

A photograph of a large, classical-style building with a prominent clock tower, surrounded by green trees and a clear blue sky. The building is the University of Nottingham.

Scope and Application of Article 346 of the Treaty on the Functioning of the EU

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Other International Organisations

EU Treaties Principles

EU Common
Military List

EU Public
Sector
Procurement
Directives
2004/18
89/665

EU Defence and
Security
Procurement
Directive
2009/81

EU Intra-Community Transfer
of Defence Goods Directive
2009/43

Commission
Interpretative
Communication

Art.346 TFEU
Council Decision 255/58 ("1958 List")

EDA Voluntary
Intergovernmental
Defence Procurement
Regime

Procurement
Code of
Conduct

Code of Best
Practices in the
Supply Chain

Emergency
Mutual Support

Security of
Information

Code of Conduct
on Offsets

- No EU Member State may be obliged by EU law
 - to supply information
 - the disclosure of which it considers contrary to the essential interests of its security
- An EU Member State may take measures contrary to EU law
 - if it considers them necessary
 - to protect the essential interests of its security
 - connected with
 - the production of, or
 - trade inarms, munitions and war material listed on the “1958 list”
 - *but* such measures may not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes
- Specific *in camera* complaint procedure to ECJ

- Limited scope
 - Exceptional and clearly defined cases (not automatic)
 - No general exemption excluding all measures taken for public security
 - No wide interpretation, to be interpreted strictly
 - Requires genuine and sufficiently serious threat to a fundamental interest of society (NOT aims of a purely economic nature)
- Wide discretion for EU Member States in defining security interests
 - But security interests concerned have to be specifically expressed
- Measure must be suitable and necessary to protect the security interest concerned
 - Only if such protection could not have been addressed by a less restrictive measure
- No prior notification requirement
- May only be invoked by EU Member States

- Exemption applies to products included in the “1958 list”
 - Council Decision 255/58 (not officially published)
 - May be amended unanimously by the Council (never done)
- Products included in the list in principle come within the possibility of derogation
- BUT only if such products are intended for specifically military purpose
 - Not if use of equipment for “military purposes” is hardly certain or only a possibility
 - Not when the equipment is procured for the military, but for the purpose of “civilian use”
- If product also presents possibilities for essentially identical civilian applications, only covered
 - If intended by the contracting entity solely for military use AND
 - If, by virtue of its intrinsic characteristics, product is specifically designed and developed, also as a result of substantial modifications, for such purposes

- Published by the Commission in 2006
- Summarises ECJ case law
- Defines a set of questions to be asked case-by-case to determine if Art.346 TFEU may be invoked
 - Which essential security interest is concerned?
 - Connection between security interest and procurement decision?
 - Why non-application of the directives is necessary?
 - Affects competition for products not for specifically military purposes?
- Represents only the views of the Commission !
 - But guide to possible enforcement policy
- When Art.346 TFEU validly invoked, EDA procurement regime may be used, but...

- Only for 'subscribing Member States' (sMS)
 - All pMS except Romania, plus Norway
- To be used when Art.346 TFEU is invoked
- Voluntary and non-binding, with mutual accountability of sMS
- Code of Conduct on defence procurement
 - Equal treatment of suppliers
 - Transparency, clear rules on conditions & award criteria
 - Allows offsets as award criteria
 - Procurement by competitive tendering (options)
- Electronic Bulletin Board for defence notices
- Code of best practice for suppliers to be applied by prime contractors
- Mutual support between sMS in case of emergency
- Provisions on security of information
- Code of Conduct on offsets

- Procurement principles flowing from EU Treaties apply
 - Non-discrimination on the grounds of nationality
 - Implies an obligation of transparency
 - Requires “sufficient advertising” to open the market to competition
 - Basic mutual recognition of technical standards and qualifications
 - Requires comparing the actual standards/qualifications
 - Proportionality
 - Measures may not exceed what is appropriate and necessary to attain the objective
 - Effective judicial protection
 - Access to courts, duty to give reasons
 - Equal treatment of tenderers
 - Complete lack of competition not allowed
 - See Commission interpretative communication on contracts not covered by the EU procurement directives
- Secondary legislation (including EU procurement directives) applies unless specific exemption

For more information, questions and any help on defence procurement regulation, Baudouin Heuninckx can be reached at 100544.1653@compuserve.com

B. Heuninckx, “Security of Supply and Offsets in Defence Procurement: What’s New in the EU?”
Public Procurement Law Review Volume 23(2) (2014)

B. Heuninckx, “The EU Defence and Security Procurement Directive: Trick or Treat?”
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B. Heuninckx, “Towards a Coherent European Defence Procurement Regime? European Defence Agency and European Commission Initiatives”
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