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

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**Graphical View of EU Law**

**Other International Organisations**

- Art.346 TFEU
  - Council Decision 255/58 (“1958 List”)

**EU Treaties Principles**

- 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
- EU Common Military List

**Commission Interpretative Communication**

**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

**EU Public Sector Procurement Directives**

- 2004/18
- 89/665

**EU Intra-Community Transfer of Defence Goods Directive**

- 2009/43
Art.346 TFEU

- 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 in
      arms, 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
Application of Art. 346 TFEU

- **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**
Material Scope of Art.346 TFEU

- 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
Interpretative Communication

• 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…
EDA Intergovernmental Regime

- 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, non-discrimination against suppliers
  - Transparency, clear specifications & award criteria
    - Allows offsets as award criteria
  - Procurement by competition (with exceptions)
- Electronic Bulletin Board to publish notices
- Code of best practice in the supply chain to be applied by prime contractors
- Mutual support between sMS in case of emergency
- Provisions on security of information
- Code of Conduct on offsets
If Art. 346 TFEU Cannot be Invoked...

- 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

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B. Heuninckx, “The EU Defence and Security Procurement Directive: Trick or Treat?”

B. Heuninckx, “Lurking at the Boundaries: Applicability of the EC Public Procurement Directives to Defence and Security”