

Defence procurement

European Parliament resolution on the Green Paper on defence procurement (2005/2030(INI))

The European Parliament,

- having regard to the Treaty establishing the European Community, and in particular Articles 95 and 296 thereof,
 - having regard to 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 contracts¹, and in particular Article 10 thereof,
 - having regard to the case law of the Court of Justice²,
 - having regard to Rule 45 of its Rules of Procedure,
 - having regard to the report of the Committee on the Internal Market and Consumer Protection and the opinions of the Committee on Foreign Affairs and the Committee on Industry, Research and Energy (A6-0288/2005),
- A. whereas Article 296 of the Treaty provides a derogation for the protection of the essential interests of national security which are connected with the production of or trade in arms, munitions and war material, and, although that Article also provides that measures taken pursuant to that derogation shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes, it is often misused,
- B. whereas Article 10 of Directive 2004/18/EC provides that, subject to Article 296, that Directive applies to contracts awarded in the field of defence,
- C. whereas the Court of Justice has held that Article 296 does not amount to a general, automatic derogation, that its use must be justified on a case-by-case basis, that recourse to it is justified only if it is necessary for achieving the objective of safeguarding the relevant security interests involved and that the burden of proof must be discharged by the Member State concerned,
- D. taking account of the economic importance of defence procurement within the internal market, the tight budgetary position in the Member States, the restriction in terms of budgetary expenditure imposed on the Member States and the considerable burden which defence expenditure places on taxpayers,
- E. conscious of the specific features of defence markets, in particular with regard to the dominant role of the state, the importance of armaments procurement in terms of security

¹ OJ L 134, 30.4.2004, p. 114.

² In particular the judgments in Case C-222/84 *Johnston* [1986] ECR 1651 and Case C-414/97 *Commission v Spain* [1999] ECR I-5585.

and the particularly fragmented structure of such markets, as evidenced for example by the very limited number of suppliers and purchasers, extending even to monopolies,

- F. whereas the fragmented nature of the armaments market in Europe is one of the causes of weakness of Europe's military capabilities,
 - G. whereas the hermetic segregation of armaments markets is also the cause of a lack of standardisation and has led to a lack of interoperability between systems in Europe and made cooperation in international operations more difficult,
 - H. whereas the fact that 25 different sets of rules on procurement are in force constitutes an obstacle to implementation of the European Capabilities Action Plan (ECAP),
 - I. whereas relevant armaments purchasers are solely the governments of the 25 Member States, six of which account for 90% of armaments purchases and in some cases even hold stakes in the armaments industry,
1. Welcomes the Green Paper presented by the Commission on 23 September 2004 (COM(2004)0608) and encourages the Commission in its efforts to "contribute to the gradual creation of a European defence equipment market ... which is more transparent and open between Member States and which, whilst respecting the sector's specific nature, would increase economic efficiency", as well as competitiveness and common security in all Member States;
 2. Takes seriously the goal of the Treaties, to be taken up in the Constitutional Treaty, of strengthening cohesion between Member States by means *inter alia* of armaments cooperation;
 3. Calls on the Member States and the industry to abandon the reservations which for decades have stood in the way of a European defence market and to set in train a new phase of cooperation based on an innovative strategy;
 4. Agrees with the Commission that current policies of *juste retour* and off-setting in the field of military procurement lead to large-scale distortions of competition and artificial divisions of labour between industrial partners, and greatly hinder the efficiency of public procurement;
 5. Agrees with the Commission that a European defence market is necessary for the reduction of military expenditure costs and in order to make the production of military goods more cost-effective, in the interests of the European taxpayer;
 6. Stresses the need, particularly in the context of a more efficient European armaments industry, not to bring into doubt the Union's role as a civil power;
 7. Emphasises that the increased efficiency of the industry should serve to protect European soldiers in action and benefit European citizens;
 8. Points out that every effort must be made at EU level to increase harmonisation and standardisation in defence procurement matters in accordance with accepted NATO standards of interoperability and specific European Security and Defence Policy needs and that, in the process, overcoming ECAP shortfalls should be seen as a priority by all

Member States;

9. Agrees with the Commission that pressure should be placed on national defence procurement agencies to alter the general practice of taking advantage of the derogation contained in Article 296 and to take measures to ensure that defence procurement is covered to a larger extent by Community legislation rather than by national legislation;
10. Believes that the Commission should both adopt an interpretative Communication reflecting its determination to stop the misuse of Article 296 and start to develop, in parallel, a new directive, tailored to the specific features of defence, for the purposes of the procurement of arms, ammunition and war material subject to Article 296;
11. Considers that the interpretative Communication should explain the application of Article 296 on the basis of the relevant case law of the Court of Justice, and in particular should clarify the product groups and steps in the armaments procurement procedure that are covered by the derogation and the scope of essential security interests;
12. Regards a restrictive interpretation of national security interests as appropriate, given that Member States are already mutually dependent in areas such as monetary affairs and energy; questions to what extent any meaningful distinction at all can still be drawn between national and common European security interests;
13. Could conceive, given that Article 296 can be revised only by amending the Treaty, of a self-imposed obligation on the part of Member States to invoke derogations in limited individual cases; at the same time welcomes the industry's commitment to playing a part in the development of a code of conduct for defence procurement;
14. Is aware of the limited suitability of conventional public procurement directives for armaments procurement because of that area's specific features;
15. Believes that, with regard to a new directive, both mandatory and optional instruments could be considered in connection with procurement procedures; considers that the emphasis should be placed on creating greater transparency and fairness in the award of contracts; points out that, in addition to the actual acquisition of equipment, other aspects will need to be taken into account, such as research and development, offsetting agreements, maintenance, repair, retrofitting and training;
16. Regards the possibility of negotiations in procurement procedures as essential, particularly where standard products are not involved;
17. Believes that there must be intensive consultation with stakeholders in drawing up a directive, and stresses the need for a business impact study and a foreign-relations impact study;
18. Points to the presence of many small and medium-sized enterprises (SMEs) in the sector, which are distinguished by a high degree of specialisation and efficiency; seeks to ensure that SMEs with dual military and civilian technology can benefit from the opening up of the market;
19. Urges Member States to cooperate actively with the Commission on a new directive and to instruct the European Defence Agency (EDA) to develop, as an initial step, a code of

conduct for defence procurement within the meaning of Article 296; is of the opinion that this code should apply to contracts covered by Article 296 with the aim of introducing more competition and transparency to the sector; believes that national parliaments should be involved in the process in line with relevant national legislation; is of the opinion that the European Parliament should be consulted;

20. Considers that such a code of conduct should:

- (a) provide Member States with a consultation mechanism in connection to research and development and procurement,
- (b) define preconditions for the exercise of the derogation under Article 296 and ensure the required transparency of reasons for exemption and non-publication of information,
- (c) provide information on policies on cross-border competition and transfer of defence equipment,
- (d) provide information on rules for fair competition and state support in order to avoid distortions of competition,
- (e) provide criteria for contractor eligibility and selection,
- (f) set out criteria for laying the ground for a European Defence Equipment Market, which in the medium term could be developed into a directive on arms, munitions and war materials relevant to the central security interests of the Member States, depending on the progress in developing the market,
- (g) provide a general orientation on the handling of offset practices;

21. Urges the Commission to work closely with the EDA so as to establish in parallel a comprehensive action plan with accompanying measures in related areas, such as security of supply, transfer and exports, which are necessary for the creation of a level playing field for fair competition within the EU and to ensure the provision of reliable statistical information about the market;

22. Considers that the successes achieved in the field of Common Foreign and Security Policy and the internal market have created the confidence finally to venture to take new steps in this important area;

23. Points to a series of obstacles to the competitive award of contracts which are not due to the nature of public procurement *per se*, such as:

- restrictions on cross-border trade in armaments within the EU,
- the exertion of political influence on award decisions,
- the strong state influence on armaments companies,
- the lack of controls on aid,
- the lack of research cooperation (including within EU research policy),

- the lack of market rules at the global level,

and calls on the Commission to take appropriate measures, in tandem with this initiative, to tackle these problems;

24. Stresses the need to observe the precautionary principle in trade relations with third countries with regard to the possible destination of arms, as well as to economic and social conditions and respect for human rights in purchasing countries;
25. Recognises that defence procurement problems in the EU are partly linked to the absence of a genuine 'two-way street' with the United States; therefore questions whether European defence procurement agencies should be recommended to make more European purchases in order to reinforce strategically the European defence industry in certain sectors; is convinced that new EU defence procurement legislation should not be used as an instrument enabling US corporate interests unilaterally to infiltrate European defence procurement markets;
26. At the same time considers it indispensable, however, that all Member States observe the Common Military List of the European Union (equipment covered by the European Union Code of Conduct on Arms Exports) adopted by the Council on 25 April 2005¹; calls on the Commission to monitor and evaluate observation of this List;
27. Calls on the Commission, together with the EDA, to put forward long-term proposals indicating how closer links between EU procurement markets and those in the United States and also in countries such as Ukraine and, in specific sectors, Russia, could lead to both greater choice and more efficient specialisation;
28. Asks the Commission to examine whether Member States are classifying, on certain occasions, dual use equipment and technology as military, thereby avoiding the application of Community legislation on public procurement;
29. Stresses the leading role of the EDA and other bodies currently involved in the procurement of armaments;
30. Agrees that ending the fragmentation of the defence equipment market will increase the competitiveness of the industry as a result of greater production, a greater return on research and enhanced global marketability; also stresses that voluntary restrictions on exports to third countries laid down in the Code of Conduct on Arms Exports of 1998 should be fully applied;
31. Regards the opening up of the market as a precondition for strengthening a financially viable EU armaments industry, for developing an autonomous and powerful industrial basis for more cost-effective procurement and for ensuring necessary defence capabilities; also considers that the inevitable concentration of the armaments industry should be subject to greater monitoring and control by the Directorate General for Competition of the Commission as regards the application of Community competition law, so that the advantages of mass production are not jeopardised by sectoral monopolies and the resulting market power of undertakings;

¹ OJ C 127, 25.5.2005, p. 1.

32. Instructs its President to forward this resolution to the Council, the Commission and the governments of the Member States.