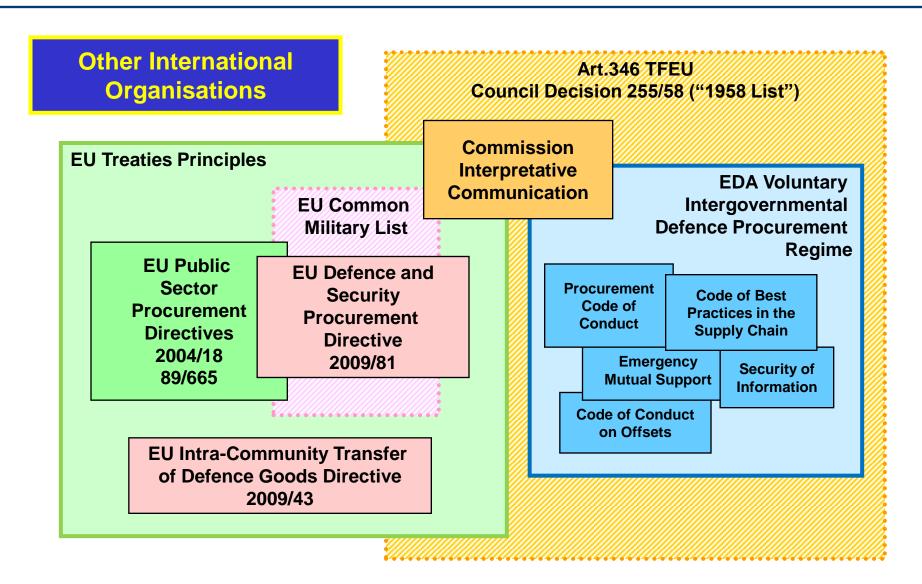


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Graphical View of EU Law





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-bidging, with mutual accountability of sMS
- Code of Conduct grant
 - Equal treatment
 - Transparency, clean
 Transparency, clean
 - Allows offsets as awa
 - Procurement by compositions)
- Electronic Bulletin
 Ish notices
- Code of best practice of section of 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

- 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?"
 Public Procurement Law Review Volume 20(1) (2011)
- B. Heuninckx, "Lurking at the Boundaries: Applicability of the EC Public Procurement Directives to Defence and Security"

Public Procurement Law Review Volume 19(2) (2010)

B. Heuninckx, "Towards a Coherent European Defence Procurement Regime? European Defence Agency and European Commission Initiatives"

Public Procurement Law Review Volume 17(1) (2008)

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