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## UK Public Procurement Law Digest: EU Prepares for the Implementation of Directive on Defence and Security Procurement

***Dedicated regime for Defence and Security Procurement to be created***

**By Alistair Maughan, Masayuki Negishi, and Hannah Whelan**

EU member states are in the process of implementing a 2009 EU directive dealing with procurement in the field of defence and security (the “**Defence Directive**”). The aim of the Defence Directive is to create a more flexible and transparent procurement system for contracting authorities and entities in the defence sector, whilst continuing to safeguard national security interests.

Importantly, the Defence Directive will also make it harder for civilian public bodies in the EU to use “national security” as a basis for exempting projects from the scope of the open procurement regime. As a result, the progress of the implementing regulations will be relevant not just to entities involved in purely military procurement, but also to those involved in the purchase or supply of non-military, but still sensitive or secure, goods and services.

### 1. WHAT IS THE DEVELOPMENT?

In August 2009, the EU adopted the Defence Directive,<sup>1</sup> which is designed to implement new procurement rules specifically aimed at public contracts in the fields of defence and security. The Defence Directive is intended to adapt standard procurement rules and tailor them to contracts for the procurement of defence and security equipment.

The Defence Directive must be implemented into law in EU member states by 20 August 2011. The UK Ministry of Defence (“MoD”) is in the middle of a two-phase consultation on the implementation of the Defence Directive, particularly focusing on the provisions which are optional for member states.

In general, the Defence Directive (and the new UK implementing regulations, when they come) is not about exempting more projects from the scope of the procurement regime. One aim of the directive is to stop some of the perceived abuses that have gone on over the years by contracting authorities classifying non-defence projects within the scope of Article 296 of the EU Treaty, which allows members states to claim exemption from the procurement regime for projects which are deemed to be secret or require special security measures.

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<sup>1</sup> Directive 2009/81/EC

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## 2. WHY IS THIS DEVELOPMENT IMPORTANT?

Existing EU procurement rules are considered to be ill-suited for most defence and security-related contracts.

Under the current system, the procurement of defence and security-related contracts is mainly governed by the controlling Directive that applies to conventional, non-utilities procurement<sup>2</sup> (the “**Public Contracts Directive**”). However, there are a number of mechanisms that permit member states to bypass general procurement rules in order to protect security interests.<sup>3</sup> In the past, these exemptions have been applied inconsistently by member states, creating a situation where defence procurement procedures significantly vary from one member state to another. The lack of uniformity arising from differing national procurement rules has led to a lack of competition, inefficient public spending and a sense of lack of transparency in the European defence market.

In addition, defence and security-related contracts are complex in nature and include classified, sensitive and confidential information which, for security reasons, may be required to be protected from unauthorised access. The EU considered that old procurement rules (primarily dealing with civil procurement) did not take sufficient account of these specific requirements.

The new Defence Directive addresses these requirements and adapts the open procurement rules to meet these particular features of the defence market.

## 3. WHAT IS THE SCOPE OF THE DEFENCE DIRECTIVE?

The Defence Directive is heavily based on current rules set out in the Public Contracts Directive although the applicable financial thresholds are based on those outlined in Directive 2004/17/EC (the “**Utilities Directive**”<sup>4</sup>). There are, however, a number of provisions that have been adapted to facilitate the award of defence and security-related contracts.

The main changes brought about by the Defence Directive are as follows:

### (a) Procurement procedures

There is no open procedure under the new rules. Contracting authorities may use the negotiated procedure with prior publication without restriction, or the restricted procedure. As extensive negotiations are often required in these types of contracts, this will give contracting authorities more flexibility to negotiate the finer details of more complex procurement contracts.

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<sup>2</sup> Directive 2004/18/EC. To a lesser extent, Directive 2004/17/EC that governs utilities procurement also applies, but the application of the latter directive is limited.

<sup>3</sup> Article 296 of the Treaty establishing the European Community provides that a member state may take “such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material”, whilst Article 14 of Directive 2004/18/EC also provides a similar derogation from the procurement rules.

<sup>4</sup> Directive 2004/17/EC

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## (b) Security of supply

Article 23 contains new provisions on the “*security of supply*”, which are intended to provide contracting authorities with greater assurance that equipment, works or services can be delivered in times of crisis or armed conflict. Tenderers will be required to provide documentation and/or commitments to ensure that there will be security of supply.

Contracting authorities are obliged to specify their security of supply requirements in contract documentation (Article 23).

## (c) Security of information

Article 7 includes new security-related provisions to ensure that sensitive and classified information is protected during the tendering and contracting process. Compliance with such requirements may also be extended to subcontractors.

Contracting authorities can require that tenderers and subcontractors provide specific commitments on safeguarding the confidentiality of classified information during the tender process.

## (d) Framework Agreements

The permitted duration for framework agreements has been increased from 4 years (under the Public Contracts Directive) to 7 years.

## (e) Threshold values

The Defence Directive applies higher threshold values: €387,000 for supply and service contracts and €4,845,000 for works contracts<sup>5</sup>. The Defence Directive shares these threshold values with the Utilities Directive.

## (f) Subcontracting

Member States may allow contracting authorities to ask successful tenderers to subcontract up to 30% of the contract value and that tenderers compete proposed subcontracts to third parties on an EU-wide basis. These changes are intended to open up supply chains and create business opportunities for small and medium-sized enterprises and to improve competition within the EU.

## 4. DOES THE DEFENCE DIRECTIVE APPLY OUTSIDE MILITARY REQUIREMENTS?

The Defence Directive covers new procurement contracts awarded after 20 August 2011 by contracting authorities for:

- a) the supply of military equipment (including any parts, components and/or subassemblies);
- b) the supply of sensitive equipment (including any parts, components and/or subassemblies);
- c) works, supplies and services directly related to the equipment referred to in (a) and (b) for any element of its life

<sup>5</sup> Note that at the time the Defence Directive was published, the thresholds were €412,000 and €5,150,000 respectively. However, the revision of threshold values for public procurement brought about by the EU Regulation No. 1177/2009 had lowered these values from 1 January 2010. Further information on the changes to the threshold value can be found in our previous update [UK Public Procurement Law Digest: New Threshold Values for 2010, 30 December 2009](#)

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cycle; and

- d) works and services for specifically military purposes or sensitive works and sensitive services.

Clearly, therefore, the Defence Directive applies to military procurements. But it can also cover “*sensitive works and sensitive services*”, meaning “*equipment, works and services for security purposes, involving, requiring and/or containing classified information*”. In the specific field of non-military security, the Defence Directive should apply to procurements which have features similar to those of defence procurements and are equally sensitive. This can be the case in particular in areas where military and non-military forces cooperate to fulfil the same missions and/or where the purpose of the procurement is to protect the security of the EU and/or its member states on their own territory or beyond it against serious threats from non-military and/or non-governmental actors. This may involve, for example, border protection, police activities and crisis management missions.

In the UK consultation, the MoD has specifically asked for comments on the transposition into UK law of the definitions of “*military equipment*”, “*sensitive equipment*”, “*sensitive works*” and “*sensitive services*”.

Article 3 provides that if a single contract requirement covers supplies or services that fall within the ambit of either the Defence Directive, the Public Contracts Directive and/or the Utilities Directive, the rules of the Defence Directive will take precedence (provided that a single contract is justified). But, somewhat surprisingly, if a contract requirement partly falls within the ambit of the Defence Directive, and the other part is not subject to either the Public Contracts Directive or Utilities Directive, the contract will be excluded from the rules of all three directives (again, provided that a single contract is justified).

The Defence Directive will not alter the position in relation to the arms trade with third countries outside the EU, which remains governed by WTO rules and the Government Procurement Agreement (“**GPA**”) of non-EU suppliers. Under EU law, contracting authorities can choose to exclude suppliers based outside the EU, although where a member state has signed the WTO GPA, then the GPA also contains reciprocity and non-discrimination provisions.

## 5. CAN THE EXEMPTION UNDER ARTICLE 296 OF THE EC TREATY STILL BE INVOKED?

One of the objectives of the Defence Directive is to limit to exceptional cases only the use of exemptions under both the EC Treaty and the Public Contracts Directive, and to encourage member states away from routine and inappropriate use of Article 296 and other derogations.

Contracting authorities will still have the possibility to use Article 296 to exempt from open procurement defence and security procurement contracts which are so sensitive that even the new rules cannot satisfy their security needs. In most cases, however, authorities should be able to use the new Defence Directive. In relation to purely military procurements, the use of the procedures under the Defence Directive ought to be clear-cut – likewise for “shared use” procurements where the goods or services to be acquired cover military and non-military uses.

The position of non-military, quasi-defence or security-specific procurements may be less clear. Authorities with national security-related requirements, for example, will be able to rely on the directive only where the procurement projects in question have “*features similar to those of defence procurements and are equally sensitive*”, and the fact that a specific regime exists to deal with defence procurement (containing enhanced secrecy provisions) makes it even less likely that a civil government agency with a non-military requirement would be able to invoke the Article 296 defence and avoid open

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procurement altogether.

## 6. HOW WILL THE DEFENCE DIRECTIVE BE IMPLEMENTED IN THE UK?

Unlike EU Regulations, EU Directives are not directly effective in EU member states; they require the individual member states to adopt additional legislative measures in order to transpose them into domestic law.

In order to transpose the provisions of the Defence Directive into UK law, the MoD intends to implement the provisions of the Defence Directive by creating specific Regulations and by amending the existing legislations to remove procurement rules that will be covered by the scope of the Defence Directive. The second consultation will take place later this year and will include a draft statutory instrument.

*For a copy of Morrison & Foerster's consolidated digest of recent cases and decisions affecting UK public procurement law, please click [here](#).*

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