depending on the organisation of the state concerned, a regional or local government entity having its own legal personality (for example, a *Land* in Germany, regional or local authorities). Contracts concluded by, or on behalf of, other contracting authorities/entities, such as bodies governed by public law or public undertakings, are not eligible for the exemption.

Contracts can be awarded for a broad range of very different purchases. The government of Member State A may, for example, decide for operational reasons to conclude a contract with the government of Member State B on the training of its pilots by the air force of Member State B. Such a service contract would be covered by the exemption.

26. With regard to supply contracts, the exemption is primarily intended for sales of equipment which is delivered from existing stocks, such as used equipment or stocks that are surplus to requirements.

However, the exemption is not restricted to such operations and applies to all contracts for the supply of military or sensitive equipment, including, in principle, even purchases of new material. In this context, it should be borne in mind that the exclusion only covers the contract between the two governments, and not any related contracts concluded between the selling government and an economic operator. Therefore, if Member State A purchases new military equipment from the government of Member State B, the latter must ensure to procure the material in question in accordance with the contract award rules set out in Directive 2009/81/EC. It may do so by using framework agreements, for example, or options included in existing supply contracts awarded under the rules of the Directive. If a Member State purchases new military equipment from the government of a third country, it must do so with due regard to its obligation under Article 11 not to use such contracts for the purpose of circumventing the provisions of the Directive. This is particularly relevant in situations where market conditions are such that competition within the Internal Market would be possible.