

DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
POLICY DEPARTMENT



**The impact of the
'defence package'
Directives on European
defence**

SEDE



STUDY

The impact of the 'defence package' Directives on European defence

ABSTRACT

In its conclusions on the Common Security and Defence Policy, the December 2013 European Council stressed the importance of ensuring the full and correct implementation and application of the two defence Directives of 2009. The present study intends to provide the Parliament with an initial perspective regarding the state of implementation of the Directive 2009/81/EC on defence and security procurement (Part.1) and the Directive 2009/43/EC on intra-European Union transfers of defence-related products (Part.2). It undertakes a first assessment of national practices, through qualitative and statistical analysis. It identifies the complex points and obstacles, which, if not overcome, may well call into question the Directives' expected beneficial effects.

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List of acronyms

AEO	Authorized Economic Operator
AT	Austria
BE	Belgium
CP	EU Common Position
CPV	Common Procurement Vocabulary
CSDP	Common Security and Defence Policy
CY	Cyprus
CZ	Czech Republic
DE	Germany
DK	Denmark
DTIB	Defence Technological and Industrial Base
EC	European Commission
ECJ	European Court of Justice
EDA	European Defence Agency
EDTIB	European Defence Technological and Industrial Base
EE	Estonia
ES	Spain
EU	European Union
EEA	European Economic Area
FI	Finland
FR	France
FRS	Fondation pour la recherche stratégique
GPA	Government Procurement Agreement
GR	Greece
GRIP	Groupe de recherche et d'information sur la paix et la sécurité
HR	Croatia
HU	Hungary
ICT	Intra-Community Transfers
IE	Ireland
IT	Italy
ITAR	International Traffics in Arms Regulation
LT	Lithuania
LU	Luxembourg
LV	Latvia
ML	EU Common Military List

MS	Member States
MT	Malta
NATO	North Atlantic Treaty Organisation
NL	Netherlands
OJEU	Official Journal of the European Union
SMEs	Small and Medium Enterprises
PL	Poland
PT	Portugal
RO	Romania
SE	Sweden
SI	Slovenia
SK	Slovakia
UK	United Kingdom
TEC	Treaties Establishing the European Communities
TED	Tenders Electronic Daily
TFEU	Treaty on the Functioning of the European Union
VEAT	Voluntary ex-ante Transparency

Executive summary

The directive 2009/81/EC on defence and security Procurement under scrutiny

In order to understand the evolution of Member States' acquisition practices since the entry into force of the Directive, the first part of the study is structured around three main sections : (1) the situation before the Directive's entry into force, an overview of the major principles introduced by the Directive and their implications for actors in the European defence sector, along with the process of transposition into national law; (2) An initial evaluation of national practices through qualitative analysis and statistical analysis (based on reprocessed data from the TED database, during the period from the 21st August 2011 to the 31st December 2014, covering all EU Member States) ; (3) An identification of the complex points and obstacles, which, if not overcome, may well call into question the Directives' expected beneficial effects.

The Directive 2009/81/EC intends to provide procurement rules tailor-made for defence and security markets and is supposed to lead to more transparency and competition. Most importantly, it should limit the use of the exception clause of Article 346.

While the number of documents published on TED over these past two years has been increasing, this increase is not as significant as expected, and above all it is due to a small group of Member States (France, Germany, and the United Kingdom). This initial survey demonstrates an important disparity in the Member States' publication practices (contract notices and contract awards). This poses the question of reciprocity. In value, contract awards notified between the 21st August 2011 and the 31st December 2014 represent around €10.53 billion. The year 2014 accounts for around 65% of the total, due to significant contracts notified by the United Kingdom in the field of services and facilities management, and by France on the segments covering Repair and maintenance services of military aircrafts.

The Directive 2009/81/EC is today favoured for contracts dealing with services, the acquisition of equipment deemed to be of a low strategic value, and sub-systems. Over the past three years, all of the major military equipment contracts, thus those that have had a structural effect on the DTIB, were notified without going via the Directive. Previous practices have continued, notably the use of Article 346.

When the contracting authorities/entities provide the name and address of the successful economic operators, in 84% of cases, the selected supplier is based on national territory. An analysis focused on the Member States that have published the most contract award notices (and if we consider non-specified addresses as national, as the European Commission does) demonstrates that the proportion of selected suppliers located on national territory reaches 98% for Germany, 97% for France, 96% for Italy, 96% for Poland, 92% for the United Kingdom, 90% for Romania, and 64% for Finland.

Concretely today acquisition practices seem to show an incomplete and incorrect application of the Directive, with de facto a limited or even non-existent impact on the DTIB. It is indeed too hasty and premature to draw conclusions from such a short period, all the more so given that it generally takes 5 to 10 years for a directive to be fully applied, and this is referring to the civilian sector. Although this new regime is not yet functioning satisfactorily at the present time, the Directive represents an important step in a sector such as defence, which is marked by a significant degree of opacity in acquisition practices.

The State of implementation of the Directive 2009/43/EC on Intra-EU transfers of defence- related products

In order to assess in details the current state of implementation of the Directive 2009/43/EC, the second part of the report proceeds in 3 steps and considers, first, the principles of the ICT Directive regarding the general licences, second, the state of the certification process and third the eventual impact of the Directive on the actors focusing specifically to topic of the end-use/end-user control.

The use of general licences appears to be quite limited considering its potential. This can be partially explained by the fact that the implementation of the new regulations is still in a transitional phase. However study reveals that the entire licensing process established by the EC suffers from major problems threatening the objective of simplification and harmonization. First, the report identifies a lack of availability of the relevant documents. Second, the general licences are too diversified in terms of scope and structure of the documents and conditions attached. Third Member states adopt different definitions of what sensitive products are, which is a corollary of the multiplicity of the defence-related product lists attached to the general licences.

To date, only 36 defence companies are registered on CERTIDER. The pace of certification is impacted by the relative complexity and diversity of the general licences, but there is obviously some skepticism about the practical benefits of the enlisting process. It may not be considered worth the effort for the defence companies. The observation is even more valid for Small and Medium Enterprise.

Because of the slow pace on implementation of the Directive 2009/43/EC it is hazardous to analyze its effect on the European defence market. However, the actual trends allows the formulation of hypotheses notably on the eventual adaptation of the end use/end user control processes within the EU. States remain attached to their monitoring systems. It is an international or regional obligation for them but they also want to stay aware of any eventual re-export within the UE and of course, outside.

The benefits of the ICT Directive will not be felt similarly by all Member States, national authorities and defence companies. Their effects will certainly be different among Member States depending on the structure of their national defence sector and its reliance on exports. National factors and realities of the defence industry, as well as diverse perceptions of arms trade controls in Europe, can explain the current unequal level of implementation of the Directive and limit the overall benefits of the new regulatory system put in place by the Directive.

1 Introduction

Since the end of the 1990s, the European Commission has consistently recalled the need to improve the regulatory framework governing the treatment of arms in Europe¹, thereby defending a restrictive reading of the scope of Article 346. This issue has been the subject of several communications and consultations². The European Commission has pragmatically intensified dialogue with companies in the defence industry, moreover taking advantage of the development of the security market. These consultations finally gave rise to the launch on the 5th December 2007 of the so-called 'Defence Package', comprising a Communication from the Commission 'Strategy for a stronger and more competitive European defence industry'³ and two proposed directives designed to improve the functioning of the internal market for defence and security products. The first deals with transfers of defence-related products and the second with defence and security procurement.

Following the publication in the OJEU on the 6th May 2009 of Directive 2009/43/EC⁴ *simplifying terms and conditions of transfers of defence-related products within the Community*, and on the 20th August 2009 of Directive 2009/81/EC *on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security*⁵, the Member States had a period of two years to transpose the Directives into national law, thus up to the second semester in 2011, with concrete implementation theoretically expected in mid 2012. Given the field in question, the Commission favoured the use of directives rather than European regulations because this legal act is flexible. While a regulation is applicable in Member States' internal law immediately after its entry into force, a directive must first be transposed by the Member States (national implementing measures). It obliges the Member States to achieve a certain result but leaves them free to choose how to do so (the form and the means for applying the directive). The expected benefit depends on the consistent and standardised implementation of Directives 2009/43/EC and 2009/81/EC by all EU Member States in order to avoid recreating market distortions.

On 24 July 2013, the Commission took a further step and put forward the Communication entitled *Towards a more competitive and efficient defence and security sector*⁶, as a contribution to the European Council of 19-20 December 2013. It contains an action plan⁷ with the overall objective of enhancing the efficiency and competitiveness of the defence and security sector in Europe. In its conclusions on the

¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Implementing European Union Strategy on defence-related industries', COM(97)583 final, 04 December 1997 ; 'Industrial Policy in an Enlarged Europe', COM(2002) 714 final, 11 December 2002 ; 'European Defence – Industrial and Market Issues. Towards an EU Defence Equipment Policy', COM(2003)113, 11 March 2003

² 'Commission Green Paper on defence procurement', COM(2004)608, 23 September 2004 ; Communication from the Commission to the Council and the European Parliament 'on the results of the consultation launched by the Green Paper on Defence Procurement and on the future Commission initiatives', COM(2005)626 final, 6 December 2005.

³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A strategy for a stronger and more competitive European defence industry', COM(2007)764 final, 5 September 2007.

⁴ Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community', OJ L 146, 10.6.2009, p. 1–36.

⁵ Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security', and amending Directives 2004/17/EC and 2004/18/EC, OJ L 216, 20.8.2009, p. 76–136

⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Towards a more competitive and efficient defence and security sector', COM(2013)542 final, 24 September 2013.

⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A New Deal for European Defence Implementation Roadmap for Communication COM (2013) 542 Towards a more competitive and efficient defence and security sector', COM(2014)387 final, 24 June 2014.

Common Security and Defence Policy, the December 2013 European Council stressed the importance of ensuring the full and correct implementation and application of the two defence Directives of 2009, and decided to review progress in all relevant areas in June 2015.

The present study thus intends to provide the Parliament with an initial perspective regarding the state of the implementation of the two Directives by the Member States and the related infringement proceedings launched by the Commission. It will also investigate the comparison of procurement and transfers practices before and after the date of application of the Directives. Although it appears premature to draw any conclusions about the effect of the Directives on the development on the European defence technological and industrial base (EDTIB) and on the cost-efficiency in the development and acquisition of military capabilities, this study formulates a number of hypotheses about their potential impact on the defence sector in Europe.

This study is divided into two parts. The first, drafted by the FRS Research team, focuses on Directive 2009/81/EC on defence and security procurement, and the second, drafted by the GRIP Research team, is related to Directive 2009/43/EC on intra-European Union transfers of defence-related products. The two parts adopt the same frame of reference: (1) the situation before the Directive's entry into force, an overview of the major principles introduced by the Directive and their implications for actors in the European defence sector, along with the process of transposition into national law; (2) An initial evaluation of national practices through qualitative analysis, and for Directive 2009/81/EC, statistical analysis; (3) An identification of the complex points and obstacles, which, if not overcome, may well call into question the Directives' expected beneficial effects.

2 The directive 2009/81/EC on Defence and security Procurement under scrutiny

2.1 Before and after

2.1.1 Looking back : an extensive and intensive use of Article 346 of the TFEU

Directive 2009/81/EC is interposed between Article 346 of the TFEU, which should become the exception, and the Directive 2004/18/EC⁸ on public procurement (single market rules). This new regime, which is specific to public contracts in the fields of defence and security, provides adapted procedures. Following the transposition of the Directive 2009/81/EC into national law, the key issue is to establish to what extent EU Member States have recourse to the single market rules, to the special regime, as well as to exclusions and derogations.

In the sphere of public contracts, according to Directive 2004/18/EC, the award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the basic provisions of the Treaty relating to free movement of goods and service and freedom of establishment, and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving there from, such as the principle of equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, Article 10

⁸ In December 2011, the Commission proposed the revision of Directives 2004/17/EC and 2004/18/EC (public works, supply and service contracts), as well as the adoption of a directive on concession contracts. The directives were voted by the European Parliament on 15 January 2014 and adopted by the Council on 11 February 2014. The Member States have until April 2016 to transpose the new rules into their national law. Directive 2014/24/EU of the European Parliament and of the Council of 26 february 2014 on public procurement and repealing Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, Official Journal L 94, 28.3.2014, p. 65–242.

established that 'Directive shall apply to public contracts awarded by contracting authorities in the field of defence, subject to Article 296 of the Treaty', and Article 14 that 'Secret contracts and contracts requiring special security measures. This Directive shall not apply to public contracts when they are declared to be secret, when their performance must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned, or when the protection of the essential interests of that Member State so requires'⁹.

It is important to recall that Article 346 historically marks the willingness of the major arms producing States in Europe to exclude defence equipment from the Community sphere (which results in the non-application of Directive 2004/18/EC). Over the years, with the successive revisions of European Treaties, this article has not been subject to any major changes in substance, only its numbering has changed: Article 223 in the Treaty of Rome, then Article 296 in the Treaty establishing the European Community (TEC, in the framework of the Treaty of Amsterdam), and finally Article 346 in the Treaty on the Functioning of the European Union (TFEU)¹⁰ since the entry into force of the Treaty of Lisbon on the 1st December 2009.

Article 346 (formerly Article 296 TEC)

1. The provisions of the Treaties shall not preclude the application of the following rules:
 - (a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;
 - (b) any 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; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.
2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.

The first paragraph of Article 346 deals with the protection of classified information and opposes the principle according to which the Treaty applies to all arms, munitions, and war materials. Only a Member State's 'essential interests of its security' can justify an exemption on the basis of Article 346-1(b), and not industrial and economic interests¹¹. The general scope of this text gives Member States *de facto* a large amount of discretion in the interpretation of needs relating to the protection of the essential interests of their security. However, the second paragraph limits the scope of Article 346 to a list of military materials, drawn up and approved by the Council in its decision 255/58 of 15 April 1958¹². Wholly civilian products, dual-use products, and products that have military characteristics or specificities but which do not constitute war materials under the 1958 list, can be considered outside of the scope of Article 346.

While Article 346 gives Member States discretionary power in terms of the rules to be applied in the field of defence equipment contracts, article 348¹³ acts as a safeguard. This article stipulates that in case of

⁹ The Court of Justice has repeatedly stated : 'Article 10 EC makes it clear that the Member States are required to cooperate in good faith with the enquiries of the Commission pursuant to Article 226 EC, and to provide the Commission with all the information requested for that purpose', Judgment of 13 July 2004, *Case 82/03 Commission v Italy*, par.15.

¹⁰ Consolidated version of the Treaty on the Functioning of the European Union', OJ C 326, 26.10.2012, p. 47–390.

¹¹ Commission of the European Communities, 'Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement', COM(2006)779 final, 7 December 2006.

¹² Council of the European Union, 'Extract of the Council Decision 255/58 of 15 April 1958', 26 November 2008.

¹³ Article 348 (ex Article 298 TEC): 'If measures taken in the circumstances referred to in Articles 346 and 347 have the effect of distorting the conditions of competition in the internal market, the Commission shall, together with the State concerned, examine how these measures can be adjusted to the rules laid down in the Treaties. By way of derogation from the procedure laid down in Articles 258 and 259, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in Articles 346 and 347. The Court of Justice shall give its ruling *in camera*'.

improper use of Article 346, which could have the effect of distorting the conditions of competition in the internal market, the European Commission or any Member State may bring the matter directly before the Court of Justice of the European Union. The rule of exceptionality is thus not absolute and must be justified.

As such, ECJ jurisprudence repeatedly recalls ¹⁴ that derogations 'deal with exceptional and clearly defined cases' and 'do not lend themselves to a wide interpretation'. Any derogation must be interpreted strictly, even in 'situations which may involve public safety'. In 2006, in its interpretative communication on the application of Article 296 of the Treaty in the field of defence procurement¹⁵, the Commission recalled that, for such limited cases, it is for Member States to provide, at the Commission's request, the necessary information and prove that exemption is necessary for the protection of their essential security interests.

But, in practice, the Article 346 TFEU was applied quasi automatically for the very large majority of defence equipment contracts awarded by Member States. The number of court cases was too low to bring about a change in practices, particularly regarding acquisitions.

2.1.2 A new flexible instrument

The Directive 2009/81/EC intends to provide procurement rules tailor-made for defence and security markets. Presented as an adapted and flexible regulation, outside the scope of the Government Procurement Agreement (GPA ¹⁶), the new Directive is supposed to lead to more transparency and competition. Most importantly, it should limit the use of the exception clause of Article 346, even if the Member States will always have the possibility to justify restrictions based on this article (Recital 20 of the Directive).

The European Commission justifies the Directive 2009/81/EC through the lack of harmonization at the European level of national rules for contract awards in the fields of defence and security. This incoherent situation constitutes an obstacle to the establishment of a European defence equipment market, which is essential for strengthening the European Defence Technological and Industrial Base (EDTIB) and developing the military capabilities (Recitals 2 and 4).

Recital 2: 'The gradual establishment of a European defence equipment market is essential for strengthening the European Defence Technological and Industrial Base and developing the military capabilities required to implement the European Security and Defence Policy'

Recital 4: 'One prerequisite for the creation of a European defence equipment market is the establishment of an appropriate legislative framework. In the field of procurement, this involves the coordination of procedures for the award of contracts to meet the security requirements of Member States and the obligations arising from the Treaty'

¹⁴ Court cases - Defence Procurement and Article 346 of the TFEU : Judgment of 15 May 1986, *Case C-222/84 Johnston*; Judgment of 4 October 1991, *Case C-367/89 Richardt and Les Accessoires Scientifiques*; Judgment of 3 May 1994, *Case C-328/92 Commission v Spain*; Judgment of 28 March 1995, *Case C-324/93 Evans Medical and Macfarlan Smith*; Judgment of 26 October 1999, *Case C-273/97 Sirdar*; Judgment of 16 September 1999, *Case C-414/97 Commission v Spain*; Judgment of 11 January 2000, *Case 285/98 Kreil*; Judgment of 13 July 2000, *Case C-423/98 Albore*; Judgment of 11 March 2003, *Case C-186/01 Dory*; Judgment of 16/10/2003, *C-252/01 Commission v Belgium*; Judgment of 30 September 2003, *Case T-26/01 Fiocchi Munizioni v Commission*; Judgment of 13 July 2004, *Case 82/03 Commission v Italy*; Judgment of the Court (Grand Chamber) of 8 April 2008, *C-337/05 - Commission v Italy*; Judgment of the Court (Second Chamber) of 2 October 2008, *C-157/06 - Commission v Italy*; Judgment of the Court (Fourth Chamber), 7 June 2012, *Case C-615/10 - Finland v European Commission*; 28 February 2013 Judgment in *Case C-246/12 P Ellinika Nafpigia AE v European Commission*.

¹⁵ Commission of the European Communities, 'Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement', op.cit., p.8.

¹⁶ It only concerns defence procurement by national authorities inside the European Internal Market. It does not deal with arms trade with third countries, which continues to be governed by WTO rules.

The scope of the Directive 2009/81/EC is large. It covers contracts for the procurement of military and sensitive equipment (and related works and services), as well as works and services for specifically military purposes or sensitive works and sensitive services (Article 2) ¹⁷. Military equipment is defined as equipment specifically designed or adapted for military purposes and intended for use as an arm, munitions or war material (article 1.6.). It should be understood in particular as the product types included in the list of arms, munitions and war material adopted by the Council in its Decision 255/58 of 15 April 1958. It should also cover products which, although initially designed for civilian use, are later adapted to military purposes to be used as arms, munitions or war material (Recital 10). In the specific field of non-military security, the Directive 2009/81/EC should apply to procurements which have features similar to those of defence procurements and are equally sensitive (Recital 11) ¹⁸, e.g. border protection, police activities and crisis management missions.

The Threshold amounts for contracts above which the directive applies are EUR 414 000 for supply and service contracts and EUR 5 180 000 for works contracts (Article 8; excl.VAT). Thus, above the outlined thresholds, the contracting authorities/entities ¹⁹ shall treat economic operators equally and in a non-discriminatory manner and act in a transparent way (Article 4), namely by applying the rules governing advertisement and transparency, and by adopting objective and non-discriminatory criteria, e.g. publication of appropriate information prior to, and at the end of, the award procedure²⁰, indication of the selection criteria, etc. ²¹. Contracts should be awarded based on these principles which guarantee that tenders are assessed in a transparent and objective manner under conditions of fair competition.

Based on the principle of non-discrimination, the directive recalls that it is forbidden to introduce selection criteria based on nationality. Article 21.1 (Subcontracting) notably stipulates that the public buyer cannot impose a choice of sub-contractor on the successful tenderer, on grounds of nationality. However, Member States may provide that the contracting authority/entity may ask or be required to ask the successful tenderer to subcontract to third parties a share of the contract (not exceed 30 % of the value of the contract; Article 21.4). When such a share is required, the successful tenderer should award subcontracts following a transparent and non-discriminatory competition. However, the Recital 18 underlines that Member States retain the power to decide whether or not their contracting authority/entity may allow economic operators from third countries to participate in contract award procedure.

In addition, the criteria for awarding contracts (Articles 47.1.a and 47.1.b) provide a certain amount of freedom to contracting entities. Indeed, the definition of the most economically advantageous tender could be founded 'for example' (extensive range of possible criteria) on quality, price, technical merit, functional characteristics, environmental characteristics, running costs, lifecycle costs, cost-effectiveness,

¹⁷ Article 2-Scope. Subject to Articles 30, 45, 46, 55 and 296 of the Treaty, this Directive shall apply to contracts awarded in the fields of defence and security for: (a) the supply of military equipment, including any parts, components and/or subassemblies thereof;(b) the supply of sensitive equipment, including any parts, components and/or subassemblies thereof; (c) works, supplies and services directly related to the equipment referred to in points (a) and (b) for any and all elements of its life cycle;(d) works and services for specifically military purposes or sensitive works and sensitive services'.

¹⁸ Article 1.7 of the Directive 2009/81/EC. 'Sensitive equipment', 'sensitive works' and 'sensitive services' means equipment, works and services for security purposes, involving, requiring and/or containing classified information'.

¹⁹ As defined in Article 1.9 of Directive 2004/18/EC: 'Contracting authorities' means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law'.

²⁰ Documents: buyer profile, subcontract notice, prior information notice, contract notice, voluntary ex ante transparency notice, contract award

²¹ Recitals 56, 61, 69, Chapter V. Rules on advertising and transparency, Chapter VII. Conduct of the procedure, of the Directive 2009/81/EC.

after-sales service and technical assistance, delivery date and delivery period or period of completion, security of supply, interoperability and operational characteristics.

Furthermore, the Directive recognizes the 'sensitive nature' of goods and services in the defence and security sectors, because vital for both the security and the sovereignty of Member States and for the autonomy of the Union (Recital 8). This results in specific requirements (which do not exist in Directive 2004/18/EC), in the fields of security of information (Article 22) and security of supply (Article 23). In both cases, this allows for the imposition of particular conditions during the selection process for applications or offers, or during the execution of a contract. The Directive 2009/81/EC thus gives a fair amount of leeway to contracting entities to rule out undesirable tenderers, notably in relation to security of supply²².

Moreover, the 'sensitive nature' of goods and services in the defence and security sectors implies the possibility to applying a large range of award procedures, from 'standard' procedures [Restricted procedure (article 25) and Negotiated procedure with prior publication of a contract notice (article 26)], to 'non standard' procedures [Competitive Dialogue (article 27) and Negotiated procedure without prior publication of a contract notice (article 28)]. The use of the Competitive Dialogue procedure is relevant in the case of particularly complex contracts, when the article 28 covers a limited number of specific cases (and contracting authorities/entities shall justify the use of this procedure), such as (not exhaustive list):

- no tenders or no suitable tenders or no applications have been submitted
- in the event of irregular tenders or the submission of tenders which are unacceptable under national provisions
- when the periods laid down for the restricted procedure and negotiated procedure
- for reasons of extreme urgency brought about by events unforeseeable
- for technical reasons or reasons connected with the protection of exclusive rights
- R&D services and products manufactured purely for the purpose of R&D
- for additional deliveries by the original supplier, or additional works or services

On top of that, a dedicated section called 'Section 3. Excluded Contracts' contains a large list of 13 types of exclusions, ranging from contracts awarded pursuant to international rules (Article 12; international agreement or arrangement, international organisation purchasing) to specific exclusions, of which the main ones are as follows (Article 13):

- Contracts for which the application of the rules of the Directive would oblige a Member State to supply information the disclosure of which it considers contrary to the essential interests of its security
- Intelligence activities
- Cooperative programme based on R&D
- Contracts awarded in a third country carried out when forces are deployed outside the territory of the Union

²² Article 23 (SoS) of the Directive 2009/81/EC and Article 42 h. 'A description of the tools, material, technical equipment, staff numbers and know-how and/or sources of supply — with an indication of the geographical location when it is outside the territory of the Union — which the economic operator has at its disposal to perform the contract, cope with any additional needs required by the contracting authority/entity as a result of a crisis or carry out the maintenance, modernisation or adaptation of the supplies covered by the contract'.

- Government to government sales
- R&D services (other than those where the benefits accrue exclusively to the contracting authority/entity for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting authority/entity)

The diversity of exclusions that can be used and their undefined character (e.g. essential interests of security; intelligence activities; the lack of a list of materials that can be subject to exclusion) give contracting entities a significant amount of scope to exclude certain contracts from the sphere of the Directive, even though this freedom is reduced by European Court of Justice jurisprudence²³. Article 11 recalls that the use of exclusions must not circumvent the Directive.

2.1.3 Transposition : a difficult and lengthy process

Published on the OJEU on August 21st 2009, the transposition was mandatory within 2 years. Many Member States have widely missed the 21 August 2011 deadline imposed by the European Commission for the transposition into national law of the Directive²⁴. Only 3 Member States had notified complete transposition at that moment (and a fourth Member State in September 2011). Under Article 258 TFUE, the Commission opened infringement procedures against 23 Member States by sending letters of formal notice (30 September 2011). Moreover, on 26 January 2012, the Commission's request to Germany and The Netherlands takes the form of a reasoned opinion. If the national authorities do not reply satisfactorily within two months, the Commission may refer the matter to the Court of Justice and ask for the payment of financial penalties²⁵. Same process with Bulgaria and Luxembourg in March 2012²⁶, United Kingdom (in Gibraltar) in April 2012²⁷, Austria (with regard to Carinthia) and Poland in May 2012²⁸, Slovenia in June 2012²⁹ and Portugal in March 2013 (request to fully implement the Directive, and not only parts of it)³⁰. By July 2012, four Member States (Poland, The Netherlands, Luxembourg and Slovenia) had still not notified any transposition measure to the Commission. On 27 September 2012, Commission has decided to ask the Court to impose daily penalty payments³¹ on the four Member States until they fully implement the Directive³².

Finally, as stated in the Communication from the Commission, *Towards a more competitive and efficient defence and security sector*³³, the transposition in all 27 Member States was accomplished in March 2013³⁴.

²³ Possibilities of exclusion must be interpreted in the strictest sense (ECJ, 13 December 2007, *Bayerischer Rundfunk*, C- 337/06)

²⁴ Report from the Commission to the European Parliament and the Council on transposition of directive 2009/81/EC 'on Defence and Security Procurement', COM(2012) 565 final, 2 October 2012.

²⁵ The Commission acts to ensure the implementation of EU rules in the area of defence procurement', European Commission, Press Release, 26.01.2012.

²⁶ The Commission acts to ensure the implementation of EU rules in the area of defence procurement', European Commission, Press Release, 22.03.2012.

²⁷ The Commission requests the United Kingdom to implement EU rules in the area of defence procurement in Gibraltar', European Commission, Press Release, 26.04.2012.

²⁸ 'The Commission requests Austria and Poland to fully transpose EU rules in the area of defence procurement', European Commission, Press Release, 31.05.2012.

²⁹ The Commission requests *Slovenia* to implement EU defence procurement rules', European Commission, Press Release, 21.06.2012.

³⁰ Defence Procurement: The Commission requests Portugal to apply EU rules', European Commission, MEMO/13/261, 21.03.2013.

³¹ Daily penalty payment of € 70 561.92 for Poland, € 57 324.80 for The Netherlands, € 8 320 for Luxembourg and € 7 038.72 for Slovenia.

³² The Commission asks Court of Justice to fine Poland, The Netherlands, Luxembourg and Slovenia for not implementing defence procurement rules' European Commission, Press Release, 27.09.2012.

³³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Towards a more competitive and efficient defence and security sector', COM(2013)542 final, 24 September 2013.

The difficulty now lies in the consistent and harmonised application of the directive by all EU Member States in order to avoid recreating market distortions.

The European Commission will verify and monitor whether the national implementing measures comply with the Directive 2009/81/EC, considering that the difference in the implementation is directly linked to the national defence industrial capabilities, notably in addressing the following 'crucial provisions : the scope of application (Article 2); the exclusions from the application of the Directive (Articles 12 and 13); the subcontracting provisions (Articles 21 and 50 to 54 – title III); and the review procedures (Articles 55-64)' ³⁵. The Commission's objective is thus to verify if these modifications lead to concrete changes in practices.

Furthermore, the Commission considers that the correct application of the Directive 2009/81/EC in the Member States is also dependent on the phasing out of offsets. Offsets are identified as incompatible procurement practices with the Directive (against the principles of openness, transparency and non-discrimination). Offsets are discriminatory measures on the ground of the nationality, and a disturbance of internal market. The Commission's position is that offsets are not automatically exempted from EU rules (under Article 346 TFEU). Even inside art 346 TFEU, It is necessary to justify and prove that requiring offsets are an 'essential interest of security', and not linked with economic purposes or employment-related interests.

In 2007, a study commissioned by the EDA thus underlined that 18 Member States (out of the 24 Member States studied) applied offsets policies ³⁶ in the framework of their policy of defence equipment acquisition (with the average level of compensation being 135 %). In July 2009 ³⁷, the new EDA *Code of Conduct on Offsets* ³⁸ have represented an attempt to limit offsets by introducing a 100% cap (subscribing governments will neither request nor accept offsets exceeding the value of the procurement contract). The Code of Conduct on Offsets sets out a framework for evolving offsets, but it's a voluntary, non-legally binding code.

However, the Directive 2009/81/EC does not explicitly address offsets. There is no provision, no express reference in the text. The option chosen by the Commission is to not mention specifically offsets in the Directive, as it would leave it down to the Member States to assess the compatibility of offsets with EU law. The article 21 of the Directive 2009/81/EC deals indirectly with this issue, from the subcontracting perspective. The Commission has published a Guidance Note ³⁹, which reflects the views of the services of Directorate General Internal Markets and Services and is legally not binding.

³⁴ Croatia officially became an EU Member State on the 1st July 2013. It first published a contract notice on TED in October 2013. Yet it began the transposition of the Directive in July 2011, with Public Procurement Act adopted by the Croatian Parliament at its session of 15 July 2011.

³⁵ Report from the Commission to the European Parliament and the Council on transposition of directive 2009/81/EC on Defence and Security Procurement', COM(2012) 565 final, 02 October 2012, p.5-8.

³⁶ Final Report of 06-DIM-022 Study on the effects of offsets on the Development of a European Defence Industry and Market', By E. Anders Eriksson with contributions by Mattias Axelson, Keith Hartley, Mike Mason, Ann-Sofie Stenérus and Martin Trybus, EDA, 12 July 2007. The average offset obligation among EU member states between 2000 and 2006 was 135% of contract value, and that direct offsets account for 40% of total offsets (Indirect military 35%, Civil indirect 25%).

³⁷ The European Defence Agency's Steering Board adopted the code on the 24th October 2008. It came into effect on 1 July 2009.

³⁸ European Defence Agency, 'Code of Conduct on Offsets', 24 October 2008.

³⁹ Guidance Note *Offsets*', Directorate General Internal Markets and Services.

2.2 Implementation : statistical and analytical analysis

2.2.1 Transparency: Tenders Electronic Daily (TED): free access to business opportunities

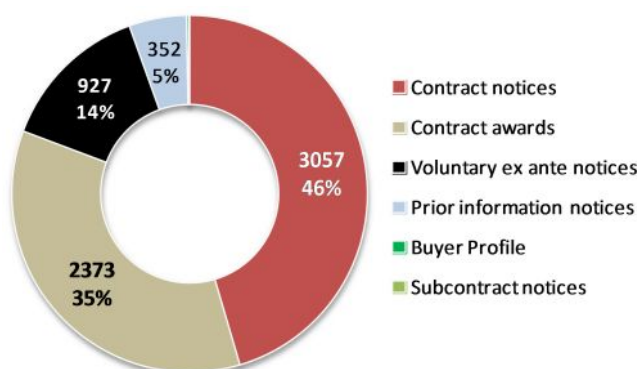
Contracts covered under the Directive 2009/81/EC are advertised in TED (Tenders Electronic Daily ⁽⁴⁰⁾). TED database is the online version of the 'Supplement to the Official Journal of the EU', dedicated to European public procurement. TED provides free access to business opportunities. It is updated 5 times a week. Procurement notices can be browsed, searched and sorted by country, type of contracts, type of documents, CPV code ⁽⁴¹⁾, publication date, type of authority, etc.

As requested in article 32.4 of the Directive 2009/81/EC, contract notices shall be published in full in an official language of the Community, as chosen by the contracting authority/entity, this original language version constituting the sole authentic text. A summary of the important elements of each notice shall be published in the other official languages.

In order to understand the evolution of Member States' acquisition practices since the entry into force of the Directive, the FRS Research team has relied on statistical analysis drawn up using reprocessed data from the TED database, during the period from the 21st August 2011 to the 31st December 2014 ⁽⁴²⁾, covering all EU Member States. This analytical and statistical work is undertaken in the Framework of a dedicated review publication established in 2012 by the Foundation for Strategic Research (with a quarterly publication of statistical bulletins).

Notices published on TED: major differences between Member States

Figure 1 - Number of notices published on TED per type



Source: TED data

⁴⁰ <http://ted.europa.eu>.

⁴¹ The CPV establishes a single classification system for public procurement aimed at standardising the references used by contracting authorities and entities to describe the subject of procurement contracts. The CPV, adopted by Regulation (EC) No. 213/2008 is in use since 17/09/2008. The CPV consists of a main vocabulary for defining the subject of a contract, and a supplementary vocabulary for adding further qualitative information. The main vocabulary is based on a tree structure comprising codes of up to 9 digits (an 8 digit code plus a check digit) associated with a wording that describes the type of supplies, works or services forming the subject of the contract. (see <http://simap.europa.eu/>). The CPV version 2008 is the current CPV version to: Fill the notices of calls for competition, Search business opportunities in TED, Find contract notices in the archive of TED (http://simap.europa.eu/codes-and-nomenclatures/codes-cpv/codes-cpv_en.htm).

⁴² Martin Kévin, 'Directive 2009/81/EC Statistical Report 2012', FRS, January 2013; 'Directive 2009/81/EC Statistical Report 2013', FRS, January 2014; 'Directive 2009/81/EC Statistical Report 2014', FRS, February 2015.

Between the 21st August 2011 and the 31st December 2014, 6 728 documents were published on TED: **3 057** Contract notices, **2 373** Contract awards ⁴³, **927** Voluntary ex ante notices, and **352** Prior Information notices.

Buyer Profiles and Subcontract notices are few in number (only 19 over the period).

Figure 2 - Growth in notice since 2011



Source: TED data

⁴³ The search on TED gave rise to the 2 381 contract awards notices, although 8 of them have been declared either fruitless, not followed up, cancelled, or have been deleted from the system. These notices have been removed from the statistics.

The year 2012 can be considered as a transitional period given that, in July of that year, only 23 Member States had transposed the Directive into national law. Starting from the second semester of 2013, all EU Member States had completed this process. The years 2013 and 2014 thus provide a better indication of practices.

While the number of documents published over these past two years has been increasing, this increase is not as significant as expected, and above all it is due to a small group of Member States (France, Germany, and the United Kingdom).

Moreover, Member States (Portugal, Malta, Ireland and Spain) have not published documents on TED. This initial survey demonstrates an important disparity in the Member States' publication practices.

Table 1 Contract Notices

Contract Notices						
TOP10	2011	2012	2013	2014	TOTAL	
	Nb	Nb	Nb	Nb	Nb	%
FR	86	361	294	316	1057	34,58%
DE	8	171	202	239	620	20,28%
UK	1	65	60	115	241	7,88%
PL	0	0	81	148	229	7,49%
FI	2	44	43	43	132	4,32%
CZ	0	31	29	55	115	3,76%
DK	5	31	32	40	108	3,53%
SE	0	14	37	37	88	2,88%
IT	0	21	26	33	80	2,62%
RO	0	0	16	29	45	1,47%

Source: TED data

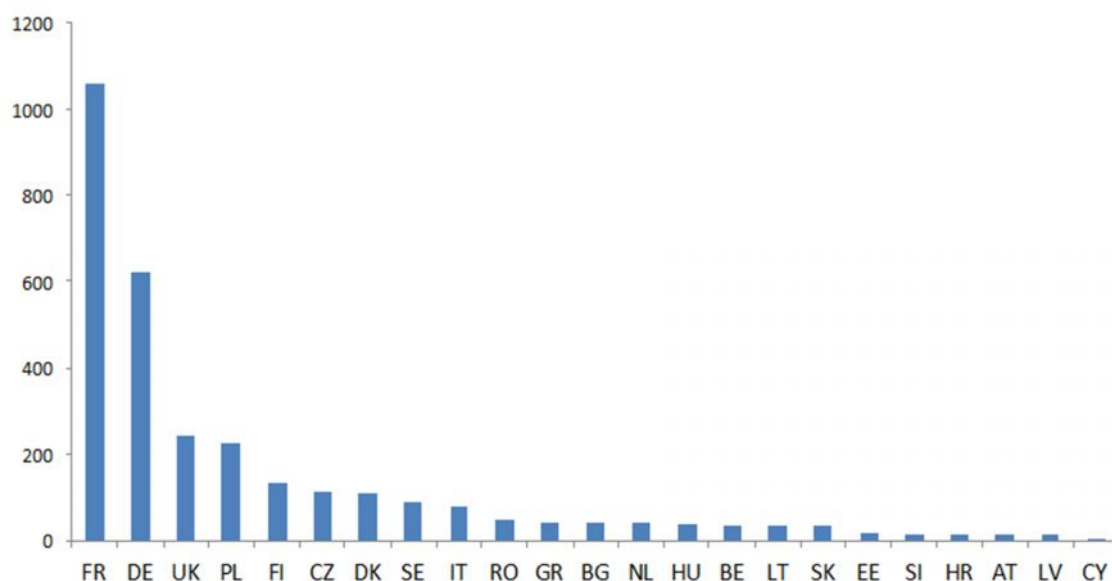
It is apparent from an analysis by country and per year that, out of a total of 3057 **contract notices** ⁴⁴ published on TED between the 21st August 2011 and the 31st December 2014, France and Germany account together for around 55% of the notices.

Next are the United Kingdom (7,9%) and Poland (7,5%), and there is then a significant gap to the rest of the Member States, with 17 Member States, ranging from 0,1% to 4,5%.

To date, 5 Member States have not yet published contract notices (Spain, Ireland, Luxembourg, Malta, and Portugal). Overall, the top 10 account for 89% of the contract notices published on TED.

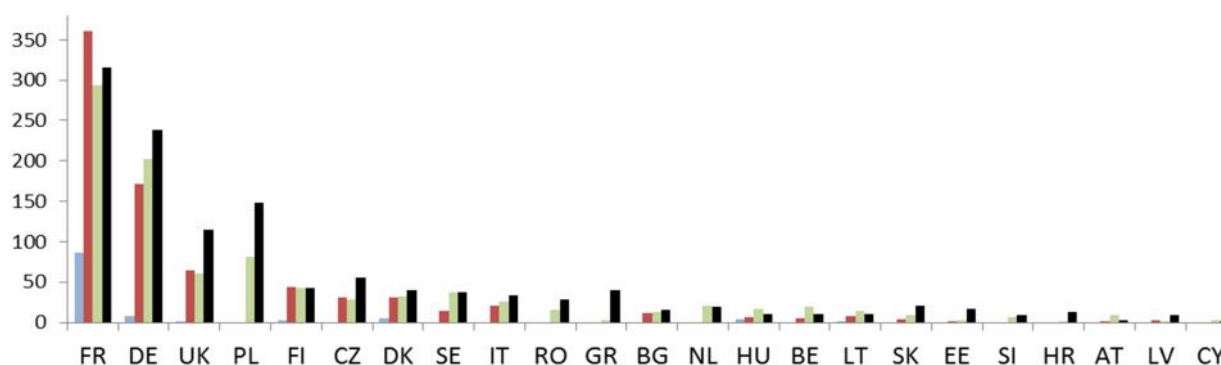
Poland's swift upsurge, in spite of its late transposition, should be highlighted, increasing from 81 contract notices published in 2013 to 148 in 2014 (+84%). France, at the head of the list right from the start, with a high point in 2012 (361 contract notices), seems to subsequently have stalled (-12,5% between 2012 and 2014).

⁴⁴ See the detailed table in the Annex 1.

Figure 3 - Number of contract notices per Member State (2011-2014)


*0 contract notices for ES, IE, LU, MT, PT

Source: TED data

Figure 4 - Number of contract notices per Member States and per year (2011-2014)


*0 contract notices for ES, IE, LU, MT, PT

Source: TED data

Table 2 Contract Awards

TOP10	2011	2012	2013	2014	TOTAL	
	Nb	Nb	Nb	Nb	Nb	%
DE	3	89	205	253	550	23,18%
FR	0	42	237	232	511	21,53%
IT	10	109	100	108	327	13,78%
PL	0	3	35	171	209	8,81%
UK	0	31	55	86	172	7,25%
FI	0	26	36	45	107	4,51%
RO	0	0	22	58	80	3,37%
DK	0	17	23	32	72	3,03%
CZ	0	9	16	40	65	2,74%
HU	1	14	19	9	43	1,81%

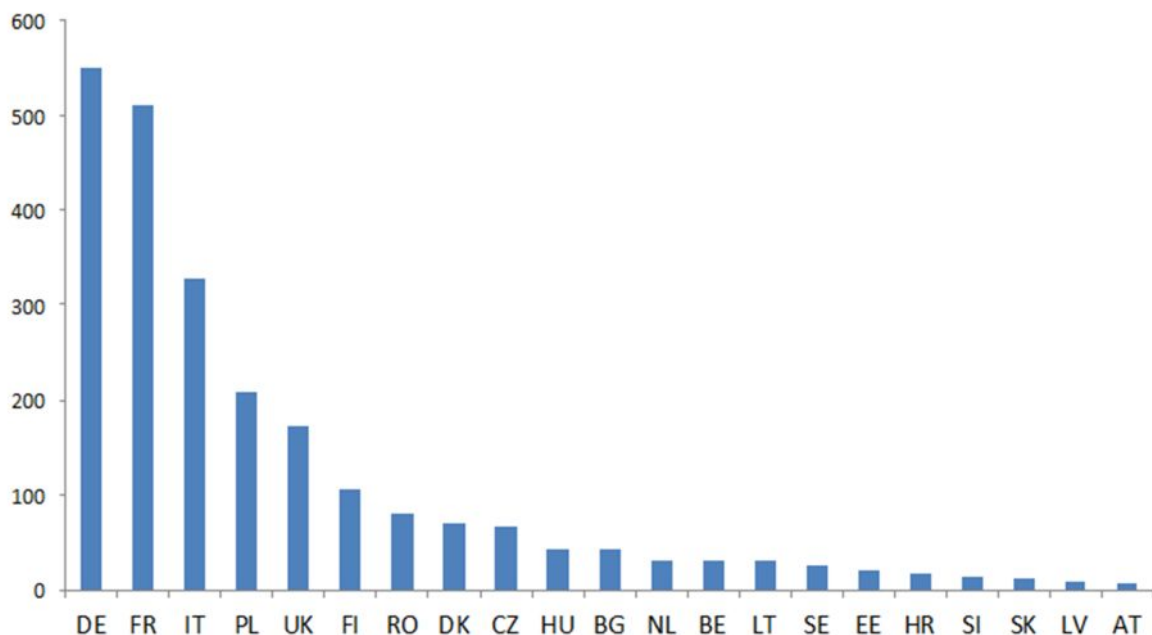
Source: TED data

Out of a total of 2373 **contract awards** ⁴⁵, Germany, France, and Italy account together for a share of 58%.

Poland and the United Kingdom follow, in the range of 7% and 9%, while the other Member States are all below the 5%. 6 Member States have not published contract awards (Portugal, Malta, Ireland, Greece, Cyprus, and Spain).

Thus, among the principal European State arms buyers and producers (France, the United Kingdom, Germany, Italy, Spain, and Sweden), Sweden is lagging far behind with only 25 *contract awards* over the period (and 88 *contracts notices*), while Spain has still not put Directive 2009/8 into practice despite the transposition of the text into national law ⁴⁶.

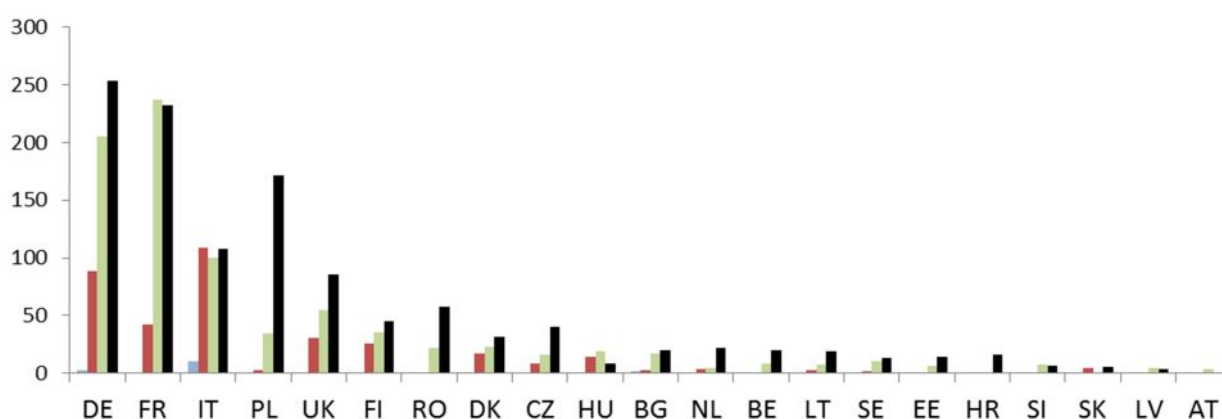
Figure 5 - Number of contract awards per MS (2011-2014)



*0 contract notices for ES, CY, GR, IE, MT, PT, LU

Source: TED data

Figure 6 - Number of contract awards per MS and per year (2011-2014)



*0 contract notices for ES, CY, GR, IE, MT, PT, LU

Source: TED data

⁴⁵ See the detailed table in the Annex 2.

⁴⁶ Act on defence and sensitive security procurement', (2011:1029) (LUFS), 1st August 2011 (entry into force on the 3rd November 2011).

The table below helps to illustrate several particularities in the publication practices of certain Member States.

- As previously underlined, Spain, Portugal, Ireland, Luxembourg, and Malta, have not yet published contract notices or single contract awards.
- Greece and Cyprus have published at least 50 contract notices but not a single contract award.
- Italy has published a much greater number of contract awards (327) compared with contract notices (80). This is also the case for Romania. This asymmetry seems to suggest frequent use of the negotiated procedure without prior publication, or the use of other procedures not foreseen in Directive 2009/81; a situation that has moreover been raised by the European Commission⁴⁷ in 2013.
- Italy and the Czech Republic also stand out due to their significant number of Prior Information Notices. This type of notice helps to reduce the timeframe for the reception of offers from candidates. When contracting authorities/entities have published a prior information notice, the minimum time limit for the receipt of tenders is shortened to 36 days, but under no circumstances to less than 22 days.
- The United Kingdom and Denmark, and to a lesser extent, Finland and Poland, are distinguished by the large number of publications of Voluntary ex ante transparency (VEAT) notices. This notice aims to provide voluntary prior transparency as referred to in Article 60.4 of Directive 2009/81/EC. A contracting authority can publish a contract notice through VEAT if it intends to award a contract without prior publication or to award a contract by negotiated procedure without prior publication of a contract notice in the Official Journal of the European Union. If the administrative court has not received an application for a review before the expiry of the 'standstill period' (10 days, in some circumstances 15 days), the contract awarded without prior publication may subsequently not be subject to review. The advantage to the contracting authority is that the penalty of mandatory ineffectiveness does not apply in the event of a challenge to a contract awarded after the standstill period has elapsed.
- The VEAT notice shall contain a justification of the decision of the contracting authority/entity to award the contract without prior publication of a contract notice in the Official Journal of the European Union (Article 64, Directive 2009/81/EC). The United Kingdom was the first Member State to use VEAT notices⁴⁸, and justifies this procedure largely for technical reasons connected with the protection of exclusive rights, or no tenders or no suitable tenders in response to negotiated procedure. For its part, Denmark also cites justifications linked to technical reasons, but also additional works/deliveries/services⁴⁹.

⁴⁷ Commission Staff Working Document on Defence, 'Accompanying the Document Communication Towards a more competitive and efficient defence and security sector', COM (2013) 542 final, SWD (2013) 279 final, 24.07.2013, p.15.

⁴⁸ Examples of British VEAT notices: Training simulators, Development of software for military applications, Helicopters (delivery of the 3rd pricing period of a 25 year contract for the support of Merlin helicopter availability), Sonars (Sensors Support Optimisation Project), Torpedoes (Spearfish Torpedo Upgrade Programme), Repair and maintenance services, LAIRCM system.

⁴⁹ And in a lesser extent, justifications related to 'the contract falls outside the scope of application of the Directive', or article 13(f) (contracts awarded by a government to another government), or article 10.2. (Contracts and framework agreements awarded by central purchasing bodies).

Table 3 Number of notices published on TED (21.08.2011 until 31.12.2014)

	Buyer profile	Subcontract notices	Contract notices	Prior Information notices	Contract awards	Voluntary ex ante notices	Total
France	2	3	1057	5	511*	92	1670
Germany	1		620	17	550*	3	1191
United Kingdom		1	241	37	172	452	903
Italy	4		80	111	327*	25	547
Poland	3		229	1	209	82	524
Finland			132	2	107	98	339
Denmark			108	8	72	145	333
Czech Republic			115	143	65		323
Romania			45	3	80*		128*
Sweden			88	1	25	1	115
Bulgaria			41	3	42	1	87
Hungary	3		37		43		83
Netherlands			41	6	31*	1	79
Lithuania			34		30	6	70
Belgium			35	2	30	1	68
Slovakia			34	10	12	6	62
Greece			43	1	0		44
Estonia			20		21		41
Slovenia			15		15	11	41
Croatia			14		16	2	32
Latvia			12		9		21
Austria			12	1	6		19
Cyprus			4	1	0		5
Spain	1	1	0		0	1	3
Malta			0		0		0
Portugal			0		0		0
Luxembourg			0		0		0
Ireland			0		0		0
Total	14	5	3057	352	2373	927	6728

2.2.2 Contract awards notices: still too many "No information"

As underlined in the article 31.3 of the Directive, contracting authorities/entities which have awarded a contract or concluded a framework agreement shall send a notice of the results of the award procedure no later than 48 days after the award of the contract or the conclusion of the framework agreement. The contract award notice shall contain the following information (Annex IV):

1. Name and address of the contracting authority/entity.
2. Award procedure chosen. In the case of a negotiated procedure without prior publication of a contract notice (Article 28), justification.
3. Works contracts: nature and extent of the services.
Supply contracts: nature and quantity of products supplied, where appropriate, by the supplier; CPV nomenclature reference no(s).
Service contracts: category and description of the service; CPV nomenclature reference no(s); quantity of services purchased.
4. Date of contract award.
5. Contract award criteria.
6. Number of tenders received.
7. Name and address of the successful economic operators.
8. Price or range of prices (minimum/maximum) paid.
9. Value of the tender (tenders) retained or the highest tender and lowest tender taken into consideration for the contract award.
10. Where appropriate, proportion of contract to be subcontracted to third parties and its value.
11. If appropriate, the reasons for the framework agreement lasting more than seven years.
12. Date of publication of the tender notice in accordance with the technical specifications for publication in Annex VI.
13. Date of dispatch of this notice.

The table below presents a statistical analysis of information not provided by contracting authorities/entities in the framework of contract awards notices (out of a targeted panel of requested information). It is apparent that the contracting authorities/entities have a tendency to provide more information as the years go by, in particular the 'Type of procedure', the 'Estimated total value of contract', the 'Total final value of contract', the 'Number of tender received', the 'Contract award criteria', the 'Successful economic operator' (Name, address) and the 'Information about subcontracting'.

Table 4 Contracts awards notices: % No Information

	16 contract awards notices	359 contract awards notices	822 contract awards notices	1176 contract awards notices	TOTAL 2373 contract awards notices
Type of procedure	6,25%	0,00%	3,89%	0,94%	1,85%
Estimated total value of contract	43,75%	72,70%	72,90%	58,47%	65,53%
Total final value of contract	6,25%	24,23%	24,54%	23,15%	23,68%
Number of tender(s) received	0,00%	38,16%	26,97%	26,55%	28,28%
Contract award criteria	6,25%	48,19%	30,26%	26,04%	30,72%
Information of the successful economic operator*	6,25%	15,04%	3,40%	2,13%	4,55%
Name of economic operator	6,25%	15,32%	3,52%	2,21%	4,68%
Address of economic operator (country)	6,25%	15,88%	4,50%	4,00%	5,98%
Information about subcontracting	6,25%	48,75%	32,69%	29,96%	33,59%

Source: TED data

However, significant disparities exist. 'Type of procedure' and 'Information of the successful economic operator' are generally provided by the contracting authorities/entities, with an average rate of 'No Information' less than 2% for the former and less than 5% for the latter.

'Total final value of contract' is not specified by the contracting authorities/entities in an average of 24% of cases over the period. No significant improvement is discernible in 2013 and 2014. An analysis of Member States practices demonstrate that Sweden, the Netherlands, Belgium, Denmark, and Germany can be characterised by the small amount of information provided regarding the final value of the contract (from 88% 'No Information' for Sweden, to 48% 'No Information' for Germany).

Concerning information relating to 'Contract award criteria' and 'Number of tender(s) received', the level of 'No Information' remains high: around 26% in 2014 (30% over the period 2011-2014), even though the situation has been improving since 2012, notably for 'Contract award criteria'.

An approach by Member State highlights the fact that Italy, Denmark, Sweden, France, and Finland are the States that, on average over the entire period, demonstrate the highest level of 'No Information' for the item 'Contract award criteria' (between 71% for Italy and 36% for Finland).

Regarding the 'Number of tender(s) received', Finland is at the head of the list of States providing the lowest amount of information on this point (73% 'No Information' from 2012-2014; 84% in 2014), followed by Denmark (72 % 'No Information' from 2012-2014; 63% in 2014), and Italy (68 % 'No Information' from 2012-2014; 66% in 2014).

In the framework of contract awards notices, the contracting authorities/entities are supposed to provide 'where appropriate, the proportion of contract to be subcontracted to third parties and its value'. In 2014, around 1/3 provided no information about subcontracting (34% 'No Information'). Furthermore, when information on this item is provided (the contract is likely to be sub-contracted: YES or NO), 50% respond in the negative, and 16% in the affirmative (385 contract awards). And in the latter case (YES), around 70% do not give any figures about the value or proportion of the contract likely to be sub-contracted to third parties. It is important to underline here that more than half of the 385 contract awards concerned, stem from German contracting authorities/entities, which provide almost no information on the value or the proportion.

2.2.3 Total Value of contract awards notices: €10.53 billion only...

In value, contract awards notified between the 21st August 2011 and the 31st December 2014 represent around €10.53 billion ⁵⁰. It is important to underline that this figure does not reflect the entirety of contract awards over the period in question. Indeed, 562 contract award notices, out of a total of 2373, do not contain any information on this particular point.

An analysis by Member State demonstrates the preponderant weight of the United Kingdom, with 38% of the total amount between 2011 and 2014 (€3.99 billion), followed by France (26% ; €2.77 billion).

The cumulative share of these two Member States in addition to that of Germany (9%; €949 million), Italy (8%; €831 million) and Poland (8%; €816 million) represents 89% of the total amount. The contracts notified by the other 23 Member States during the period thus amount to no more than 11% (around €1.1 billion) ... with each Member State located in the range of 0,1% and 2% (Finland and Romania are each around 2%; the others have a share of less than 1%) ⁵¹.

Table 5 Total value of contracts in € million, per year

Year	Value (M€)	% total
2014	6 846,78	65%
2013	2 323,51	22%
2012	1 341,31	13%
2011	22,16	<1%
TOTAL	10 533,77	100%

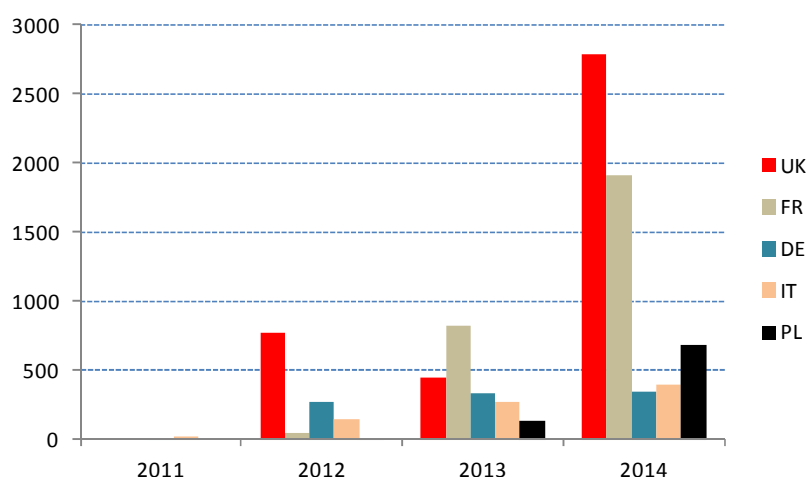
Source: TED data

⁵⁰ 562 Contract awards (23.28% of the total number) do not specify an exact value.

⁵¹ See the detailed table in the Annex 3.

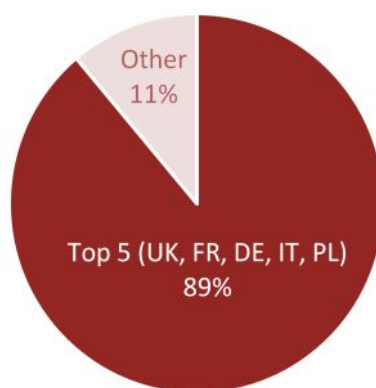
Although a comparison with Member States' spending on equipment is not rigorous from a methodological point of view, it nonetheless helps to put the size of the markets notified via Directive 2009/81/EC into perspective. For instance, for the year 2012, a period for which aggregated budgetary data is available (European Defence Agency, Defence Data 2012, edited in 2013), the total value of EDA pMS Aggregated National Defence Equipment Procurement Expenditure reaches €28.1 billion (without European Collaborative Defence Equipment Procurement). For the year 2012, the amount of the contracts attributed via the Directive represents less than 5% of the spending on equipment.

Figure 7 - Value of contracts in € million per year, for 5 MS



Source: TED data

Figure 8 - Total value of contracts: Top 5 MS (%)



Source: TED data

While the year 2013 can be distinguished by an increase in the total amount of *contract awards* (+73% to €2.32 billion), the year 2014 demonstrates a significant rise with a total value of €6.85 billion. Thus, over the period 2011-2014, the final year accounts for around 65% of the total, due to significant contracts notified by the United Kingdom in the field of services and facilities management, and by France on the segments covering Repair and maintenance services of military aircrafts and the acquisition of military equipment (rockets).

Table 6 Top 10 Major contracts awards, published on TED, in € million

Contracting authority		Publication date	Information about the contract award	Value <i>Local currency</i>
UK	Command & Centre, DE&S	10/2012	Technical services (Framework Agreement for Technical Support FATS/4)	550 M£
UK	Ministry of Defence, DIO	06/2014	Real estate services (Strategic Business Partner for Defence Infrastructure Organisation)	400 M£
FR	Ministry of Defence, Simmad	09/2014	Repair and maintenance services of military aircrafts, missiles and spacecrafts (CASA Transport aircraft)	379,7 M€
UK	National Training Estate Prime	07/2014	Building and facilities management services	319,5 M£
UK	Ministry of Defence, DIO	08/2014	Building and facilities management services (Regional Prime Central)	234,3 M£
FR	Ministry of Defence, DGA/SCA	12/2014	Rockets	229 M€
UK	Ministry of Defence, C&C	08/2014	Technical training services (Defence College of Technical Training Electro-Mechanical Training Contract)	180 M£
FR	Ministry of Defence, Simmad	06/2013	Repair, maintenance and associated services related to aircraft and other equipment	198,5 M€
UK	Ministry of Defence	08/2014	Building and facilities management services (Regional Prime South East)	148,3 M£
UK	Ministry of Defence	08/2014	Building and facilities management services (Regional Prime South East)	132,6 M£

Source: TED data

Moreover, when the amount is provided by Member States (562 contract awards notices display *No Information*), it is apparent that the number of contracts with a value above €5 million is very low, around 11% of the contracts notified by Member States during the period 2011-2014 (a total of 255 contracts).

Figure 9 - Number of contract awards, by value range

Source: TED data

The vast majority of the contracts awarded under the Directive 2009/81/EC involve contracts with relatively small amounts. The contracts ranging from €1 million to €5 million account for 25% of the total, and those with a total less than €1 million account for 40%; in other words 65 % of the contracts are below €5 million.

The number of major contracts - exceeding €50 million - is increasing: 2 in 2012, 7 in 2013, and 29 in 2014. The same is true for the contracts ranging from €10 million to €50 million, namely their number is increasing, from 2 in 2011 to 68 in 2014. But overall, the Directive does not, at the present time, seem to be favoured for the major equipment contracts.

2.3 Openness and competition

2.3.1 Procurement procedures

Within the Directive 2009/81/EC, the various procedures at the disposal of contracting authorities/entities represent different degrees of transparency and competition.

- Contracting authorities/entities may choose to contract awards by applying the Restricted procedure and the Negotiated procedure with publication of a contract notice (Article 25).
- In the case of particularly complex contracts, Member States may award their contracts by means of a Competitive dialogue (Article 27).
- In the specific cases and circumstances, the contracting authorities/entities may apply a Negotiated procedure without publication of a contract notice (referred to expressly in Article 28).

Table 7 Contract notices: type of procedures, per year

Procedures		2011	2012	2013	2014
Competitive dialogue	Nb	0	1	2	1
	%	-	0,13%	0,21%	0,08%
Restricted procedure*	Nb	70	368	415	667
	%	65,42%	47,36%	44,20%	54,14%
Negotiated procedure*	Nb	37	406	502	563
	%	34,58%	52,25%	53,46%	45,70%
Not applicable	Nb	0	2	20	1
	%	-	0,26%	2,13%	0,08%
Total		107	777	939	1232

* *accelerated procedure included*

Source: TED data

As such, an analysis of the **contracts notices** published by Member States over the period 2011-2014 demonstrates that the Negotiated procedure⁵², the majority until 2013, falls to second place in 2014.

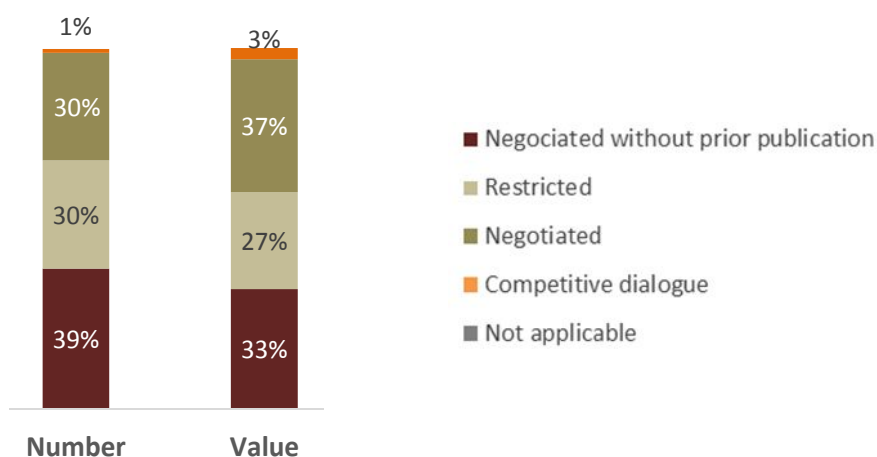
During this last year, Restricted procedures are preferred with a level of 54% compared to 45% for Negotiated procedures.

⁵² including accelerated negotiated

The remaining 1% comes under Competitive dialogue, thus used very sparingly by public purchasers.

This shift is largely the result of Poland's upsurge. In 2014, out of 148 contract notices, the Polish contracting authorities/entities favoured the use of a Restricted procedure (or accelerated restricted) in 74% of the cases.

Figure 10 - Contract awards: Procedure by use and value, 2011-2014



Source: TED data

An analysis of contracts awards over the period 2011-2014 shows that in 60% of cases a prior publication of a contract notice was established by Member States. Although in this framework, the Restricted and Negotiated procedures were applied almost equally numerically speaking (705 vs. 701), the situation is inverted in terms of the total value (€2.8 billion vs. €3.8 billion). This means that for the most significant contracts in terms of value, the Member States favoured the use of Negotiated procedure. Such is the case for 7 of the 10 major contracts since 2011

Furthermore, Award of a contract without prior publication of a contract notice accounts for 39% in terms of numbers (917) and 33% of the total value (€3,5 billion). Italy is the Member State that has had the greatest recourse to this procedure. The Competitive dialogue procedure was used for 6 contracts (3 FI, 1 UK, 1 DE, 1 AT) and thus remains extremely marginal.

Figure 11 - Procedures by Number (%)

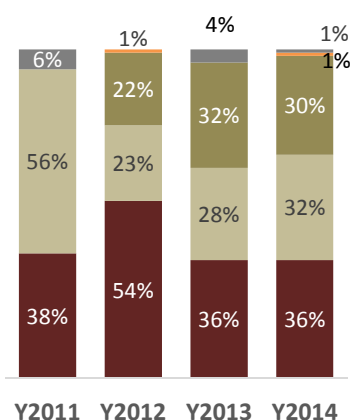
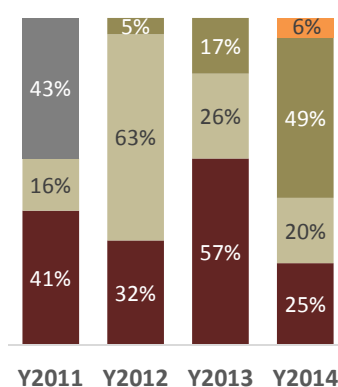


Figure 12 - Procedures by Value (%)



Source: TED data

An analysis by year underlines a certain level of stabilisation, in terms of numbers, of the different types of procedures used, with each being used almost 30% of the time (with the exception of Competitive

Dialogue) in 2013 and 2014. In terms of values, it is apparent that the contracts involving a Restricted procedure have reduced considerably, falling, from 63% in 2012 to 20% in 2014. Over the same period, Negotiated procedure increased, from 5% in 2012 to 49% in 2014.

Moreover, the year 2014 was marked by a major contract awarded by the United Kingdom (National Training Estate Prime) *via* the Competitive dialogue procedure for a total of £319 million (Building and facilities management services), accounting for 6% of the total value of contracts awarded during the year under the Directive 2009/81/EC.

Of the Member States that notified the greatest number of contract awards (DE, FR, IT, PL, UK, FI, RO), Italy and Romania are distinguished by a level of Award of contract without prior publication of a contract notice procedure higher than 60%, with Finland, Poland, and the United Kingdom ranging from 30% to 40%, followed by Germany and France between 20% and 30%.

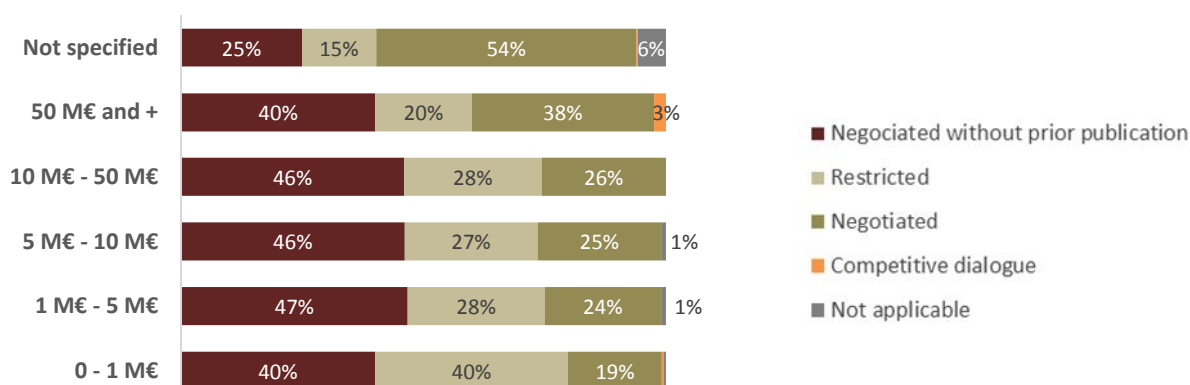
Figure 13 - Award contract without prior publication of a contract notice (%)



Source: TED data

As the bar chart above illustrates, a value-based approach clearly distinguishes Italy and Romania, but also Germany. With regard to the latter Member State, this procedure represents a 27% share of the number of contract awards, but 60% in terms of final value.

Figure 14 - Procedures by value (%), 2011-2014



Source: TED data

An analysis of the different types of procedures, by value, from 2011 to 2014, confirms that the Negotiated without prior publication procedure is heavily favoured, irrespective of the value range.

Only contracts under €1 million show recourse to the Restricted procedure at the same level as the Negotiated without prior publication procedure.

As for contracts of a total lower than €50 million, the Member States mostly use the Negotiated **without** prior publication procedure (40%), then the Negotiated **with** publication of a contract notice procedure (38%), followed by the Restricted procedure (20%), and finally Competitive dialogue (3%).

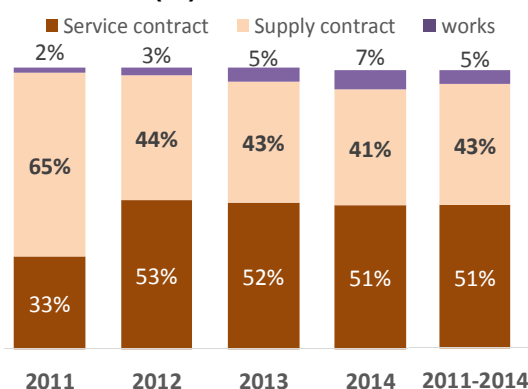
When the contracting authorities/entities award contracts by a Negotiated procedure without prior publication of a contract notice (a total of 917 contracts over the period 2011-2014), they shall justify the use of this procedure in the contract award notice as required in Article 28. In 99% of cases, the Member States justify this choice of procedure⁵³, by notably invoking:

- In the vast majority of cases (89%), the primary justification involves 'technical reasons or reasons connected with the protection of exclusive rights' (Article 28.1.e), such as in VEAT cases.
- To a lesser extent, the other justifications (10%) refer to: 'Additional works/deliveries/services', 'No tenders or no suitable tenders in response to negotiated restricted or competitive dialogue'(Article 28.1.a.), and 'for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities/entities' (Article 28.1.d).

2.3.2 Type of contracts: a majority of services contracts

A majority of service contracts

Figure 15 - Contract notices in number (%)



Source: TED data

An analysis of contracts notices by type, 'Supply contracts'⁵⁴, 'Service contracts'⁵⁵, and 'Works contracts'⁵⁶ underlines the predominance of Service contracts notices over the period 2011-2014, representing a share of 51%.

⁵³ For 6 contract awards, no justification is given (3 CZ; 2 FR and 1 DE).

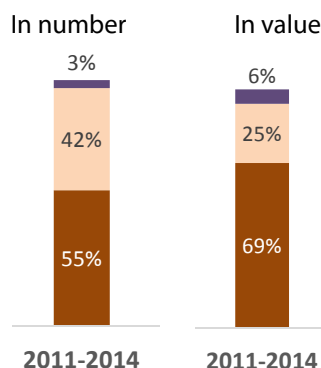
⁵⁴ Article 1.4. 'Supply contracts' means contracts other than works contracts having as their object the purchase, lease, rental or hire-purchase, with or without the option to buy, of products. A contract having as its object the supply of products and which also covers, as an incidental matter, siting and installation operations shall be considered to be a 'supply contract'.

⁵⁵ Article 1.5. 'Service contracts' means contracts other than works or supply contracts having as their object the provision of services. A contract having as its object both products and services shall be considered to be a 'service contract' if the value of the services in question exceeds that of the products covered by the contract. A contract having as its object services and including activities mentioned in Division 45 of the CPV that are only incidental to the principal object of the contract shall be considered to be a service contract.

⁵⁶ Article 1.3. 'Works contracts' means contracts having as their object either the execution, or both the design and execution, of works related to one of the activities mentioned in Division 45 of the CPV, or a work, or the realisation, by whatever means, of a

Since 2012, this share has remained relatively stable.

Figure 16 - Contract awards (%)

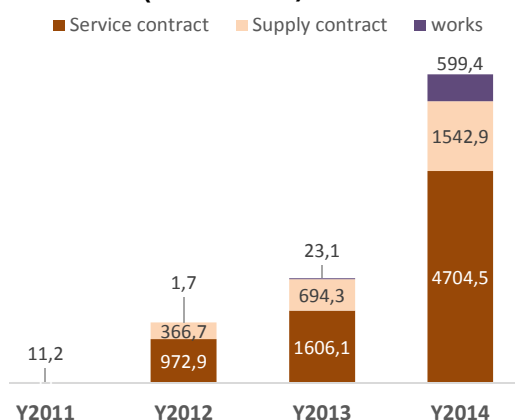


Source: TED data

Concerning contract awards over the period 2011-2014, fairly logically, services are in the majority in both number (55%) and value (69%).

1308 service contracts were awarded for a total of €7.3 billion, against 989 supply contracts for €2.6 billion.

Figure 17 - Growth in contract awards (in € million)



Source: TED data

Since 2012, the value of service contracts has almost quadrupled, rising from €973 million to €4.7 billion. Significantly behind, supply contracts rose from €367 million to €1.5 billion over the same period.

In 2014, the share of works contracts broke the €600 million barrier for the first time, as a result of the notification of 2 British contracts.

A majority of contract awards in the field of 'Defence', mainly in the Aerospace sector (repair and maintenance services)

work corresponding to the requirements specified by the contracting authority/entity. A 'work' means the outcome of building or civil engineering works taken as a whole that is sufficient of itself to fulfil an economic or technical function.

In order to better understand the profile of contracts awarded under the Directive 2009/80/EC, we have broken down the contract award notices into four major categories (the methodology is presented in the Annexes ⁵⁷:

- **Defence** : supplies and services directly related to military equipment ⁵⁸(including any parts, components and/or subassemblies)
- **Security** : supplies and services directly related to sensitive equipment (including any parts, components and/or subassemblies)
- **Support Services**
- **Other**

Figure 18 - Contract Award Notices by category

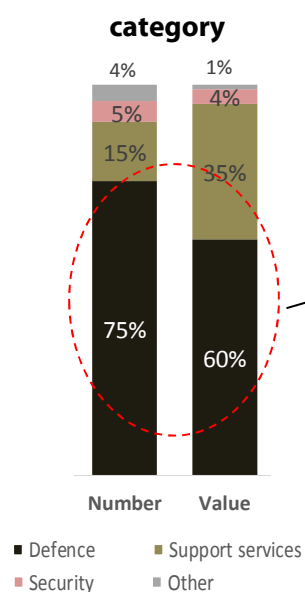
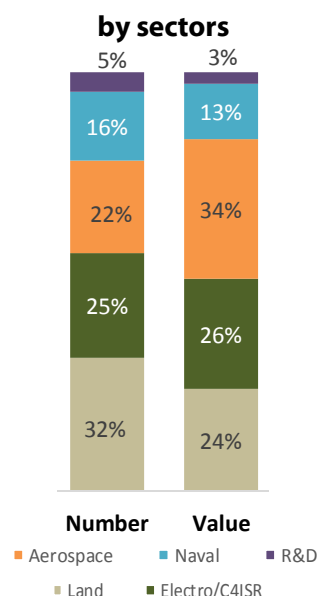


Figure 19 - 'Defence': Contract Award Notices by sectors



Source: TED data

In both number and value, the majority of contract awards are in the field of 'Defence' (75% in number, 60% in value). The contract awards in the field of 'Security' are marginal. The contracts that we have classified under 'Support Services' represent 15% in number and 35% in value (greatly linked to British contract awards⁵⁹).

Concerning the contracts in the field of 'Defence', and through the breakdown of contract awards by sectors (Aerospace, Land, Naval, Electro/C4ISR, R&D), the contracts relating to Land sector ⁶⁰ were predominant, followed by the Electronic and Aerospace sectors. However, in terms of value, the

⁵⁷ Annex 6.

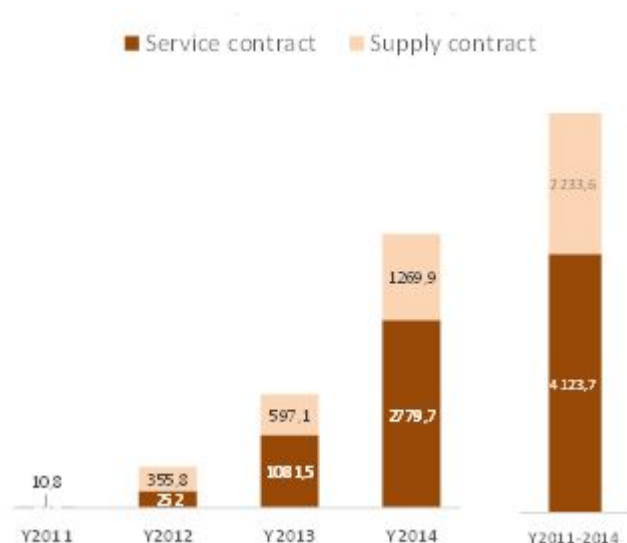
⁵⁸ 'Military equipment' means equipment specifically designed or adapted for military purposes and intended for use as an arm, munitions or war material.

⁵⁹ For the United Kingdom, out of the 10 major contracts, 8 fall into the 'General Support' category: Framework agreement FATS4 for £550 M ; Selection of Strategic Business Partner for DIO for £400 M ; National Training Estate Prime for £319,5 M ; Regional Prime Central for £234,3 M ; 2 contract awards relating to the regional Prime South East for £148,3 M and £132,7M ; Defence Mechanical Handling Equipment for £87,2M ; Principal Support Provider - HMNB Clyde for £64 M.

⁶⁰ This assessment is the result of German contracts notified by the HIL contracting authority (which manages the MCO of the fleet of military vehicles of the German armed forces). HIL published 194 contract awards notices (but for 99% of these contract awards notices, HIL did not specify the final value).

Aerospace sector is clearly in pole position, comprising €2,1 billion out of the 'Defence' total of €6,3 billion.

Figure 20 - Defence: services / supply contracts (in € million)

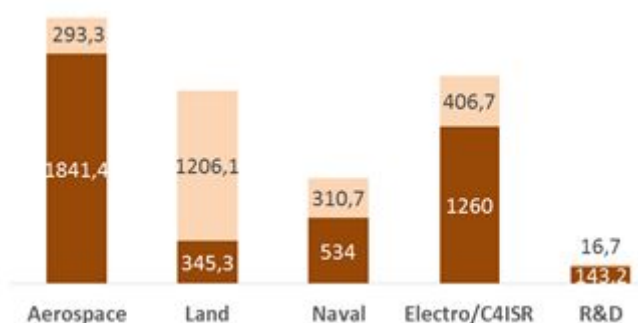


Source: TED data

Furthermore, service contracts (directly related to military equipment) account for a share of 65% over the period 2011-2014 (with a high point in 2014, at 69%). The weight of service contracts is particularly important for the Aerospace sector, reaching 86% (€1.8 billion out of a total of €2.1 billion), as the graph illustrates. The services are related to 'repair and maintenance services of military aircrafts, missiles and spacecrafts', and 'training and simulation in aircrafts, missile and spacecrafts'.

The 3 service contracts in the Aerospace sector with the highest value (> € 100 million) were awarded by France in 2014⁶¹.

Figure 21 - Defence subsectors: services / supply contracts (in € million)



Source: TED data

⁶¹ (Ministry of Defence/SIMMAD ; Airbus Military France; €354,8 million) + (Ministry of Defence/SIMMAD; Sabena Technics DNR; €108,4 million) + (Ministry of Defence/SIMMAD ; Airbus helicopters ; €100,1 million).

This situation is repeated for the Naval and Electro/C4ISR sectors. Only the Land sector stands out with a 78% share of supply contracts (but due to the lack of information regarding the value of service contracts passed by the German contracting authority HIL).

As such, under the Directive 2009/80/EC, the contracts relating to the acquisition of military equipment remain limited in both number and value. The first contract is valued at approximately €229 million. In December 2014, the Swedish defence and security company Saab Dynamics (subsidiary of Saab Group) was awarded a contract by the French Ministry of Defence procurement branch (DGA) to supply the Roquette Nouvelle Generation, (Roquette NG) next-generation shoulder-launched weapon system for the French armed forces ⁶². The contract also incorporates an integrated logistics and support package with an extensive training suite, including deliveries of outdoor training simulators from Saab. The Swedish company has teamed up with NEXTER Munitions in Bourges, France, for engineering and logistical support throughout the programme. Other contracts relating to the acquisition of vehicles (KMW, RDE), or Multi-Purpose Vessels ⁶³ (Kership, a joint company founded in 2013 by PIRIOU and DCNS ⁶⁴.

2.3.3 Successful economic operator: 84% based on national territory

Offers in competition

In the framework of contract awards notices, Directive 2009/80/EC specifies that the information requested from contracting authorities/entities notably includes the 'number of tenders received' and the 'name and address of the successful economic operators'.

Figure 22 - Offers in competition



Source: TED data

Information relating to 'number of tenders received', provides a clearer idea of the reality of the situation regarding competition. It is also apparent that over the period 2011-2014, a proportion of 35% of contract

⁶² The Roquette NG is a general-purpose weapon system which will be employed by all three branches of the French armed forces (Army, Air Force and Navy). The contract is a multi-stage agreement with one fixed element and eight consecutive options over the period 2015-2024. The new weapons are part of the AT4CS family and build upon Saab Dynamics' modular 84-mm product range including the renowned Carl-Gustaf multi-purpose reloadable weapon system and the AT4 family of disposable weapons. Saab AB press release, 08.12.2014.

⁶³ B2M Contract: vessel to perform public service missions such as humanitarian assistance, pollution response, logistic support and SAR as well as military operations such as patrol, counter piracy or illegal immigration prevention.

⁶⁴ 'Piriou et DNCS remportent le contrat B2M', Piriou Communiqué de presse, 09.01.2014.

awards notices (33% in value) received one offer, compared with 37% that received several offers. The number of contracts that received several offers is, however, showing an upward trend, rising from 32% in 2012 to 40% in 2014.

Yet it is important to note that a third of contract awards notices do not provide any information on the number of offers received.

Figure 23 - Offers in competition ('Defence')



Source: TED data

Looking specifically at the 'Defence' category, it is not at all discriminating in terms of numbers. The spread is fairly close to the average of all contract awards notices.

However, a value-based approach helps to nuance the analysis. The proportion of contracts for which one bidder entered competition reached 46% over the period 2011-2014. In 2013, this share was 70%.

According to the procedures used by Member States, it appears that the proportion of contracts for which more than one bidder entered competition is 68% for Restricted procedures, and 51% for Negotiated procedures with prior publication of a contract notice, a fact that means that the proportion of contracts for which one bidder entered competition remains high, particularly in the framework of Negotiated procedures.

For negotiated procedure without prior publication, the key point is that contracting authorities/entities communicate very little information on the number of offers (no information: 46%).

Table 8 Number of offers, by procedure

	1 offer	> 1 offer	No Information
Restricted	20%	68%	12%
Negotiated with prior publication	27%	51%	23%
Negotiated without prior publication	51%	4%	46%

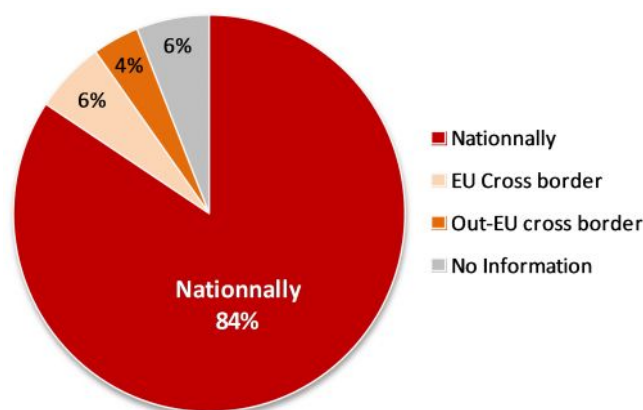
Source: TED data

Selected suppliers: 84% based on national territory

When the contracting authorities/entities provide the name and address of the successful economic operators, in 84% of cases, the selected supplier is based on national territory. In terms of value, this share reached 92% in 2013 and 94% in 2014 (the high point during the period in question).

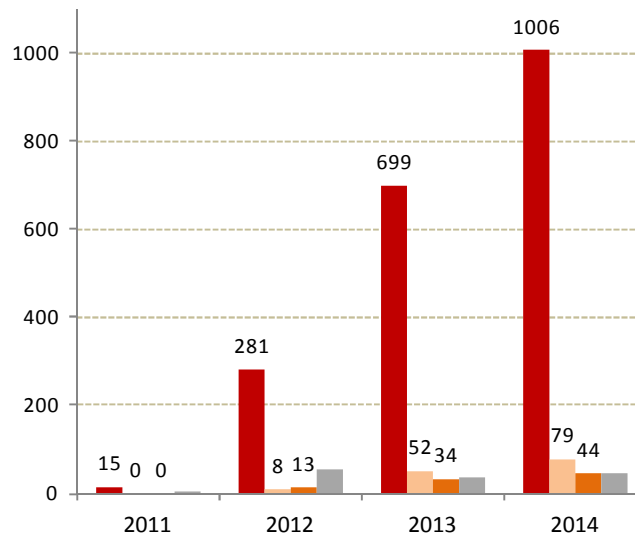
Figure 24 - Location of the successful economic operator

In number (%), 2011-2014



Source: TED data

In number of contract awards, per year



Source: TED data

National location can refer to a diverse profile of suppliers:

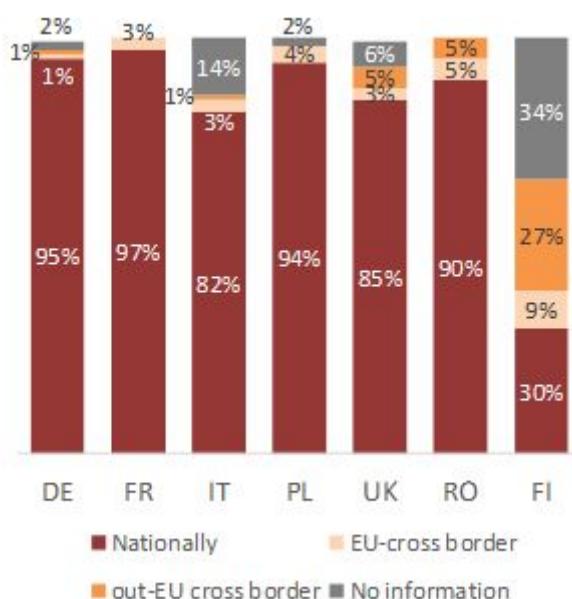
- A company whose headquarters is located on national territory and a majority of whose capital is held by private and/or State national shareholders
- A company whose headquarters is located on national territory and whose capital is held by a variety of shareholders (national and foreign)
- A subsidiary entirely owned by a European group (e.g. Finmeccanica/Selex ES in the United Kingdom)
- A subsidiary entirely owned by a non-European group (e.g. General Dynamics ELS in Spain, Lockheed Martin UK in the United Kingdom)
- A joint venture (co-owned by companies whose headquarters is located on national territory; or co-owned with a European or non-European partner)

The remaining 16% break down as follows:

- Economic operators whose address is given in another European country, accounting for 6% (139 EU cross-border contract awards, €271.4 million). In terms of location (ranked by number of order), addresses are given in Germany, the United Kingdom, and to a lesser extent in France, then Belgium, Denmark, Sweden, the Netherlands, Spain, and Italy.
- Economic operators whose given address is outside the EU, accounting for 4% (91 out-EU cross border contracts, €183.1 million). 62% of the out-EU cross border contract awards were won by American companies, in particular General Electric, Harris Corp., L-3, Lockheed Martin, Parker Hannifin, and Boeing.

For 6% of the contract award notices, the contracting authorities/entities did not provide any information; this involves for the most part notices from Italy and Finland.

Figure 25 - Selected suppliers (in number of contract award notices)



Source: TED data

An analysis focused on the Member States that have published the most contract award notices (and if we consider non-specified addresses as national, as the European Commission does) demonstrates that the proportion of selected suppliers located on national territory reaches 98% for Germany, 97% for France, 96% for Italy, 96% for Poland, 92% for the United Kingdom⁶⁵, 90% for Romania, and 64% for Finland.

The 27% of out-EU Finnish cross-border contracts represent contracts for supplies and services linked to the F-18 Hornet aircraft and were awarded to American companies.

The top 10 (Thales, Airbus Group, Carillion, Capita, Finmeccanica, Landmarc Security, Saab AB, MBDA, Babcock International, CNH Industrial) won 11% of the contracts (256 contracts awards) representing 41% of the total amount (€4,29 billion).

They are followed by a group of companies (Aerostar, BAE Systems, Compagnie Nationale de Navigation, Cobham, Dassault Aviation, DCNS, Diehl, Fincantieri, FN Herstal, IAR, KMW, MAN, Nammö,

⁶⁵ The 'No Information' part is linked to the contract FATS/4.

Nexter, Patria, QinetiQ, Pern Przyjazn, Rheinmetall, Rolls Royce, Rosomak, Safran, Seyntex, Zodiac, Sabena Technics, Terma and Volkswagen) that won 13% of the contracts (303 contracts awards), accounting for 15% of the total amount (€1,55 billion).

The European subsidiaries of the foreign firms Briggs, Jacobs, General Dynamics, Lockheed Martin, Chapman Freeborn, AECOM, Parker Hannifin, Caterpillar, Garda World, Raytheon, Rockwell Collins, L-3 Communications and Boeing won 1% of the contracts (34 contracts awards), representing 5% of the total amount (€553,96 million).

2.4 Too soon and relatively unfair to say ... no effect

2.4.1 Instability

With regard to this analysis of the implementation of the Directive since its entry into force in August 2011, and above all since its transposition in the majority of Member States (which had been carried out in the majority of Member States at the end of 2012, and in all of them by mid-2013), the situation is not satisfactory. While concretely today acquisition practices seem to show an incomplete and incorrect application of the Directive, with de facto a limited or even non-existent impact on the DTIB, could the case be any different after only three years of implementation? It is indeed too hasty and premature to draw conclusions from such a short period, all the more so given that it generally takes 5 to 10 years for a directive to be fully applied, and this is referring to the civilian sector. Although this new regime is not yet functioning satisfactorily at the present time, the Directive represents an important step in a sector such as defence, which is marked by a significant degree of opacity in acquisition practices.

In the short term, this period of transition should allow the Commission to set a course and ensure the harmonization of transposition texts and the coherence of practices among Member States. The most important, and perhaps the most urgent point, given the longstanding nature of 'bad' practices, is for the Commission to fully assume its 'watchdog role'. Setting a course means not allowing old practices that were manifestly contrary to EU law to continue and not allowing new bad practices to become engrained (at the risk of legitimising them). The Commission should already be supporting Member States in their efforts to reform their purchasing policy, while at the same time publicising to a greater degree the action taken against certain Member States that are not playing the game⁶⁶, and, where appropriate, deciding to refer the Member States to the European Court of Justice.

2.4.2 Learning time and mutual assistance

A certain period of apprenticeship is necessary in order to integrate all of the Directive's content and the legal specificities, all the more so seeing as the Directive is flexible and gives public buyers a significant amount of leeway. From one Member State to another, public buyers are more or less tough on the regulation linked to contract awards in the field of defence and security, for instance according to whether or not they used Directive 2004/18/EC prior to the entry into force of Directive 2009/81/EC.

⁶⁶ Following infringement proceedings, the Commission considered referring the Czech Republic to the EU Court of Justice in 2010, for breaching EU public procurement rules (2004/18/EC) by not opening up to EU-wide competition a contract for 4 military tactical transport aircraft. In November 2011, the EC has closed investigations as the Czech Republic has ensured that contracting authorities will in future limit the use of the Article 346 TFEU. This clarification was made in the transposition of the Directive 2009/81/EC and brings the Czech legislation in line with the Commission's position. Moreover, although the Commission continues to consider that the purchase of aircraft in 2009 should have been subject to EU-wide tendering procedures, the public supply contract in question has already been fully performed (See 'Public procurement: Commission closes its investigations concerning the purchase of military transport aircraft by the Czech Republic', European Commission Press Release, 24 November 2011) ; In September 2012, the EC has sent separate letters to the Defence Ministers of Romania, Bulgaria and the Czech Republic, after it became concerned about possible moves (planned purchases of fighter jets from the stocks of other countries), likely to violate the Directive 2009/81/EC (EU warns Romania, Bulgaria, Czechs over defence procurement, Actmedia Romania News Agency, 4 September 2012).

Therein lies the importance in the context of prioritising information sharing and the exchange of experiences and best practices among national administrations, and of training public buyers, in order to guarantee a standard level of knowledge and competence.

This reciprocal support should allow for an improvement in understanding the text and for an adjustment in practices, particularly regarding the following points:

- The boundaries between what falls under Directive 2009/81/EC and Directive 2004/18/EC.
- The different types of procedures and the selection criteria (the more these criteria are shared the greater the readability and the predictability will be for suppliers concerning the conditions to win a contract).
- The correct use of CPV codes, associated where appropriate with discussions between buyers and users on improving the TED interface.
- The notions of Security of Information and above all Security of Supply, particularly what that means concretely in terms of selection criteria. For instance, Finland has developed interesting purchasing practices that display a good grasp of the issue of Security of Supply, experience that could be shared with other Member States.

The European Commission has published seven Guidance Notes (Field of Applications, Exclusions, R&D, Security of Supply, Security of Information, Subcontracting, Offsets) and is planning to release two more in 2015 on Government-to-Government sales (Article 13.f) ⁶⁷ and Purchases under international agreements and international organisations (Article 12) ⁶⁸. These two notes thus constitute the perfect opportunity for the Commission to establish a dialogue with Member States on subjects that have previously never been addressed in a formalised and open manner. Moreover, this aspect constitutes progress in and of itself.

However, up until now, dialogue has focused on the issue of exclusions, which appear to cause problems of interpretation, with a view to remedying it, and to ensure that these exclusions are interpreted strictly (and not used to circumvent the Directive). This mobilisation of different stakeholders on the question of exclusions structures discussions according to a frame of reference that is marked by practices which precede the Directive. This approach focuses on the glass half-empty when it should concentrate on the glass half-full (as little full as it may be...). The angle is different and it would initially contribute to centring current efforts on the correct application of the Directive for all of the contracts that fall under domains that are not excluded (which is by no means the case today), and then to adjusting acquisition practices that may become exclusions. The margin for progress is thus significant.

2.4.3 Publication disparity and the problem of reciprocity

The Directive 2009/81/EC is today favoured for contracts dealing with services, the acquisition of equipment deemed to be of a low strategic value, and sub-systems. If it can be considered progress, the Directive is carried/supported by a small group of Member States, and seems to clearly be insufficient. The disparity in the publication of documents (contract notices and contract awards) between Member States is too great. If this situation continues there is a significant risk that the initial Member States that

⁶⁷ Government-to-government sales (Article 13.f) : launch of a fact-finding exercise in December 2013, organisation of workshops with Member States in 2014, drafting of a guidance note on the use of the exclusion early 2015.

⁶⁸ Purchases under international agreements (Article 12.a) and international organisations (Article 12.c) : launch of the clarification work in 2015 (according to the same approach as G to G sales), direct discussions with the NATO Support Agency and OCCAR, drafting of a guidance note by the end of 2015.

played the game, even in a very limited fashion, will back-pedal in light of the non-application of the Directive by other Member States (despite its transposition into national law).

This poses the question of reciprocity (supplier A of State A benefits from access to the market of State B without supplier B having the opportunity to get a foothold in the market of State A...). In the case of the loss of a contract on the national market, suppliers cannot compensate such a loss with success on other European export markets. This asymmetry heightens tension and contributes to conservatism in acquisition policies.

2.4.4 Article 346, still very much in the Member States' minds

Over the past three years, all of the major military equipment contracts, thus those that have had a structural effect on the DTIB, were notified without going via the Directive. Previous practices have continued, notably the use of Article 346. The transition seems to be proving difficult for public buyers that are used to 'securing' defence contracts through the use of Article 346 and the culture of secrecy. More transparency could mean more recourse, and thus risks of slowing down the procedure of contract awards. It consequently appears 'easier' and more 'secure' to use Article 346 than to open up a contract, even according to adapted procedures. This issue clearly places at the centre of the agenda the importance of public buyers familiarisation with the tools proposed by the Directive, which help to secure the buying process, or run the risk of seeing extensive use of Article 346 continue.

While the Directive is flexible and provides numerous instances of leeway to public buyers, the use of negotiated procedures without prior publication seems to be favoured, with the primary justification being technical specifications. The European Commission should look into this issue, in order to avoid the establishment in certain cases of practices that might resemble protectionism.

2.4.5 Subcontracting, Actions to support SMEs, Direct offsets: a complex equation

The statistical analysis clearly underlined the fact that clauses linked to sub-contracting are used extremely sparingly. The mechanism appears to be complex to implement, as much for the public buyer as for the selected supplier. The obligation to use competitive procedure regarding sub-contractors implies that the selected supplier takes the place of the public buyer. For large groups, this means further administrative constraints and conflicts with their policy of integrating the supply chain (with the establishment of partnership agreements with sub-contractors that are deemed 'strategic') that is supposed to allow for better cost management.

In actual fact, this equation relating to sub-contracting seems to be poorly formulated, hence the introduction of a complex and hardly applicable mechanism in practice. Indeed it cannot be a question of a kind of 'lawful alternative to offsets', in response to the fears expressed by European States with an equipment suppliers base (national companies that have not reached the critical size to be able to compete with large groups), given that discrimination on the basis of the supplier's nationality is prohibited by the Directive. If the purchasing State wishes to have in its national territory industrial capacities that allow it to be autonomous in terms of maintenance, or even renovation (concerns which are legitimate), this comes back to the clauses linked to the security of supply (SoS). This issue linked to the obligation of geographical location imposed on the holder of the contract for SoS reasons should be clarified by the European Commission and should be subject to the exchange of best practices between Member States (Finland has notably developed interesting purchasing practices on this point).

Furthermore, while this question of sub-contracting ⁶⁹ goes back to the issue of the access of small and medium enterprises to public defence and security contracts, this constitutes a real challenge, and one which concerns all Member States. Indeed, in the defence sector, the role of OEMs is central. As the prime contractors of the major weapons systems, they take care of integration and final assembly, and they represent the interface with the State client. In addition to this primary and pivotal role in client relations, a policy has developed of reducing the number of sub-contractors and transferring technical and financial risks to rank 1 and 2 suppliers. The SMEs must thus manage these risks without controlling the management of the project, and with very late return on investment in the context of military equipment programmes conceived over long cycles. However, the relationship between SMEs and large groups does not systematically fail to be in favour of small structures. There are also numerous examples demonstrating the advantages of a partnership with the large primes to break into new markets.

More importantly, small and medium enterprises have to fight against a certain level of conservatism of practices and other habits of national administrations in charge of acquisitions, practices that maintain the large prime contractors at the centre of the process. The issue here is not to bring about a more advantageous situation for SMEs but to ensure the elimination of disproportionate and unfair disadvantages. There is a historical tendency to underestimate SMEs with regard to their ability to provide innovative technologies and solutions, as a result of an exaggerated perception of these companies as being financially fragile. Furthermore, the administrative constraints are still both significant and numerous, complicating the direct relationship between SMEs and the State clients, and rendering access to public contracts costly.

It is these practices that need to be made to evolve, through a better understanding of the supply chain and the mobilisation of industrial policy tools that facilitate small and medium enterprises' access to public defence and security contracts. Several Member States have taken measures in this direction (e.g. public policy provisions and tools in support of defence SMEs in France and the United Kingdom). Furthermore, the adoption of a new business model, such as SME consortiums proposing complete offers constitutes a strong response to the problem of direct access to public defence contracts.

2.4.6 Improving Security of Supply between Member States

The '*sensitive nature*' of goods and services in the defence sector results in specific requirements, particularly in the field of security of supply. Ensuring security of supply raises the question of exposure to the risks of dependencies and failures, with the undesirable consequences to be unable to rapidly respond to demand for military equipment in a crisis situation, or to be unable to operate key weapons systems properly and autonomously. The security of supply is a prerequisite, a *sine qua non* condition that must be fulfilled to ensure that the armed forces can operate their equipment without third party constraints. It constitutes the bedrock of a confidence-based relationship between States, and one of the necessary conditions for contracting authorities to accept cross-border contracts.

Establishing a trusting ongoing relationship implies that European Member States adopt a common approach to decisive factors affecting security of supply, and thus a harmonised application of Article 23 of Directive 2009/81/EC (list of commitments that procurers may require tenders to contain; as conditions for the performance of the contract, e.g. export controls, supply chain, IPR clauses, liability of spare parts throughout the life cycle of the weapon system, etc.).

A number of MS will continue to retain on their national territory certain activities, assets and installations for reasons of national security (with contracts likely to be awarded under Article 346). But in a time of

⁶⁹ Sub-contracting is often associated to SMEs, a reductive link given that sub-contractors can also be of significant size, such as a large group, MMCs, or SMEs.

budget constraints, the areas covered are de facto decreasing. This context should provide an opportunity to consolidate confidence among Member States, thereby making cross-border contracts acceptable in fields that were hitherto excluded. It raises the fundamental question of the establishment of a system of appropriate guarantees, based on bi/multilateral SoS agreements.

2.4.7 Harmonization of the demand side and Industrial Policy

The Directive 2009/81/EC is a flexible legal instrument, a tool used to standardise national legislations. This Directive is a tool for better coordination of procedures for the award of contracts in the fields of defence and security (better purchasing), not an instrument for industry consolidation.

Harmonization of demand (and thus cooperation) and Industrial policy remain the cornerstone and the main conditions for strengthening the European Defence Technological and Industrial Base. Today, however, the majority of large programmes (national and in cooperation) have entered the production phase and are moving forward under tight constraints. There is little or no prospect of launching new generation programmes, due to the substantial investment required and the lack of convergence of European States' needs. It is these large programmes that have a structural effect on the DTIB.

Although the European Commission's action, which is today focused on competition, is not linked to industrial policy provisions at the European level, Article 346 will continue to be used and exploited by numerous Member States. Offsets, and in particular direct offsets, will continue to exist (the ongoing offset policy reforms are often purely 'cosmetic'). In order to avoid Member States developing circumvention strategies which disrupt the internal market, a compromise needs to be reached. This would involve making a more precise distinction between what falls under security of supply, a legitimate national concern (which justifies, for reasons of national security, obligations of local presence, transfers of technologies and know-how, and the establishment of partnerships with a local company), and offsets whose sole justification is motivated by a conscious economic calculus (linked with economic purposes). In the latter case, legal proceedings should be brought by the European Commission.

3 Assessing the Directive 2009/43/EC on intra-EU transfers of defence related products

The 'Defence Package' launched by the European Commission (EC) in December 2007 aims to support the competitiveness of European defence firms. One of its goals is to limit the problems due to the fragmentation of the European defence market, some governmental protectionist attitudes in the award of defence contracts and the lack of coordination between the 27 control regimes transfers of defence-related products. As part of this initiative, Directive 2009/43/EC (called the Intra-Community Transfers Directive or the ICT Directive) simplifying intra-Community transfers of defence-related products specifically attempts to simplify and harmonize the conditions and rules for arms transfers between European Member States, and to reduce red tapes related to licensing both for defence companies (also called defence undertakings) and national authorities. These new procedures ultimately aim to create a favourable environment for European businesses involved in defence, to improve security of supply and to strengthen their cooperation at the European level and their international competitiveness.

To achieve these objectives, the ICT Directive, on one hand, sets up a licensing system structured by three types of licences: 1) the general licences, 2) the global licences and 3) the individual licences. General licences are the new tool implemented by Directive 2009/43/EC ⁷⁰. They are meant to become the licence of reference for all arms transfers that occur within the European Union (EU). Global and individual

⁷⁰ At the Member States level, the United Kingdom has a long tradition of using general licences well before the entry into force of the ICT Directive.

licences that were already in use *before* the ICT Directive was implemented are now intended to be only used in the context of intra-EU transfers of 'sensitive products'. On the other hand, the ICT Directive provides levers to foster greater mutual trust. These include the requirement to keep records for vendors, the certification of companies and the ability to link a transfer to export restrictions.

Moreover, the new licensing system is accompanied by the removal of transit licenses ("passing licences") as well as import licences ("entrance"). Indeed, as article 4.1 of the ICT Directive states, the prior transfer authorization by the process of licensing (general, global and individual) from the Member State of origin should be considered as enough to authorize transit through other Member States and entrance on the territory of the Member State of destination⁷¹. In theory, the supplier no longer needs to request a transit authorization for a transfer within the EU via other Member States. However, it remains at the discretion of the Member State to maintain some level of control on the goods transiting through its territory from one Member State to another, for instance "on grounds of public security or public policy such as, *inter alia*, the safety of transport"⁷².

The action of the EC is based on the assumption that risks of exporting armaments within the European Union (EU), such as diversion to outside EU countries or companies, are low or simply non-existent due to the community of interests between the EU Member States and their participation in both, the Common Security and Defence Policy (CSPD) and the North Atlantic Treaty Organization (NATO). The core idea is that harmonization of export control practices should be a reachable goal between actors engaged in an enduring, secure and deep regional integration process. Expectations of possible results achieved through the application of the ICT Directive are both high and vague; it is supposed to 'organize intra-EU defence production chains and collaborative defence R&D projects'⁷³.

The ICT Directive imposed two deadlines on EU Member States: The first one, on June 30th, 2011, concerns the adoption of the 'laws, regulations and administrative provisions necessary to comply with the Directive'⁷⁴ and the second one, on June 30th, 2012, pertains to the entry into force of these provisions. The national transposition process of the ICT Directive and its full implementation were particularly arduous. Many Member States have failed to meet the first deadline of 30th June 2011. Although most Member States have now implemented the ICT Directive into their national legislations, only 38 certified defence companies are listed on CERTIDER, the database set up by the EC (more precisely by the Directorate-General for Enterprise and Industry) and it is still quite challenging to access general licences issued by the European countries, documents which appear to be marked by a huge diversity in terms of scope and conditions. Thus, considering the slow pace of implementation of the ICT Directive and the relative lack of available data, it is still early to identify clear effects of EC's initiatives on the European defence market and on the defence technological and industrial base (DTIB). For instance, it is clearly not doable at this stage to compare the transfer practices before and after the application of the ICT Directive. The new system is still largely inoperative considering its potential.

⁷¹ The transfer of defence-related products between Member States shall be subject to prior authorisation. No further authorisation by other Member States shall be required for passage through Member States or for entrance onto the territory of the Member State where the recipient of defence-related products is located, without prejudice to the application of provisions necessary on grounds of public security or public policy such as, *inter alia*, the safety of transport" Article 4.1 of Directive 2009/23/EC.

⁷² In this regard, Member States made use of these exceptions in their transposition of the ICT Directive. Germany and Hungary maintained passing authorization and entrance procedures for certain categories of products. The Netherlands established a system of prior notification. This can be seen as a limitation to the application of the ICT Directive. Moreover, companies will have to make arrangements to inquire about the existence of such measures taken by the Member States.

⁷³ Terlikowski M., "Liberalization of the European defence equipment market – answer to capability gaps?" in: M. Majer, R. Ondrejcsák, V. Tarasovič, T. Valášek, (eds.), *Panorama of global security environment* 2010. Bratislava: CENAA, 2010, pp. 519-531.

⁷⁴ Article 18 of Directive 2009/43/EC.

However, this report can determine what has been done so far by Member States and identify various trends and concerns arising from and expressed by the stakeholders of the European defence market, i.e. mainly the Member States and the defence companies. It can also formulate a hypothesis on the potential future effects of this new regulation on the structure of the European defence market. To reach these objectives, this section of the report primarily relies on *The study on the implementation of Directive 2009/43/EC* ⁷⁵ conducted by GRIP ⁷⁶ during the first semester of 2014. It was the occasion for the researchers who led the project ⁷⁷ to interview Member States officials, defence companies (more than 300 firms contacted) and several defence associations (national and European). Although GRIP has to respect the confidentiality of the respondents, valuable data was collected this way.

This section of the report focuses on three topics: 1) general licences, 2) certification process and 3) controls on the end-use/end-user. These three dimensions are closely linked and their operationalization is central to the efficiency of the system the ICT Directive aims to establish. General licences are at the core of the new regulations covered by the ICT Directive. It is expected that they will facilitate the commercial relationships between defence companies by reducing the administrative burden related to the excessive use of individual licences for transfers within the EU. The certification process of defence firms is the necessary counterpart to enable the use of general licences. Finally, the possibility to simplify or to ease the authorisation process for arms transfers within the EU raises the issue of the relevance of maintaining or adapting controls on the end-use/end-user for intra-EU transfers and of eventual impacts on re-exports outside the EU.

To explain in more details the current dynamic, the section proceeds in 4 steps. The first step presents the principles of the ICT Directive regarding the general licences, evaluates the state of their implementation and identifies the main concerns emerging from its implementation. The second step follows the same logic but for the certification process. The third step focuses on the end use/user control issue and formulates hypotheses about the eventual impacts of the ICT Directive. The fourth step summarizes the main observations.

3.1 General licences: everything is in the details

3.1.1 Principles: simplifying arms transfers within the EU

According to Article 5 .2 and .3 of the ICT Directive, 'general licences shall be published at least where:

- a) The recipient is part of the armed forces of a Member State or a contracting authority in the field of defence, purchasing for the exclusive use by the armed forces of a Member State;
- b) The recipient is an undertaking certified in accordance with Article 9;
- c) The transfer is made for purposes of demonstration, evaluation or exhibition;
- d) The transfer is made for purposes of maintenance and repair, if the recipient is the originating supplier of the defence-related products.

Member States participating in an intergovernmental cooperation programme concerning the development, production and use of one or more defence-related products may publish a general

⁷⁵ Mampaey L. et al. 'Study on the implementation of Directive 2009/43/EC on transfers of defence-related products', *GRIP*, 14 August 2014.

⁷⁶ Groupe de recherche et d'information sur la paix et la sécurité.

⁷⁷ Who are also contributors to this report. See L. Mampaey et al. 'Study on the implementation of Directive 2009/43/EC on transfers of defence-related products', *GRIP*, 14 August 2014.

transfer licence for such transfers to other Member States which participate in that programme as are necessary for the execution of that programme' ⁷⁸.

Member States determine the categories of defence-related products covered by the general licences. All defence companies can use the general licences of their country to transfer defence-related products to a recipient in another EU country as long as they respect the conditions of the general licences (notably concerning registration prior to the first use) ⁷⁹.

General licences are actually the main feature of the licensing system promoted by the ICT Directive. According to the EC, the new tool 'will fundamentally simplify procedures for suppliers for the less sensitive transfers. It will allow Member States to focus the control efforts to more sensitive transfers, as a case-by-case analysis will not be required for all transactions' ⁸⁰. More specifically, general licences issued for recipients who are undertakings certified in accordance with Article 9 of the Directive are of particular interest to improve or facilitate the commercial relationships between European defence companies.

3.1.2 Slow pace of implementation: accessibility and diversity matter

To date, the use of general licences appears to be quite limited considering its potential. This can be explained by the fact that the implementation of the new regulatory system is still in a transitional phase. Nevertheless, the analysis of the various implementation processes at the Member States level reveals at least four major trends: a) a lack of availability of the relevant documents, b) diversity of scope and structure of the documents, c) several differences regarding the conditions attached to the general licences for the certified firms and d) various definitions of what sensitive products are, which are a corollary of the multiplicity of defence-related products lists.

Availability

Several observations on their public availability are worth making. First, information on the general transfer licences published by EU Member States are not always available online. In the summer 2014 for instance, several countries were still in the process of drafting general licences, were awaiting their publication in the national official gazette ⁸¹ or did not publish them on the official website of the arms export control authorities. Sometimes, the law mentions the possibility of using general licences, but authorities decided against developing this tool completely or partially, depending on the structure of their national defence sector and the structure of their exports. When Member States have parts of their website dedicated to export controls, the resources are far from being exhaustive in a majority of cases. Moreover, the relevant documents are only published in the national language of the country. Translation into English is rare which makes things more complicated for most companies. They must deal with law firms able to provide the correct understanding of a quite huge diversity of documents published in several languages.

Number, scope and structure

The number of general licences published by the Member States also varies greatly from one to another. Even though the Directive mentions that general licences have to be published in at least four cases (see section 2.1.1), not all Member States restrict themselves to these guidelines. For instance, the Walloon

⁷⁸ Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community.

⁷⁹ Idem.

⁸⁰ European Commission, Report from the Commission to the European Parliament and the Council on transposition of Directive 2009/43/EC simplifying terms and conditions for transfer of defence-related products within the EU, COM(2012) 359 final, 29 June 2012.

⁸¹ Such as Bulgaria, Poland, Romania and the Brussels Region (in Belgium, the competence of arms trade has been regionalised since 2003).

Region and Slovenia limit the general licences for transfers to armed forces and certified companies. The Flemish Region and Spain have already published a general licence for intergovernmental cooperation programme⁸². France and Austria used the opportunity offered by the ICT Directive to expand the system of general licences to other types of transfers within the EU or to authorize exports outside the EU. For instance, France expanded the scope of possible recipients of controlled goods transfers, publishing a general transfer licence for defence-related products to the police, customs, border guards, and coast guards of a Member State for the exclusive use by these recipients⁸³.

One can note significant discrepancies in the definition of the scope of general transfer licences between Member States and even for a Member State between its general licences in terms of military equipment covered depending on the recipient or the purpose of the general licence⁸⁴. Common patterns of what is covered on the basis of the categories of the Annex of the ICT Directive across all EU Member States are actually quite difficult to establish (see below *Concerns about the list of defence-related products*).

It also appears there is no specific format for the general licence. It varies from a one-page paper to an extended and complex document explaining in depth the conditions attached. Most countries actually published separate documents for each type of general licences. Latvia and Lithuania are exceptions, since they published a single, integrated document including all types of general licences.

Conditions attached to the general licences

Conditions attached to the general licences also vary from country to country. Some general licences are more detailed than others. Most general licences provide all the necessary information in the body of the document about the conditions of use, often repeating what the legislations or what the executive decrees state concerning the scope and conditions of use of the transfer licences. For concise general licences, one must often go back to the legislation and executive decision to acquaint itself with conditions and restrictions concerning for instance, registration prior to first use, record-keeping, reporting, and information to be provided to the recipients by the suppliers.

At least six types of specific conditions are attached to the general licences for certified companies: a) non-re-export clause, b) integration clause, c) technical clause, d) the obligation to notify, e) the obligation to keep records on each transfer and to provide regular reports and f) the obligation to inform certified recipients about the existence of specific restrictions.

Non-re-export clauses differ between Member States in types of limitations. They go from an obligation to ask the consent of the Member State of origin to re-export military items outside the European Union⁸⁵ to a total non-re-export clause which theoretically forbids any re-exports outside the EU⁸⁶. France links

⁸² Spain published a general licence (LG5) to be used when the transfer is the result of the participation of the Spanish Ministry of Defence and Spanish companies in activities and operations of NATO and of NATO Maintenance and Supply Agency (NAMSA). Moreover, the Flemish Region published a general licence (AV5) on intergovernmental cooperation and Bulgaria plans to publish a general licence for transfers for the purposes of the execution of an intergovernmental cooperation programme concerning the development, production and use of one or more defence-related products with other Member States which participate in that programme.

⁸³ See 'Arrêté du 6 janvier 2012 relatif à la licence générale de transfert dans l'Union européenne de produits liés à la défense à destination de la police, des douanes, des gardes-frontières et des garde-côtes d'un État membre dans un but exclusif d'utilisation par ces destinataires', *JORF*, n°0008, 10 janvier 2012, p. 419m texte n° 9. Moreover, France published a specific general export licence for French armed forces based outside the EU. See 'Arrêté du 6 juin 2013 relatif à la licence générale d'exportation de matériels de guerre et de matériels assimilés à destination des forces armées françaises situées hors de l'Union européenne', *JORF* n°0131 du 8 juin 2013, p. 9584, texte n° 36

⁸⁴ GRIP created a database for each Member State with the categories of the ML covered by the general licence for certified recipients to provide points of comparison. The database consist in an Excel sheet available online. See '[Table on the general licences for certified company](#)', *Grip.org*, August 2014.

⁸⁵ Estonia, France, Hungary, Luxembourg, Spain and the Walloon Region.

⁸⁶ Denmark and the Flemish Region.

specific categories of defence-related products covered by the general licence to a non-re-export certificate ⁸⁷ and asks the recipient to provide information ensuring that the end-user will 'not sell, give, lend, transmit to any third party or export the goods, including any related specific supplies, spare parts or tools delivered within the scope of after sales services, in addition to the related documentation and user manuals, without the prior written approval of the French Government'. The United Kingdom adopts a more flexible approach for its closest partners allowing 're-transfer in the EU and re-export from the EU for the ultimate end-use to a government of Norway, Australia, Canada, Iceland, Japan, New Zealand, Switzerland, and the United States'. Denmark, Estonia, Luxembourg, Spain, the Flemish Region and Walloon Region also chose to allow some flexibility for transfers followed by a definitive export outside the EU when the ultimate end-user is an allied State, a member of the European Economic Area (EEA) or NATO.

Integration clauses (also referred as declaration or statement of use) specifically target the components of a weapon system controlled by the military lists. This type of clauses requests that the company supplying and transferring the controlled good obtains a declaration of use or of integration from the EU recipient company. In doing so, the recipient company certifies that the components it received (a product covered by the general licence) will be integrated into its own products and will therefore not be transferred or subsequently re-exported as such. To some extent, the integration clause plays the role of a substitute to a non-re-export clause. For the Walloon Region, the Flemish Region and Luxembourg, there is indeed no obligation to require prior agreement for re-export outside the EU for components assembled into another product by the recipient of the Member State. A supplier from one of these countries must therefore request a declaration of use from the recipient company stating that the components are, or will be, integrated into the new products and, therefore, will not be re-transferred or exported as such. In France, only specific categories of defence-related products covered by the general licences are linked to an integration clause in which the recipient certifies that the goods are to be integrated into its own products and will not be exported without the prior written approval of the French government.

Technical clauses are conditions related to technical specifications of the defence-related products that the user of this general transfer licence must meet before shipping them. They require the supplier or recipient to make specific alterations to the products it will send or receive. France attached this type of obligation only to specific categories of armaments. The country actually specifies three technical levels of intervention corresponding to different degrees of maintenance or alteration of the product. For instance, France requires that night-vision equipment units (ML15) be permanently and individually marked by a process ensuring its traceability.

The obligation to notify the relevant national authorities prior to the first use is automatically introduced by the general licence, though detailed variably between Member States ⁸⁸. It often comes with the obligation for the firms or agencies to prove they are legitimate actors of defence, i.e. they are authorized to manufacture and/or trade military equipment. This usually implies to register with the national authorities and to wait for a confirmation of registration before shipping the defence-related goods. Most Member States ask to be notified at least 30 days before the first transfer ⁸⁹; the Netherlands for instance systematically require that the supplier specifies the expected dates for the first use of the general licence.

⁸⁷ Certificat de non-réexportation en dehors de l'UE-CNR.

⁸⁸ See Excel table on specifications on first use. France has reserved the right to call potential supplier for a preliminary interview.

⁸⁹ Denmark requires the supplier to notify the relevant authority no later than five business days prior to the first transfer; and the Netherlands two weeks prior to the first transfer.

The obligation to keep records on each transfer and to provide regular reports to the relevant national authorities is also quite common. The scope of this obligation also varies among Member States.

The ICT Directive imposes the obligation to inform certified recipients about the existence of specific restrictions. Some countries such as Estonia, Finland, Luxembourg, the Walloon Region and Flemish Region require that their supplier requests a written proof of acknowledgement from the certified company that it was made aware by the supplier of the conditions contained in the general licence. And, the general licence of Hungary states 'the users of the present general transfer licence have to make sure to communicate the foreign buyer/end-user the special terms and conditions prescribed by the Hungarian Authority, including limitations regarding the end-use, re-export and re-transfer. For confirmation, end-user certificates have to be obtained at the latest when the contract is signed'.

Concerns about the list of defence-related products

In general, Member States attach these various types of clauses and obligations to the general licences as a whole although France linked them to each category covered by the general licences.

As mentioned above, the general licences cover a selection of categories of defence-related products and do not systematically address all of them. They can include either a comprehensive coverage of the items (i.e. the whole annex of the Directive) or a list of specific items. Details concerning the defence-related products covered by these licences are presented in different formats. Some Member States enclose a detailed list of categories in their general licence for certified recipients. It can be a positive list (also called inclusive list), i.e. 'only the following categories are covered with possible limitations'⁹⁰, or a negative list (also called exclusive list), i.e. 'all the categories except from the following categories'⁹¹, again, with possible limitations.

Estonia and Spain do not provide a list of categories only a reference to a list of items with restrictions. Although Member States directly mention the Annex to the ICT Directive or the Common Military List (ML) of the European Union as published in the Official Journal of the European Union⁹² or their national legislations in which they have transposed the categories of the ML, they frequently exclude entire categories of defence-related products⁹³. In some cases, the various categories are preserved, but with major exclusions. Sometimes, these exclusions cover complete armament systems.

Considering the diversity in the scope of the general licences, one can wonder on what criteria Member States decide to exclude an entire category from a general licence. It seems that there is no common pattern among Member States concerning the categories of defence-related products being excluded from the general licences. *In fine*, the decision to exclude categories or selected systems or components from the general licences depends on what constitutes a 'sensitive product' for a Member State. In the perspective of a better harmonization of the European regulation on arms transfers this shows a lack of consensus among Member States on a definition of this crucial concept.

Some Member States identify several specific categories as 'sensitive'. Others avoid providing a definition of what is considered a sensitive product, but still exclude categories from the scope of the general licences with no further explanation. Exclusions depend on Member States' visions, the sensitive nature

⁹⁰ Finland, France, Germany, Hungary, Latvia, Lithuania, the Netherlands, Slovakia, Slovenia, Sweden, the United Kingdom.

⁹¹ The Walloon Region, the Flemish Region, and Luxembourg.

⁹² For instance, the Walloon Region refers to "produits liés à la défense, y compris leurs composants et technologies, repris dans la dernière version de la liste commune des équipements militaires de l'Union européenne, telle que publiée dans le Journal officiel de l'Union européenne" (emphasis added). [Common Military List of the European Union](#) (adopted by the Council on 17 March 2014) (equipment covered by Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment).

⁹³ Except Estonia which seems to have introduced the whole list without exceptions.

of a product being mainly influenced by 3 types of factors: 1) a technical factors, i.e. the nature of the equipment, its potential use, the technological sensitivity of the products, and the type of end-user; 2) a political or strategic factor, i.e. the security context, the evaluation of the military capabilities, state of the relations between the partners, for instance; and 3) industrial factor, such as costs, other legal obligations, risks concerning the competitively and so on. Some countries use therefore a case-by-case approach in deciding which materials has to be covered according to these different factors.

Exclusion of some weapons and/ or components from the general licences is not only based on a strictly national case-by-case approach. International obligations are sometimes taken into account⁹⁴. Commitments under international export control regimes such as the Wassenaar Arrangement are also used as a factor of exclusion of specific military items from the list of defence-related products covered by their general licences. Romania and the Flemish Region also refer to the 7+1 categories of the UN Register of Conventional Arms (including small arms and light weapons) to explain why they established specific lists of defence-related products different from the categories of the EU Military List. International Treaties banning landmines and cluster munitions, for instance are also a factor here.

This leads to a multiplication of lists of defence equipment covered by the general licences within the European Union. It presents a challenge for stakeholders who need an extensive knowledge of the categories of the EU Military List, of the national legislations transposing the ICT Directive and of the list of products specifically controlled and prohibited by each Member State. There are obvious gaps of transparency and clarity concerning the lists used by Member States, which question the understanding of the benefits of the ICT Directive and its effective implementation.

3.1.3 Time and guideline needed for better harmonization

The discussion GRIP had with the stakeholders during the first semester of 2014 shows that, despite majors concerns, it appears clear that both defence firms and national authorities value the existence and the relevance of general licences as a way to eventually facilitate commercial relations between suppliers and clients within the EU. They do not wish to explore possible alternatives for general licences even if global licences remain available⁹⁵ and individual licences are still in use while waiting for a fully operational regulatory system.

Stakeholders are aware that the current diversity in scope and practices surrounding general licences makes them less attractive to companies. They recognise that harmonization of general licences can be improved, but they mention needing more time to become acquainted with the new regulatory framework. Indeed, some Member States are still finalising their new regulatory regime and defence companies are still assessing the usefulness of the new tools for their own activities. In this context, although several trends can be observed, points of convergence and divergence between the various processes and options for better harmonization cannot be definitely identified yet. Member States and defence firms need time to evaluate what has been done so far regarding the licensing systems and what the eventual benefits related to each option are according to their characteristics and activities on export markets (inside or outside the EU).

⁹⁴ For the Flemish Region; See [Gevoelige goederen](#).

⁹⁵ Indeed, several Member States have put in place procedures for the use of global licences even before the Directive came into force. It is quite convenient, mostly for smaller companies who can receive military items through this mechanism while avoiding the perceived burdens related to the certification process required by the new system. In addition to the increased use of general licences, global licences can be seen as an advantageous tool for smaller companies. As suppliers, the practice of global licences was established in several EU Member States well before the entry into force of the ICT Directive. As recipients, they can receive items through this mechanism while avoiding the perceived burdens related to the certification process.

Assuming that the decision to become certified can be influenced by the knowledge of the types of equipment covered by the general licences published by other Member States, their access in a common language, such as English, would certainly ease the decision-making process to become certified or not, even if the translation has no legality. One can also think of the variety of conditions of use of general licences and of the lists of defence-related products as an additional factor slowing the implementation.

These are probably the main steps the EC should consider for the future. The question of the lists is probably the more difficult one. Taking into account the diversity of rules implemented, it could be of some interest to explore the possibility of excluding specific categories of defence-related products depending on the purpose of the general licence. Following the same logic, the EC could also consider discussing the feasibility to design a positive/minimum list of defence-related products. It sounds doable to rally the Member States to this idea if the positive list is based on current international regimes, specifically the Wassenaar Arrangement, since most Member States and many European defence companies are already familiar with this regime. The Arms Trade Treaty should also be taken into account.

Nonetheless, some resistance towards any attempt to move toward greater harmonization can be expected. The national interests among EU Member States constitute a barrier that should not be underestimated. Seeking harmonization could lead to a very low common denominator between the Member States that could put at risk the relevance of the entire project behind the ICT Directive. For EU Member States with multifaceted export control systems and elaborated mechanisms to determine the exclusion of specific items deemed sensitive, any attempt to put in place minimum standards could translate in steps backwards in relation to their current practice. Those countries with more complex control devices are also those who are at the heart of the European market and has European Defence Technological and Industrial Base (EDTIB) and therefore those most challenged by these issues. Therefore, it is important to allow the changes introduced by the ICT Directive the time it takes to mature and to let actors of the defence sector the opportunity to become acquainted with the new tools even if the pace is probably slower than expected.

3.2 Certification: where are the benefits?

3.2.1 Principles: identify reliable defence companies

The basic purpose of any certification process is to publically recognize the actors who qualify as reliable partners. To be compliant, companies must fulfil various obligations. In the case of the ICT Directive, these conditions are mentioned at the articles 8, 9 and 10 which present the general principles guiding the certification and the supervision of export limitations.

Article 8 of the Directive exhibits the information that has to be provided by suppliers (terms and conditions of the transfer licence, including limitations relating to the end-use or export of the defence-related products). It creates the obligation for suppliers to keep detailed and complete records of their transfers containing: 'a) a description of the defence-related product and its reference under the Annex; b) the quantity and value of the defence-related product; c) the dates of transfer; d) the name and address of the supplier and of the recipient; e) where known, the end-use and end-user of the defence-related product; and f) proof that the information on an export limitation attached to a transfer licence has been transmitted to the recipient of the defence-related products'⁹⁶.

Article 9 of the Directive lays down the general principles for the certification of defence firms in the EU. Certification is granted at the national level and is meant to testify to the ability of defence undertakings

⁹⁶ Directive 2009/43/EC, *Op. Cit.*

to receive defence-related products and, where appropriate, their respect of all the conditions attached to these products such as end-use conditions. In each Member State, there is a competent authority that has to carry out the certification of companies based on certain criteria. If a company is certified, suppliers from other Member States can deliver defence-related products to this company by using a general transfer licence. The certification is valid for five years.

Article 10 of the Directive gives the Member States the responsibility of ensuring 'that recipients of defence-related products, when applying for an export licence, declare to their competent authorities, in cases where such products received under a transfer licence from another Member State have export limitations attached to them, that they have complied with the terms of those limitations, including, as the case may be, by having obtained the required consent from the originating Member State'⁹⁷.

As certificates have to be mutually recognized, the EC provided the national competent authorities with common certification guidelines aiming to specify the certification criteria, to harmonize them and to facilitate the information sharing⁹⁸. It also publishes on Internet information about certified recipients of defence-related products through [CERTIDER](#), the central EU register of certified undertakings (see table 1).

⁹⁷ Idem.

⁹⁸ Commission Recommendation 2011/24/EU, January 11th, 2011.

Table 9 List of certified defence companies (as of 10/03/2015)

Country	Companies
<u>Austria</u>	<u>Glock Ges.m.b.H.</u>
<u>Belgium</u>	<u>Cassidian Belgium NV</u> <u>CMI Defence SA</u> <u>FN Herstal</u>
<u>Bulgaria</u>	<u>EnerSys AD</u>
<u>Denmark</u>	<u>Composhield A/S</u> <u>Falck Schmidt Defence Systems A/S</u> <u>Terma A/S</u>
<u>Finland</u>	<u>Patria Land Services Oy</u> <u>Patria Land Systems Oy</u>
<u>France</u>	<u>Messier-Bugatti-Dowty</u> <u>Microturbo</u> <u>Nexter Munitions</u> <u>Nexter Systems</u> <u>Renault Trucks Defense</u> <u>Rockwell-Collins France</u> <u>Snecma</u> <u>Sofradir</u> <u>Thales Avionics</u>
<u>Germany</u>	<u>Raytheon Deutschland GmbH</u> <u>Airbus DS Optronics GmbH</u> <u>Airbus Operations GmbH</u> <u>Diehl Aerospace GmbH</u> <u>Diehl BGT Defence GmbH & Co.</u> <u>Junghans microtec GmbH</u> <u>Northrop Grumman LITEF GmbH</u> <u>Rheinmetall Defence Electronics</u> <u>Rheinmetall MAN Military Vehicles GmbH</u> <u>Rheinmetall Waffe Munition GmbH</u> <u>RUAG Ammotec GmbH</u>
<u>Hungary</u>	<u>RABA Jarmu Kft.</u> <u>Respirator Zrt.</u> <u>RUAG Ammotec Magyarországi Zrt.</u>
<u>Netherlands</u>	<u>B.V. Nederlandse Instrumenten Compagnie "Nedinsco"</u>
<u>Portugal</u>	<u>OGMA - Indústria Aeronáutica de Portugal</u>
<u>Slovakia</u>	<u>Glock, s.r.o.</u>
<u>Spain</u>	<u>Celéstica Valencia S.A.U.</u>
<u>Sweden</u>	<u>FLIR Systems AB</u>

Source: CERTIDER

3.2.2 Few certified companies

The lack of visibility and availability of the general licences in all the Member States certainly impacts the certification process. Since certification is not an assessment of general competence on export control compliance, but a condition for the use of these licences, it is logical that, before seeking certification, defence firms need to analyse the general licences available in the various Member States. Defence companies have to understand the obligations imposed by the licences of other Member States. Due to the documents differences both in their structures, languages and contents, a decision to seek certification may suffer delays as it makes the assessment time longer and more resources consuming.

As mentioned previously, when they are available, general licences are usually complex. Moreover, requirements for certification are not really harmonized (additional criterion, different lists and processes...) despite the common certification guidelines provided by the EC. It can be observed that even if they were specifically targeted by the Directive, the small and medium enterprises (SME) do not use the certification. Requirements are seen as being too burdensome. This and the lack of information on the general licences lead some small and medium size companies to compensate the obstacles by using individual and global licences.

Nevertheless, the diversity of the general licences should not be seen as an insurmountable barrier to get companies to certify. Most defence companies are used to deal with challenging compliance criteria. Time is one of the main factors to take into account to deal with the complexity inherent to the implementation of the new regulatory systems.

When consulted on their views about the certification process, both defence companies and government officials mention they strongly believe that it is useful and that it can make a significant contribution to simpler arms transfer processes within the European Union. They also believe it would help create a more cost-effective and competitive European defence industry⁹⁹. In the future, harmonization for the general licences is expected to allow more flexibility and to save time since it will not be necessary to investigate the various national publications. The common belief is that the more certified companies there are, the more the system will evolve towards a better harmonization, alleviating the bureaucratic burden on the defence firms. This conviction seems to be shared by subsidiaries of non-European companies, some of them being already certified (Raytheon or Northrop Grumman to name them). However, this is more an expectation of the future evolution of the European defence market than an objective assessment of the current situation. The fact that only 38 defence companies from 13 countries registered on CERTIDER at this date arises serious doubts about the timetable. It must be recalled that if only a limited number of defence firms are certified at the European level, individual or global licences may remain the dominant norm concerning arms transfers. One must hope a significant acceleration of the rate of certification will occur in the coming months or the entire project of the EC to positively impact the European defence market may be at risk of failure.

3.2.3 Missing incentives

There is at the moment some scepticism about the practical benefits of the certification process. It seems these benefits may be mainly seen as a matter of image or marketing, such as the idea that registered companies are recognized by the EU as reliable actors. To support the wider use of certification and assessing its adequacy in terms of costs and impacts, the concrete benefits of the certification process should be clarified. For the moment, it is doubtful that the certification process is considered worth the effort for the private sector. It is time consuming and implies various risks (Intellectual property, security breach, negative findings...). The organizational and financial requirements needed to prepare policies

⁹⁹ Mampaey L. et al., *Op. Cit.*.

and procedures to guarantee effective internal controls and audits and the benefits of the certification process are uncertain. This is the case for some major defence firms, but the observation seems even more valid for smaller entities. It can also be mentioned that there are concerns about engaging the personal responsibility of a senior executive, as determined in Article 9 of the Directive, which can also explain some level of reluctance to become certified.

To improve the benefits of the certification process it can be suggested, for instance, to allow re-transfer within the Community after import for test, maintenance, repair, evaluation, exhibitions, and demonstrations without seeking additional approval if the initial approval for a transfer was granted to a certified company on the legal basis of a general licence. At a later stage, the Commission might want to consider, with the agreement of the Member States, widening the scope the Directive in order to create a 'see through' rule regarding certified companies. If the final systems integrator is certified, the lowest supplier should be able to use the general licence even if the next tier supplier is not certified. Discussions with industry and Member States will be necessary to evaluate the level of feasibility of such a measure, especially taking into account the perspectives of Member States on the relevance of remaining informed on end-use and end-user (see below).

The ICT Directive actually fails to answer a critical question: What are the consequences of not being certified? The consequences of not being certified are unclear... if there are any. There are, for the moment, no legal issues for the company nor accountability for the persons in charge. Moreover, as long as defence companies can still rely on individual and global licences, tools they are already familiar with, the interest of being certified will remain doubtful. As long as individual and global licences are still usable and valid, there is actually no real need for a company to register on CERTIDER. Only an expiration date for the individual licences could change the situation.

In this regard, the options for the EC seem to be limited. It actually has to rely on the Member States on this issue. As clients of European defence companies, they could efficiently support the certification process and the other goals of the ICT Directive in indicating to their suppliers it would be better for them to be certified to maintain their position in the market. The defence market is driven by the demand which emerges from States that are also in many cases shareholders of defence firms. Thus, they are key to ensure a better rate of certification. If they favour general licences, the private sector will have to conform to this situation.

3.3 Effect of the directive: end use/user control and other hypotheses

Because of the slow pace on implementation of Directive 2009/43/EC, it is hazardous to already analyse its effect on the European defence market. However, the actual trends allow the formulation of several hypotheses that could help the EC to anticipate the actions to undertake in order to improve the effectiveness of the intra-Community transfers. The main questions at this stage are 1) the eventual adaptation of the end-use/end-user control processes within the EU, 2) the identification of the actors who will benefit from the new regulatory systems.

3.3.1 Does the ICT Directive impact the end use/users control?

Theoretically, exports of conventional arms are under the scrutiny of national authorities that approve them on the basis of prior knowledge on the end-use and the end-user in the country of final destination. The idea is to ensure the armaments are delivered exclusively to the legally authorised end-user and for the legally declared end-use. Several documents are used for this purpose, notably the end-user certificate (EUC). It is established prior to any delivery to guarantee to the national authorities of origin that the buyer is the ultimate recipient of the goods. EUCs usually, but not systematically, imply a non-re-export clause certifying the products will not be re-exported without the prior written approval of the original exporting State. In sensitive cases, post-delivery verifications are required by the exporting authorities to verify the proper use of the armaments.

If EUCs or other kinds of end-use/end-user documentation are legal tool against arms diversion, their efficiency relies on their inclusion in a broader monitoring system encompassing comprehensive considerations of diversion risks at the licensing stage, verifications of end-user documentation and post-shipment controls. Once the transfer is authorized, risks of diversion remain a sensitive issue. Diversion can occur during the transfer *per se*, or several years later, once the material has been delivered. Therefore, the efficiency of the licensing process and the restrictions it imposes is limited if other steps are not taken to ensure that the military items arrive at their intended destination and that they are used in compliance with the provisions of the granted licence and its restrictions regarding re-export.

The ICT Directive has an effect on end-use/user control mechanisms, as it will no longer be possible with the general licences to make individual assessments of the final recipient and of the end-use of the goods before the transfer. The Member State exporting the items will have access to information concerning the end-user/use only after the transfer has occurred. Therefore, if this transfer does involve a future re-export, the originating Member State will lose control over the end-use of military equipment that leaves the European territory through another Member State. This is why the Directive sets forth confidence building measures between Member States. According to Article 4 .6 Member States shall determine all the terms and conditions of transfer licences, including any limitations on the export of defence-related products to third countries. It specifically mentions that end-user assurances, including end-user certificates, may be required. It should be noted that even if these provisions expressly concern exports to third countries, it does not exclude the possibility that they may be used for intra-Community transfers. However, the Directive encourages States not to impose any limitations on transfers of components where the recipient provides a declaration of use in which it declares that the components subject to that transfer licence are integrated or are to be integrated into its own products and cannot at a later stage be transferred or exported as such, unless for the purposes of maintenance or repair.

The analysis of the various clauses and obligations attached to the general licences already published shows that the EU Member States clearly consider as essential to maintain end-use/user controls even in the frame of intra-Community transfers. It is an essential part of their licensing procedures. In this regard, applications for individual and global transfer licences still entail providing guarantees on the end-user/end-use in the form of a EUC. Concerning general transfer licences, Member States prefer to include specific conditions or restrictions with regard to re-transfer and re-export outside the EU in their general licence instead of requiring EUCs as explained above.

A similar logic applies to transit licences and serves as a justification of their preservation along with the general licences. Several states (Germany, Hungary and Netherlands, for instance) still require specific procedures (like prior notification) for sensitive defence products transiting through their territory. They sometimes deny the authorization of transit, basing their decision on their own interpretation of the Council Common Position (CP) 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment. This limits the impact of the ICT Directive and illustrates the challenges of harmonization, but in most cases the problems concern exports outside the EU.

The Czech Republic for instance has complained about Germany on several occasions ¹⁰⁰. The German ports are crucial for Czech arms exports: Berlin' specific conditions for transiting systems are seen by Prague and Czech defence companies as an unnecessary burden and a factor of distortion between European firms in the competition for markets within but mainly outside the UE. Although this situation is a real challenge for landlocked countries, it would be excessive to read the additional procedures as protectionism. Germany put at risk some major contracts for its domestic firms (KMW in Qatar) and also

¹⁰⁰ Richter, J., 'Czech Arms Exporters To Sue Germany Over Transit Licences', *RadioPhaha*, 25th September 2008.

blocked arms exports from France to some Gulf countries (Saudi Arabia, notably) for products codeveloped with France but not transiting by Germany ¹⁰¹. The key-questions to authorize or the deny the arms transfers remain: what is transferred, who is the end-user, what is the end-use, what are the risks associate to the entire process. The licensing processes implemented by European countries do not seem to be designed as an instrument to influence competition, even though it may seem as such when licences are refused on grounds that are subject to disagreement between MS.

Indeed, Member States have to comply with international, regional and national commitments and obligations when it comes to control the end-user *and* end-use of the military equipment leaving their territory, commitments undertaken well before the Directive came into force. At the international level, they will now have also to take into account the Arms Trade Treaty.

Concerning more specifically the intra-EU transfers, Member States do not seem willing to leave the responsibility to another Member State to decide the re-export of products deemed sensitive. The State of origin has to remain informed in case of an export outside the EU. Consignees or importers might only be intermediaries, which are going to re-export the goods. It is a situation that has to be avoided since the national control system of the importing State will become the reference framework to authorize a re-export outside the EU. Export policies vary quite widely among Member States and they are influenced by the national interests which sometimes allow a permissive interpretation of European rules like it is the case with (CP) 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment. This document was supposed to be the main instrument of a better harmonization of arms export controls in Europe, but it clearly has had weak effects on EU Member States. Governments are reluctant to appeal to the CP to criticize each other's behaviour regarding arms exports¹⁰². Each Member State has its own interpretation of what 'sensitive products' are; the diversity of lists attached to general licence illustrating this point.

There is some willingness to work towards harmonization of EUCs¹⁰³, but Member States do not share a common vision on how to achieve this goal. It should certainly be done with regards to the international commitments of the Member States and also in association with the Council which developed guidelines on end-use/user certificates within the framework of the Common Position on arms exports. Nevertheless, at this stage of the implementation of the ICT Directive, the harmonization of export control policies neither seems useful nor feasible, considering the wide range of practices among Member States. On the one hand, EUCs are still used for individual and global transfer licences. On the other hand, they seem satisfied with the inclusion of limitations on export in their general transfer licences.

¹⁰¹ Cabirol, M. 'Armement : quand Berlin trahit l'esprit de la coopération franco-allemande', *Latribune.fr*, 11th September 2008.

¹⁰² It is the case even in situations posing security issues like with the eventual delivery of the French Mistral amphibious assault and power projection vessels to Russia while Ukrainian and pro-Russian soldiers were fighting at the frontiers of the UE. See, Isbister R. and Quéau Y., 'An ill wind: How the sale of the Mistral Warship to Russia is Undermining EU Arms Transfer Controls', *GRIP/Saferworld*, November 2014.

¹⁰³ Mampaey L. *et al. Op. Cit.*

3.3.2 Who will benefit more from the ICT Directive?

Several Member States have made significant efforts to promote and explain the new ICT Directive and its procedures. Meetings and seminars have been organized to reach out to companies and defence associations sometimes before but mostly after the entry into force of the Directive. Relevant information was often made available on the official homepage of ministries and export control authorities. National officials also produced and provided relevant industrial stakeholders in their country with brochures, newsletters or memos, which were, in some cases, complemented by bilateral talks with specific companies on the implementation of the ICT Directive. Some national defence associations also played a relatively important role in the dissemination of relevant information to their members.

The benefits of the ICT Directive will not be felt similarly by all Member States, national authorities and defence companies. Its effects will certainly be different among Member States depending on the structure of their national defence sector and its reliance on exports. National factors and realities of the defence industry, as well as the diversity of practices of arms trade controls in Europe, can explain the current unbalanced level of implementation of the Directive and limit the overall benefits of the new regulatory system put in place by the ICT Directive. Exploring the issues and challenges related to the implementation of Directive 2009/43/EC also means accepting the fact that similar levels of impact for all the relevant stakeholders should not be expected. In smaller EU countries, where the number of concerned companies is limited, their interest may be modest or non-existent.

Regarding the defence firms, it has to be noted that the key factor is the degree to which the nature of the business of the individual company (irrespective of size) relies on imports from other Member States. Certification is particularly interesting for undertakings that import large quantities of defence-related products and spare parts (mainly medium size to bigger firms). As for now, the main advantage of the certification procedure seems to be the streamlining of the supply of various spare parts.

As previously mentioned, even if the ICT Directive somehow specifically targeted them, SMEs do not, for the moment, seek certification. In many cases, they do not have the needed resources to assess the various general licences all over Europe. Very small companies struggle to access relevant information or find the new legal tools too complex. Some firms cannot even afford membership in the national or European defence industry associations and the same holds true for them when it comes to lawyers specialised in these issues. Without instructional documentation or operational toolkits available in open sources, it would be challenging for these companies to understand the necessity of certification. Thus, despite the efforts of Member States, these actors' knowledge about the new regulatory system the EC intends to implement should definitely not be overestimated.

Moreover, as long as the individual licences remain adequate for them, suppliers and their clients (other defence firms or Member States) might not see the need to be certified and will continue to use a tool they are familiar with. This duplication is clearly a challenge for the success of the Directive, since the actual process seems to leave too much room for interpretation. Why should general licences be favoured? The answer is uncertain. Member States and systems integrators may have a role to play here. These actors have a direct impact on the SMEs' sales. For instance, if systems integrators announce to the various components of their supply chain they want to prioritize general licences in their daily business with them, SMEs would probably have to conform. However, this will necessitate a clarification of the benefits of the new regulation. Feedback from companies, even those who are still in the process of evaluating the certification process according to their activities, tends to indicate this evaluation has not been positive on this point.

Besides, many European defence companies, in the United Kingdom and Italy for instance, have to deal with the US International Traffics in Arms Regulation (ITAR). Thus, they probably have concerns about the current and potential additional distortions between the European system of regulation and the

American one. This may explain the fact that no company from these two countries are listed on CERTIDER to date. The recent export control reform in the United States transferred many sensitive products from the Military List to the dual-use non-sensitive products list, exempting most of these products from licence applications. To remain competitive on the export markets, but also to support the local supply chains, a European reform should perhaps seek similar advantages.

3.4 Conclusion: can positive impacts on cost-efficiency, acquisition processes, security of supply and European DTIB be expected?

The ICT Directive seeks to introduce extensive changes in export control systems across Europe and, for most of them, even though the tools and measures are now put in place, time is needed for their implementation. As explained in the study, the new mechanisms still have to fully come into force in some Member States, and companies are still learning about and evaluating the potential benefits of the ICT Directive. Thus, it is definitely too early to assess the possible impact of the ICT Directive on cost-efficiency, acquisition processes, security of supply and more generally on the EDTIB: *One should not expect too much from a single tool at an early stage.*

Although time is a critical factor, considering the actual slow pace of implementation, the number of registered companies on CERTIDER and the diversity characterizing general licences, it is doubtful that Directive 2009/43/EC will reach all its objectives. The European defence market and DTIB are dominated by a state-centred logic. Defence companies will ultimately conform to what the Member States as buyers of the armaments require in terms of licensing and end-use/end-user control will favour in their daily practice. On the defence markets, the demand side is the cornerstone of any system of regulation. The problem is that the single European defence market does not exist outside a formal administrative and regulatory frame. There are still 27 defence markets.

In this regard, the influence that the EC can expect to exert on the procurement policies or more generally the structure of the EDTIB is obviously limited, but it can have an important role in supporting the dialogue and creating spaces of discussion on the specific aspects of the implementation of the ICT Directive, involving all the relevant stakeholders, i.e. Member States and industry. In this light, the Commission is also and perhaps mainly instrumental to progress on this issue. Next steps could address the problems of the numerous military lists implemented through the general licences. Another avenue for the future could be to develop the benefits of the certification but the interest of the defence firms (ease the administrative burden) and of the Member States (ensure the end-use/end-user control) may be challenging to conciliate.

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5 Annexes

Annex I: Number of contract notices published on TED per Member States

	2011	2012	2013	2014	TOTAL	
	Nb	Nb	Nb	Nb	Nb	%
France	86	361	294	316	1057	34,6%
Germany	8	171	202	239	620	20,3%
United Kingdom	1	65	60	115	241	7,9%
Poland	0	0	81	148	229	7,5%
Finland	2	44	43	43	132	4,3%
Czech Republic	0	31	29	55	115	3,8%
Denmark	5	31	32	40	108	3,5%
Sweden	0	14	37	37	88	2,9%
Italy	0	21	26	33	80	2,6%
Romania	0	0	16	29	45	1,5%
Greece	0	0	3	40	43	1,4%
Bulgaria	0	12	13	16	41	1,3%
Netherlands	0	0	21	20	41	1,3%
Hungary	4	6	17	10	37	1,2%
Belgium	0	5	20	10	35	1,1%
Lithuania	1	8	14	11	34	1,1%
Slovakia	0	4	9	21	34	1,1%
Estonia	0	1	2	17	20	0,7%
Slovenia	0	0	6	9	15	0,5%
Croatia	0	0	1	13	14	0,5%
Austria	0	1	9	2	12	0,4%
Latvia	0	2	1	9	12	0,4%
Cyprus	0	0	3	1	4	0,1%
Spain	0	0	0	0	0	0,0%
Ireland	0	0	0	0	0	0,0%
Luxembourg	0	0	0	0	0	0,0%
Malta	0	0	0	0	0	0,0%
Portugal	0	0	0	0	0	0,0%
TOTAL	107	777	939	1234	3057	100,0%

Annex II - Number of contract awards notices published on TED per Member States

	2011	2012	2013	2014	TOTAL	
	Nb	Nb	Nb	Nb	Nb	%
Germany	3	89	205	253	550	23,2%
France	0	42	237	232	511	21,5%
Italy	10	109	100	108	327	13,8%
Poland	0	3	35	171	209	8,8%
United Kingdom	0	31	55	86	172	7,2%
Finland	0	26	36	45	107	4,5%
Romania	0	0	22	58	80	3,4%
Denmark	0	17	23	32	72	3,0%
Czech Republic	0	9	16	40	65	2,7%
Hungary	1	14	19	9	43	1,8%
Belgium	2	3	17	20	42	1,8%
Netherlands	0	4	5	22	31	1,3%
Belgium	0	1	9	20	30	1,3%
Lithuania	0	3	8	19	30	1,3%
Sweden	0	2	10	13	25	1,1%
Estonia	0	0	7	14	21	0,9%
Croatia	0	0	0	16	16	0,7%
Slovenia	0	0	8	7	15	0,6%
Slovakia	0	5	1	6	12	0,5%
Latvia	0	0	5	4	9	0,4%
Austria	0	1	4	1	6	0,3%
Spain	0	0	0	0	0	0,0%
Cyprus	0	0	0	0	0	0,0%
Greece	0	0	0	0	0	0,0%
Ireland	0	0	0	0	0	0,0%
Malta	0	0	0	0	0	0,0%
Portugal	0	0	0	0	0	0,0%
Luxembourg	0	0	0	0	0	0,0%
TOTAL	16	359	822	1176	2373*	100,0%

**The search on TED gave rise to the 2 381 contract awards notices, although 8 of them have been declared either fruitless, not followed up, cancelled, or have been deleted from the system. These notices have been removed from the statistics*

Annex III - Value of contract awards notices published on TED per Member States, in € million

	2011	2012	2013	2014	TOTAL	
	M€	M€	M€	M€	M€	%
United Kingdom	0,00	770,13	445,54	2 781,13	3 996,80	37,9%
France	0,00	42,29	822,84	1 903,68	2 768,82	26,3%
Germany	2,09	272,32	327,13	347,82	949,36	9,0%
Italy	18,94	141,67	273,81	396,67	831,09	7,9%
Poland	0,00	4,15	135,29	676,80	816,25	7,7%
Romania	0,00	0,00	12,94	221,58	234,52	2,2%
Finland	0,00	25,07	51,74	128,44	205,25	1,9%
Slovakia	0,00	6,35	1,75	110,76	118,86	1,1%
Czech Republic	0,00	18,25	21,78	58,97	99,01	0,9%
Bulgaria	0,55	0,64	80,55	16,47	98,22	0,9%
Hungary	0,58	21,44	21,79	52,97	96,79	0,9%
Denmark	0,00	33,57	42,02	14,94	90,53	0,9%
Lithuania	0,00	1,35	29,89	33,82	65,07	0,6%
Belgium	0,00	0,00	2,48	51,44	53,93	0,5%
Croatia	0,00	0,00	0,00	35,93	35,93	0,3%
Slovenia	0,00	0,00	16,18	3,52	19,70	0,2%
Estonia	0,00	0,00	16,15	2,07	18,21	0,2%
Latvia	0,00	0,00	5,97	6,33	12,30	0,1%
Sweden	0,00	1,20	7,97	0,00	9,17	0,1%
Netherland	0,00	2,24	3,91	1,38	7,52	0,1%
Austria	0,00	0,62	3,79	2,03	6,45	0,1%
Spain	0,00	0,00	0,00	0,00	0,00	0,0%
Cyprus	0,00	0,00	0,00	0,00	0,00	0,0%
Greece	0,00	0,00	0,00	0,00	0,00	0,0%
Ireland	0,00	0,00	0,00	0,00	0,00	0,0%
Malta	0,00	0,00	0,00	0,00	0,00	0,0%
Portugal	0,00	0,00	0,00	0,00	0,00	0,0%
Luxembourg	0,00	0,00	0,00	0,00	0,00	0,0%
TOTAL	22,16	1 341,31	2 323,51	6 846,78	10 533,77	100,0%

Annex IV - Major contracts awarded under directive 2009/81/ec (published on TED), in € million

Contracting authority	Publication date	Document number	Common procurement vocabulary code	Type of contract	Procedure	Economic operator	Value (M€)
UK Commands & Centre, DE&S	10/2012	324881	Technical services	Service	Restricted	Suppliers details available on request from DESComrclCC-FATS4AB@mod.uk	638,01
UK Ministry of Defence, DIO	06/2014	190736	Real estate services	Service	Negotiated	Capita Business Services Ltd (UK)	506,14
FR Mindef/Simmad	09/2014	311657	Repair and maintenance services of military aircrafts, missiles and spacecrafts	Service	Negotiated	Airbus Military France (2 lots) (FR)	379,72
UK National Training Estate Prime	07/2014	241976	Building and facilities management services	Work	Competitive dialogue	Landmarc Security Services Limited (UK)	376,29
UK Ministry of Defence, DIO	08/2014	277436	Building and facilities management services	Service	Negotiated	Carillion Amey Ltd (UK)	296,83
FR DGA/SCA	12/2014	429874	Rockets	Supply	Negotiated	SAAB Dynamics AB (SE)	229,01
UK Ministry of Defence, C&C	08/2014	281619	Technical training services	Service	Negotiated	Babcock Land Ltd (FUK)	228,02
FR Mindef/Simmad	06/2013	208100	Repair, maintenance and associated services related to aircraft and other equipment	Service	Negotiated without prior publication	Thales systèmes aéroportés (FR)	198,47
UK Ministry of Defence	08/2014	277433	Building and facilities management services	Service	Negotiated	Carillion Amey Ltd (UK)	187,92
UK Ministry of Defence	08/2014	277432	Building and facilities management services	Service	Negotiated	Carillion Amey Ltd (UK)	168,05
FR Mindef/SIMMA D	01/2014	025010	Repair and maintenance services of military aircrafts, missiles and spacecrafts	Service	Negotiated without prior publication	Thales optronique SAS (FR)	137,10
IT Stato Maggiore Esercito – Ufficio Generale C.R.A. «Esercito Italiano»	11/2013	369989	Mechanical spare parts for military vehicles	Supply	Negotiated without prior publication	Iveco S.p.A. (IT)	115,11
DE BAAINBw	12/2012	393391	Armoured weapon carriers	Supply	Negotiated without prior publication	KMW (DE)	109,81
FR Mindef/Simmad	07/2014	239390	Repair and maintenance services of military aircrafts, missiles and spacecrafts	Service	Negotiated	Sabena Technics DNR (FR)	108,43
UK DSTL, DSTL	03/2014	079288	Research services	Service	Restricted	QinetiQ Limited (UK)	107,67
UK DE&S Commercial, DE&S	07/2013	222969	Mechanical handling equipment	Service	Restricted	Briggs Equipment UK Lt (UK)	100,81
FR DGA/SCA	01/2014	029472	Surface combatant	Service	Negotiated	Piriou (mandataire)–DCNS (cotraitant) (FR)	100,43
FR Mindef/Simmad	05/2014	183872	Repair and maintenance services of military aircrafts, missiles and spacecrafts	Service	Negotiated without prior publication	Airbus helicopters (FR)	100,08
DE BAAINBw	11/2013	399952	Unmanned aerial vehicles	Service	Negotiated without prior publication	Taurus Systems GmbH (DE)	97,20
FR	10/201	342862	Repair and maintenance	Service	Negotiated	Société THALES	94,00

Mindef/Simm ad	3	services of aircraft			without prior publication	AVIONICS SAS (FR)	
SK Ministerstvo vnútra Slovenskej republiky	02/2014	064542	Security-type printed matter	Supply	Restricted	Giesecke & Devrient Slovakia, s.r.o.(SK)	89,17
FR Marine/DCSSF /DSSF Toulon	12/2014	411145	Warships and associated parts	Service	Negotiated	CNN MCO (FR)	82,17
FR Mindef/Simm ad	09/2014	311658	Repair and maintenance services of helicopters	Service	Negotiated without prior publication	Thales Training & Simulation (FR)	81,56
UK Ministry of Defence	07/2014	219842	Construction project management services	Service	Restricted	Jacobs UK Ltd (UK)	81,07

Annex V – Value of Top 10 major Voluntary ex-ante notices published on Ted, in € million

Contracting authority	Publication date	Document number	Information about the contract award	Justification of the choice for the procedure	Type of document	Economic operator	Value (M€)
UK Ministry of Defence, Land equipment	05/2014	163665	Training simulators (AS90 Turret Trainer)	No tenders or no suitable tenders in response to: negotiated procedure Technical	Service	Van Halteren Metaal (NL)	-
UK Joint & Battlefield Trainers, Simulation & Synthetic Environments (JBTSE), DE&S	05/2013	163292	Training and simulation in military electronic systems (Post Design Service, Contractor logistics support for the Command and Staff Traainer)	technical, connected with the protection of exclusive rights (Raytheon Systems Ld)	Service	n/r	987,02
UK Ministry of Defence, C&C	06/2014	198876	Development of software for military applications (DAFIF 8.1 Upgrade)	No tenders or no suitable tenders in response to: negotiated procedure Technical, connected with the protection of exclusive rights	Supply	1Spatial Group (UK)	780,84
UK Ministry of Defence, Helicopters	09/2014	309497	Helicopters (delivery of the 3rd pricing period of a 25 year contract for the support of Merlin helicopter availability)	Technical, connected with the protection of exclusive rights (AgustaWestland)	Service	n/r	706,64
UK Maritime Combat Systems Team, DE&S	07/2012	219086	Sonars (Sensors Support Optimisation Project)	No tenders or no suitable tenders in response to: negotiated procedure Technical, connected with the protection of exclusive rights (Thales Underwater Systems)	Service	n/r	345,79
UK Ministry of Defence, Weapons	11/2014	382280	Torpedoes(Spearfish Torpedo Upgrade Programme)	No tenders or no suitable tenders in response to: negotiated procedure Technical (BAE Systems Maritime Systems)	Supply	n/r	317,99
UK Sea King, DE&S	07/2012	241920	Repair and maintenance services of helicopters (Sea King Integrated Operational Support Pricing Period 3)	Technical, connected with the protection of exclusive rights (AgustaWestland)	Supply	n/r	288,16
FR Mindef/Air/SIAé	11/2012	363571	Engineering services (Spare parts, tools and ancillary equipment in support of MRO Larzac Engines)	Technical, connected with the protection of exclusive rights	Supply	Snecma (FR)	156,05
UK Air Platform Systems Project Team, DE&S	09/2012	285703	Electronic warfare systems and counter measures (LAIRCM system)	No tenders or no suitable tenders in response to: negotiated procedure Technical, connected with the protection of exclusive rights (Northrop Grumman)	Service	n/r	109,50
UK Armoured Vehicle Programmes-In Service Platforms, DE&S	10/2013	339342	Repair and maintenance services of military vehicles (CV8 Engines, CV12 Engines, X300 Transmissions and ancillary items)	No tenders or no suitable tenders in response to: negotiated procedure Technical, connected with the protection of exclusive rights (Caterpillar)	Service	n/r	86,36

Annex VI – SEGMENTATION OF THE CONTRACT AWARD NOTICES

Defence	>> Aerospace	Air	Military aircrafts and spacecraft. Training and simulations in aircrafts, missiles and spacecraft.	Repair and maintenance services of military aircrafts, missiles and spacecraft. Repair and maintenance services related to aircraft and other equipment (engines...).
		Missiles	Air-to-air missiles, Surface-to-air missiles, Air-to-surface missiles, Anti-ship missiles, Surface-to-surface missiles.	Repair and maintenance services.
		Satellites	Satellites	Repair services of satellites.
	>> Land	Military and engineering vehicles Shelters	Military vehicles (Battle tanks, ACV, IFV, APC...) Training and simulation in military vehicles.	Associated parts, parts and accessories for vehicles and their engines. Repair, maintenance and associated services of vehicles and related equipment. Repair and maintenance services of military vehicles.
		Military individual equipment	Individual and support equipment (military uniforms, helmet, bullet-proof vest). CBRN protection.	Repair and maintenance of Individual and support equipment.
		Weapons, Ammunition, Explosives	Explosives, small arms and light weapons. Ammunition for firearms and warfare. Weapons. Training and simulation in firearms and ammunitions.	Repair and maintenance services of firearms and ammunition.
	>> Naval		Warships. Training and simulations in warships.	Associated parts and spare parts. Repair and maintenance services of warships.
	>> Electro C4ISR		Instrumentation and control equipment Military electronic systems. Electronic detection apparatus. Navigation instruments and equipment. Electronic marine equipment. Radars sets. Transmission apparatus for radiotelephony, radiotelegraphy, radio broadcasting and television. Detection and analysis apparatus. Military networks. Telecommunications equipment. Electronic, electromechanical and electro technical supplies. Information systems and software specially designed for military use. Optical instruments (binoculars, telescopic sights, night glasses).	Repair and maintenance services of military electronics systems and networks. Repair, maintenance services and associated services related to computer, telecommunication equipment and audiovisual material for military purposes. Repair services of radars sets.
	>> R&D		Research and development services and related consultancy services (Military research & technology, research & development consultancy, engineering studies, pre-feasibility study and technological demonstration, test and evaluation).	

Support	>> Cargo and transport	Cargo trucks (buses and coaches, trucks, vans).
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services	vehicles	Special purpose motor vehicle (jeep, break, estate and saloon cars).
	>> IT	Desktop computers, fax, video projectors, printers. Telecommunication equipment for personnel in the armed forces. Electrical materials for infrastructures. Software (archiving system, accounting...) Electronic mail software and e-mail system.
	>> Catering	Catering services and catering supplies
	>> Building and facilities management services	Construction works. Building-cleaning services and management services. Maintenance services (ventilation and air conditioning, central heating...).
	>> Logistics	Supply services of personnel including temporary staff. Transport services. Tanks, reservoirs, and containers for logistical services.
security	>> specialized vehicles	ambulances, rescue vehicles, patient-transport vehicles, police cars, firefighting vehicles.
	>> air traffic control	air-traffic control equipment and systems. air-traffic control simulation and training. control tower equipment, air traffic-control.
	>> surveillance	infrastructures surveillance and security systems and devices. guard services, security services. smoke-detection, gas-detection apparatus. population warning system.
	>> individual equipment	police equipment: police uniforms, firearms, bullet-proof vest... firefighting, rescue and security materials: extinguishers, fire extinguishing systems... firefighter uniforms.
Other	>> Raw material	Fuel, metallic ores.
	>> Vehicles	Refuelling vehicles, airway tractors.
	>> Healthcare	Medical, pharmaceutical products & personal care products.
	>> Machinery and equipment	Special-purpose machinery and equipment used in repair and maintenance of weapon system.
	>> Measuring instrument (nuclear)	Nuclear evaluation instruments.

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