The Defence & Security Directive 2009/81/EC

A comparative evaluation of the position of the individual firm within the procurement process in a European and international setting

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LIST OF ABBREVIATIONS

CJEU – Court of Justice of the European Union

EU – European Union

ITPD – Invitation to participate in a competitive dialogue

ITT – Invitation to Tender

NATO – North Atlantic Treaty Organization

OCCAR – Organization for Joint Armament Cooperation

R&D – Research and Development

TEU – Treaty on the European Union

TFEU – Treaty on the Functioning of the European Union

Abstract

This paper investigates and subsequently compares the legislative frameworks of the Defence & Security Directive 2009/81/EC and the Organization for Joint Armaments Procurement from the position of the average individual firm. The argument is built that the average individual firm is better off under the framework of the Defence & Security Directive than under the current international procurement settings. The main reasons for this are a stronger enforcement mechanism concerning the review of decisions taken by the contracting authority in the procurement process, increased focus on non-discrimination and transparency, as well as a better position in the field of subcontracting.

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I. Introduction

Although average government expenditure on defence did not exceed 2% in 2012[1], this percentage may vary depending on the respective Member State. Pure military expenditure, a number that excludes other institutions like the national police, is a bit lower than the general expenditure on defence and averages at 1.44% according to the World Bank 2011 database. Specifically, pure military expenditure in 2011[2] was highest for Greece with a 2.8% proportion of total government expenditure[3]. The general trend is a decrease in proportional military expenditure with 17 Member States spending less for military than in the years before on average. In spite of decreasing military expenditures, the importance of the European military sector should not be neglected because the budget on military expenditure as measured in monetary value remains significant. The United Kingdom has for example spent 57,875 million US Dollar in 2011[4]. Putting together the pieces of the European mosaic, the total value of the European defence market is very high.

In the light of the potential importance that these figures could trigger on the internal market, detailed procurement rules become all the more necessary to prevent fragmented markets in Europe and thus guarantee market access. Importantly, states want to protect their own firms at the same time as they would like their firms to be able to participate in other markets. Fragmentation can be seen in the fact that there are as many different defensive procurement systems in place as there are Member States[5]. In the field of common defence procurement, action took place on the international scene first though. More specifically, the Organization for Joint Armaments Procurement (*hereafter OCCAR*) was established that has its own procurement mechanisms, as well as the Letter of Intent (*hereafter LOI*) that is softer in nature. Eventually however, the institutions of the European Union could agree on more integration by means of directive 2009/81/EC[6]. The difficulty of achieving integration is exemplified by the Common Defence and

[1] Eurostat: Government finance statistics, Data from April 2013, available at <http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Government_finance_statistics> (last visited 14.07.2013).
[2] There are no individual numbers available for 2012 yet
[3] World Bank: Military Expenditure (% of GDP), data from 2012, available at: <http://data.worldbank.org/indicator/MS.MIL.XPND.GD.ZS> (last visited 14.07.2013).
[4] According to data from SIPRI : The SIPRI Military Expenditure Database, Data from 2012, available at <http://milexdata.sipri.org/result.php4> (last visited 14.07.2013).
[5] European Economic and Social Committee: Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on simplifying terms and conditions of transfers of defence-related products within the Community, 2008, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:100:0109:0113:EN:PDF> (last visited 14.07.2013), *see* points 4.1.1 – 4.2.3
[6] 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 defense and security, and amending directives 2004/17/EC and 2004/18/EC

Security Policy[7] being one of the remnants of intergovernmentalism in the European Union decision-making framework.

Although the directive has been adopted, the question remains in how far it represents a pooling of sovereignty. Namely, several safeguards for the Member States remain with Art. 346 TFEU being the most important integration-brake. This political caution can also be seen indirectly during the process of coming into being of the Directive[8]. The directive was adopted after the first reading in the co-decision procedure. Although the Council could agree on proposed legislation as amended by the European Parliament, the latter has been very sensitive to Member State prerogatives in its amendments. However, by providing these incentives to the Council, it was able to include other points of interest such as the review procedures in Title IV[9]. In spite of seeking open conflict, it seems then that the European Parliament rather preferred a weaker agreement that was enriched by some issues of its interest. In addition to that, already the Commission has been wary of Member State high priority interests in the area of defence. As such, it for example kept out 'exports done outside the EU by companies located on their territories'[10] from the scope of the proposed directive.

The question then is to what extent national prerogatives are safeguarded in the directive itself. This will be done by examining the distinctive defence procurement framework applicable to the Member States both on the international and European stage. In order to subsequently assess the situation, the study will investigate the position of the average individual firm vis-à-vis the contracting authority during the procedures of the Directive and OCCAR. On the grounds of such comparison the flexibility and ease of the individual firm during the process, potential discretion of contracting authorities within the procurement procedures as well as the administrative and judicial safeguards will be examined. Consequently, the results of the analysis will culminate in a conclusion on the position of the individual firm within the procurement frameworks.

[7] Articles 42 – 46 in the Treaty on the European Union.
[8] Prelex: Monitoring of the decision-making process for COM (2007) 766, available at <http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=196507>, (last visited 14.07.2013).
[9] European Parliament: Report on the proposal for a directive of the European Parliament and of the Council on the coordination of procedures for the award of certain public works contracts, public supply contracts and public service contracts in the fields of defence and security COM(2007)0766, 2008, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A6-2008-415&language=EN>, (last visited 14.07.2013), *see* Art. 38a.
[10] European Economic and Social Committee: Opinion of the European Economic and Social Committtee on the Proposal for a Directive of the European Parliament and of the Council on simplifying terms and conditions of transfers of defence-related products within the Community, 2008, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:100:0109:0113:EN:PDF)>(last visited 14.07.2013), point 17.

In the following, the international procurement framework established by OCCAR will be examined. Thereafter, the procurement framework as established by the Defence Directive will be investigated and subsequently contrasted to OCCAR from an individual firm viewpoint.

II. OCCAR

Apart from the defence procurement framework of the Defence Directive, there are two procurement regimes in place. Whereas the 'Letter of Intent'[11] provides a procurement regime of softer nature, the Joint Armaments Procurement Convention (*hereafter OCCAR*) provides for a defence procurement framework in an international law setting with established procedures and own bodies. The OCCAR is an international organization with an own legal personality[12] on cooperation in armament programmes originally established between the UK, France, Germany and Italy. Together, these four contracting parties provide for around 90% of the defence industry in Europe[13]. In the meantime, moreover, Spain and Belgium have joined the international organization established by the convention. In general, OCCAR's role is primarily related to economic tasks such as managing the joint projects the contracting parties agree to or to procuring these. The projects procured for by OCCAR are joint armament projects of larger scale in which contracting parties and, if provided for by agreement between these, also other European state parties outside of OCCAR can participate. The contracts on these projects are subsequently signed, tendered for and managed by OCCAR in place of the contracting parties[14]. The procurement regime in place is intended to apply to these projects only. In line with its economic rationale, competition and biggest return for investment are objectives that OCCAR would like to commit to.

Therefore, the main feature of OCCAR is that no sovereignty in the field of defence policy is transferred to the international organization[15] and contracting parties consequently retain full powers on which projects to participate in. In the following, the OCCAR framework will be investigated. To this end, both the OCCAR Convention and the respective OCCAR Management Procedures (*hereafter OMP*), i.e. the executive regulations, will be employed to examine the scope and the procedures in detail.

[11] Letter of Intent between 6 Defence Ministers on Measures to facilitate the Restructuring of the European Defence Industry of 6 July 1998
[12] Art. 39 of OCCAR Convention
[13] Reda , 'A new era in European Arms Procurement: Understanding OCCAR' *The DISAM Journal* (1999), p.82.
[14] Kenny, 'European armaments collaboration and integration', Leadership & *Organization Development Journal* (2006), Vol. 27, No. 6, p.489.
[15] Mawdsley, 'Arms, Agencies and Accountability: The case of OCCAR', *European Security Journal* (2010), p. 102.

2.1. Scope

The scope of the procurement by OCCAR is entirely defence-related[16]. Procurement procedures established by the OCCAR framework only apply to contracts that are to be concluded by OCCAR authorities on basis of a joint project to be procured for and funded by an operational budget. This means that the OCCAR framework does not apply to projects which are not approached jointly by the contracting parties by means of cooperation within OCCAR. A solely national project does not have to follow procurement rules of the OCCAR framework then. Overall, the framework only applies to the OCCAR authorities' *ratione personae* and to armament cooperation projects *ratione materiae*.

2.2. Procedures

2.2.1. Technical Specifications and Qualification of bidders

Although Art. 8(c) of the OCCAR Convention commits OCCAR to the 'preparation of common technical specifications for the development and procurement of jointly defined equipment', they are not defined in detail within the OCCAR framework itself but will be defined individually before each procurement process. More specifically, it is set out that the criteria for the selection and award phase have to be set out in advance[17]. OMP1 on the internal managerial process states that 'support and training aspects, the technical specifications, the schedules and industrial conditions for realization' will be set out by the OCCAR management in the definition phase[18]. The definition phase in this context is a specific phase in the managerial process leading to the concrete procurement process.

Although the technical specifications and the qualifications of bidders are not defined explicitly in any binding document, Annex OMP5-H provides for a so-called 'pre-qualification questionnaire'. This is a non-exhaustive template for selection criteria only and is structured into several parts. Firstly, information on the company itself is required, such as the financial standing or the management organization. Secondly, professional capabilities are asked for, such as acquired certifications or past performances. Thirdly, specific technical information about the company is asked, such as geographical locations outside the territory of the programme participating states, structures to finance capital investments or details of projects undertaken by the firm.

[16] Point 2 of OMP5-I.
[17] Art. 27 of the OCCAR Convention.
[18] According to point 3.5 of OMP1.

ITPDs will have details of how the respective competitive dialogue in the given case would look like specified on a case by case basis[19]. Moreover, the contract award criteria will be specified as well in this context already. Consequently, contract award criteria are also specified on a case by case approach. It is nevertheless specified that the primary awarding criterion should be the 'competitiveness of the offer'[20].

All of the former have to be specified also in the procurement strategy which 'would cover the entire programme […] [and] results in one or more contracts being placed.'[21] . This is complemented by the establishment of the contract route[22], which in explanation is the contracting strategy. Proportionality has to be taken into account[23]. Both the procurement strategy and the contract route must be approved by the approving authority.[24]

Overall, the approving authority in the OCCAR framework has a huge discretion with regard to which selection and which award criteria it is going to employ. Once the selection and award criteria have been agreed upon in the procurement strategy and the contract route, the approving authorities are required to stick to these.

2.2.2. Procedures to be applied

Within the OCCAR, chapter VI deals with the so-called procurement principles. Firstly however, Art. 23(1) of the Convention sets out that the procedures for procurement applying to all contracts awarded in this framework shall be set out by a regulation set up by the Board of Supervisors. The main regulation to deal with the procurement process is 'OMP5'[25] on the contract placement procedure. As a starting point, procurement should generally be conducted on the basis of competition in order to bring about benefits of prices and innovation.[26] Apart from the notion of competition, a preference is expressed for so-called prime contractors. Contracts should preferably be concluded with a prime contractor[27]. They would assume responsibility for the whole project, including for sub-contractors.

Bearing in mind that Art. 6 requires the contracting states to give preference to goods produced in an OCCAR cooperation if they have participated therein, there are two possibilities to tender a project, namely the competitive and the non-competitive procedure. Beforehand however, a

[19] According to point 5.2.2.1.1 of OMP5.
[20] Art. 25 of the OCCAR Convention.
[21] Point 5 of OMP5.
[22] Point 3.2 of OMP5.
[23] Point 5 of OMP5.
[24] Point 5.4 of OMP5.
[25] OCCAR OMP5 on the Contract Placement Procedure of 17.6.2009.
[26] Point 3.1.2 of OMP5.
[27] Point 3.1.3 and 4.3.1.2.2 of OMP5.

competitive dialogue may be held. Also, there may be a pre-selection according to the selection criteria specified beforehand[28]. In a competitive dialogue process, 3-4 tenderers will be invited. A further reduction may only ensue if provided for in the advertising process. Moreover, the dialogue phase may be conducted for the time that is needed to find a suitable solution[29].

When the dialogue phase has ended, ITTs are submitted[30]. Most importantly for tenderers, they have to disclose details of the industrial organization and have to make a procurement plan. If the tendering was ineffective with regard to competition, it is possible to 'carry out a comprehensive investigation of the prime contractors' and its sub-contractors' prices[31].

The competitive procedure is one of the possibilities to engage in a tendering process[32]. Art. 26 of the OCCAR Convention establishes that the tender shall be published. Hereby, it is set out that anything with a value bigger than 750,000 Euro has to be advertised[33]. However, there is also possibility to advertise contracts under 750,000 Euro.[34] Nevertheless, the OCCAR Convention builds in an exclusion. On the one hand, such a procedure may be closed for every company of a state not participating in the respective programme that is tendered for, especially in areas involving armament and technology[35]. Hereby, the individual firm has only the right to request a statement of reasons according to Art. 30 of the OCCAR Convention. On the other hand, a widening clause[36] provides for an extension of the tendering procedure to companies coming from a country different than the contracting states if there is unanimous agreement among the latter.

Competition may be reduced if justified in the contract route[37] or if the value is too small to gather benefits of competitive tendering[38]. In this regard, the time to conduct the competitive procedure must be sufficient, without the point going into detail on what exactly sufficient is[39]. With regard to sub-contracts, also these should be tendered for according to the principle of competition[40]. At the same time however, the provision limits the influence of OCCAR in that it states that the prime contractor's decision is decisive. Exceptionally however, OCCAR can exercise influence also with

[28] Point 5.1.2.2 of OMP5.
[29] Point 5.2.2.1.1 of OMP5.
[30] According to point 5.2.2.2., it has to comply with OMP6.
[31] Point 5.2.2.2.3 of OMP5.
[32] Point 4.1 of OMP5.
[33] Point 5.1.1.1 OMP5, but Point 5.1.1.4 however states that the approving authority should not advertize a tender if so recommended to it by the Board of Supervisors.
[34] Point 5.1.1.2.
[35] Fourth paragraph of Art. 24 of the OCCAR.
[36] Third paragraph of Art. 24 of the OCCAR Convention.
[37] Point 4.1.2 OMP5.
[38] Point 4.1.3 OMP5.
[39] Point 4.1.4. OMP5.
[40] Point 4.3.1.1 of OMP5.

regard to sub-contractors if interests of states participating in the programme are affected[41]. Especially if security of supply or industrial strategy are at stake, sub-contractors can come from the respective country if approved by OCCAR[42]. Subcontractors may be rejected both of contracts with prime contractors still within the procurement process and of prime contractors that successful tendered on basis of 'criteria applied for supplier selection for the main contract'[43]. A written justification must be issued to the tenderer then.

In the course of tendering, the principles of commercial confidentiality and equal and fair treatment have to be followed[44], as well as complaints being dealt with under the respective procedure in Annex OMP5-I. This includes that the ITTs and ITPDs are identical and issued simultaneously[45].

Late tenders will be returned unopened[46] . There are several possibilities for the award of a contract. Firstly, a contract can be immediately awarded in case the tenderer is either fully compliant with the requirements or outright winning.[47] Secondly, there is the possibility to negotiate with fully compliant tenderers.[48] This negotiation can be conducted with more than one tenderer simultaneously and will generally only be used if a tenderer is fully compliant but the contract could be improved[49]. Thirdly, the possibility of interactive tendering could ensue.[50] This basically is a further round of tendering to improve the contract by 'inviting the tenderers to revise or confirm their tenders'[51]. Lastly, the tendering process can be deemed ineffective[52]. Either, ITTs are re-issued or there can be negotiations. In case that there is only one tenderer that could prove suitable after negotiations, 'the process will be closed and recommenced in accordance with the procedure for non-competitive procurement'. Alternatively, the process can also be closed altogether. In general, a review of criteria or decisions within the selection process is specifically excluded[53]

The other possibility to engage in a tendering process is the non-competitive procedure[54]. The possibility to conduct 'limited competition' is not provided for as specified in the competitive procedure, but if the approving authority evaluates the competitive procedure as inappropriate it

[41] Point 4.3.1.2.1 OMP5.
[42] 4.3.1.2.1.2 OMP5.
[43] 4.3.1.2.1.3 OMP5.
[44] Point 5.2.1.2 OMP5.
[45] Point 5.2.1.3 OMP5.
[46] Point 5.2.5.1.2 OMP5.
[47] Point 5.3.2 OMP5.
[48] Point 5.3.3 OMP5.
[49] Point 5.3.3.1 OMP5.
[50] Point 5.3.4 OMP5.
[51] Point 5.3.4.1 of OMP5.
[52] Point 5.3.5.1 OMP5.
[53] Point 51.5 of OMP5.
[54] Point 4.2 of OMP5.

may conduct a non-competitive tendering process.[55] This means that a contract may be concluded on the basis of criteria specified beforehand to tenderers that seem fit to meet the criteria without any competitive procurement process having been held[56]. It is then emphasized that timing, past practice, a past procurement route, the complexity of the requirement or end-user pressure, can never be used as justifications in this regard[57]. With regard to sub-contracts, the regulation provides for competition even in a non-competitive procedure[58]. To this end, a prime contractor should issue a procurement plan on how to achieve competition at this level[59].

Contract amendments in general 'must be approved by both parties'.[60] Therefore, these do not have to be tendered out again if there is unanimous approval by OCCAR and the contracted party.

In case that a company is excluded from participating in the competitive dialogue, it must be informed thereof. Moreover, the company can be 'de-briefed' if asked for.[61] Prospective complaints would be dealt with according to Annex OMP5-I.[62] A written complaint must be submitted within three months after a debrief to the director of OCCAR, who shall 'deal with the matter promptly, fairly and objectively'.[63] In case of a negative decision by the director, the complained will be carried to the Board of Supervisors.[64] The Board of Supervisors then holds ultimate discretion on what to do with the complaint. Art. 50 of the OCCAR Convention only prescribes that the Board of Supervisors 'shall take appropriate steps' if a third party is harmed by OCCAR. The same applies for complaints against exclusion from the general tendering phase.[65] If a company from a non-participating country is excluded for that reason, the individual firm hereby only has a right to request a statement of reasons.[66] . Each contract concluded by OCCAR shall provide for conciliation and include an arbitration clause' anyways.[67] The arbitration procedure is hereby lined out in Annex II of the OCCAR Convention, setting up an ad-hoc arbitration tribunal[68] ruling with majority vote[69]. No possibility of appeal is provided for.

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[55] Point 4.1.2 OMP5.
[56] Point 4.1.2 OMP5.
[57] Point 4.2.2 of OMP5.
[58] Point 4.3.1.1.2 OMP5.
[59] Point 4.3.1.1.3 OMP5.
[60] Point 5.5.1 OMP5.
[61] Point 5.1.3 OMP5.
[62] Point 5.1.4 OMP5.
[63] Annex OMP5-I, Point I.2.
[64] Annex OMP5-I, Point I.3.
[65] Annex OMP5-I, Point I.1.
[66] Art. 30 of the OCCAR Convention.
[67] Point 3.3.3.3 OMP4.
[68] Art. 1 in Annex II to the OCCAR Convention.
[69] Articles 8 and 9 in Annex II to the OCCAR Convention.

Although the Defence and Security Directive (*hereafter Defence Directive*) is substantially similar to Public Sector Directive[70], it introduces some key defence-specific provisions adapted to the special needs of defence and security procurement, especially with regard to national security and secrecy. Before the introduction of the Defence Directive, the defence and security procurement was covered by Public Sector Directive. However, the application of the Public Sector Directive is subject to, *inter alia*, Art. 346 TFEU which enables Member States to derogate from applying EU law on the grounds of national security reasons. Despite the fact that the Commission as well as the CJEU established that the derogative provision has to be interpreted narrowly[71], on a case-by-case basis and in light of the proportionality principle, in practice many Member States continued to interpret the Art. 346 TFEU as a categorical or automatic exclusion of armaments from the application of EU law[72]. This means that there has not been any in-depth consideration of whether the conditions of 346 TFEU have in fact been met for the procurement in question[73]. The de-facto exclusion of large parts of defence contracts from the procurement was further advocated by the fact that the existing Public Sector Directive was not suited for the sensitiveness of defence procurement. Thus, by adopting the new defence- and security-specific procurement directive, the legislator sought to limit the Member States' recourse to national and public security derogations in the TFEU and consequently to keep the conduct of procurement procedures in the relevant areas, especially in the area of armaments, within the rules of the internal market, and thereby remedy the existing and long-standing lack of effective cross-border competition characterizing defence procurement within the EU.

3.1. Scope

With regard to the personal scope, the Defence Directive is not limited to ministries of defence but extends to all contracting authorities and entities covered by both the Public Sector and the Utilities Directives[74]. When drafting the Defence Directive, the legislator took the approach of creating security-specific instruments for all contracting authorities covered by the other Directives, to reflect the fact that the differences between defence and security are becoming increasingly blurred with many entities other than the armed forces carrying responsibility[75].

[70] Public Sector Procurement Directive 2004/18.
[71] E.g. Spanish Weapons judgment, Augusta judgment, Commission interpretative Communication on Art. 346 TFEU.
[72] Trybus, 'The tailor-made EU Defence and Security Procurement Directive: limitation, flexibility, descriptiveness, and substitution', *European Law Review* 2 (2013), Vol. 38, Issue 1, pp. 3-29.
[73] Kennedy-Loest, Pourbaix, 'The new EU Defence Procurement Directive', *ERA Forum* (2010) 11, pp. 399-410.
[74] Defence Directive, Art.1(17).
[75] Trybus, 'The tailor-made EU Defence and Security Procurement Directive: limitation, flexibility, descriptiveness, and substitution', *European Law Review* 2 (2013), Vol. 38, Issue 1, pp. 3-29.

The material scope of the Directive is set up in Art. 2. The Directive applies to certain contracts on supply of military equipment, sensitive equipment, works, supplies and services directly related to military and sensitive equipment, as well as to works and services for specifically military purposes or sensitive works and sensitive services. The 'military equipment' is further defined as equipment that is specifically designed or adapted for military purposes, intended for use as an arm, munitions or war material[76]. This definition is to be understood by reference to the 1958 list of equipment[77] to which Art. 346 TFEU applies, which is to be interpreted broadly[78]. This includes e.g. fighter jets, nuclear submarines, tanks as well as small items such as night vision goggles or ammunition[79]. 'Sensitive equipment/works/services' on the other hand means equipment, works and services for security purposes, involving, requiring and/or containing classified information.[80] Border security devices and homeland security surveillance equipment would fall within this category.

It follows that the Defence Directive has a wide field of application encompassing all contracts for purchase of military equipment, sensitive equipment, works and services. Nonetheless, the Defence Directive remains to be subject to derogative provisions of Articles 36, 51, 52, 62 and especially 346 TFEU according to Article 2 of the Defence Directive.

Art. 346 TFEU establishes that Member States may exclude the application of the TFEU in two situations: *i)* in case that the application of the rules of the Treaty would involve the disclosure of information which would be contrary to the essential security interests of a Member State[81] or *ii)* when a Member State considers that it is necessary to exclude the application of the Treaty for the protection of the essential interests of its security in relation to the production of or trade in arms, munitions and war material[82]. It can be observed that the definition of 'military equipment' under Art. 2 of the Defence Directive uses the very same terms as the exception under 346(1)(b) TFEU which is designed to exclude these products from the application of the Treaty as a whole[83]. Consequently, in order to reconcile these two seemingly conflicting provisions it is necessary to take as a starting point that contracts for military and sensitive equipment and related works and services in principle fall within the scope of the Defence Directive unless they are excluded under Art. 346 TFEU[84]. This approach is in line with the case law of the CJEU which established that the

[76] Art. 1(6) Defence Directive.
[77] Decision 255/58 defining the list of products (arms, munitions and war material) to which the provisions of Art. 223(1)(b) of the Treaty (now Art. 346(1)(b) of the TFEU) apply (not published),
[78] Heuninckx, 'The EU Defence and Security Procurement Directive: Trick or Treat?, *Public Procurement Law Review* ' (2011), 1, pp. 9-28.
[79] Kennedy-Loest, Pourbaix, 'The new EU Defence Procurement Directive', *ERA Forum* (2010) 11, pp. 399-410.
[80] Art. 1(7) Defence Directive.
[81] Art. 346(1)(a) TFEU.
[82] Art. 346(1)(b) TFEU.
[83] Kennedy-Loest, Pourbaix, 'The new EU Defence Procurement Directive', *ERA Forum* (2010) 11, p. 402.
[84] Kennedy-Loest, Pourbaix, 'The new EU Defence Procurement Directive', *ERA Forum* (2010) 11, p. 402.

possibility of recourse to such exceptions should be interpreted in such a way that their effects do not extend beyond what is strictly necessary for the protection of the legitimate interests that those articles help to safeguard[85]. Thus, the application of this Directive has to be proportionate and cause as little disturbance as possible to the free movement of goods and the freedom to provide services[86]. It has to be interpreted as strictly as any other derogation from fundamental freedoms[87]. The definition of essential security interests is, however, the sole responsibility of Member States[88], thus providing a great extent of discretion for the latter. Consequently, the contract award procedures provided for in the Defence Directive should be considered as standard procedures for defence and sensitive security procurement, so that recourse to Art. 346 TFEU should be limited to clearly exceptional cases[89].

3.2. Thresholds

As in the other procurement directives, the Defence Directive is applicable only above certain contract value thresholds. Art. 8 provides for thresholds[90] of 400.000 EUR for supply and service contracts and 5.000.000 EUR for work contracts, thus being equal to thresholds established in the Utilities Directive. The thresholds are higher if compared to the Public Sector Directive, which reflects the limitation of the scope of the Defence Directive.

3.3. Exclusions

Importantly, the Defence Directive contains exclusions from application in Articles 12 and 13. While some have been taken over from the Public Sector[91] and Utilities Directives, others have been adopted in order to accommodate the specific situation of defence and security sectors[92]. Specific to the Defence Directive are, in particular, exclusions concerning disclosure of information[93], intelligence activities[94] and research and development contracts[95]. Further exclusions[96] are not of relevance in this paper. All exclusions are to be interpreted strictly[97].

3.3.1. Contracts awarded pursuant to international rules

[85] E.g. Case C-414/99 *Commission v Spain*, para 22; Case C-293/06 *Commission v Italy*, para 68.
[86] Recital 17 of the Defence Directive.
[87] Case C-157/06 *Commission v Italy*, para 69.
[88] Recital 16 of the Defence Directive.
[89] Commission Guidance Note, Field of Application, p.2.
[90] Thresholds last amended by Reg. No. 1251/2011 with effect from 1.1. 2012.
[91] Art. 16 of the Public Service Directive.
[92] Commission Guidance Note, Defence- and security-specific exclusions.
[93] Art. 13(a) Defence Directive.
[94] Art. 13(b) Defence Directive.
[95] Art. 13(c) Defence Directive.
[96] Art. 13(d) and 13(f) Defence Directive.
[97] Art. 11 Defence Directive.

The purpose of Art. 12 is to preclude use of award procedures under this Directive in cases where international rules set out procedural requirement for the award of a contract. Even though Art. 12 does not explicitly refer to defence or security, the international agreements mentioned in the provision exist mainly in the field of defence[98]. It follows that exclusion can apply only when the international rules concerned provide for a specific award procedure. All the contracts which are awarded following specific procedural rules pursuant to an international agreement or arrangement concluded between one or more Member States and one or more third countries are excluded.[99] Additionally, contracts awarded following specific procedural rules pursuant to a concluded international agreement or arrangement relating to the stationing of troops and concerning the undertakings of a Member State or a third country are also excluded.[100] Exception is further provided for contracts governed by specific procedural rules of an international organisation purchasing for its own purposes.[101] Such exclusion covers cases when a Member Sates acts on behalf of the international organisation.

3.3.2. Specific exclusions

a) Disclosure of information

An exclusion provided for in Art. 13(a) already reflected through reference to Art. 346(1)(a) TFEU, refers to contracts for which the application of the Defence Directive would oblige a Member State to supply information which it considers contrary to the essential interests of its security. The repetition of this exclusion might be explained by the intention of the legislator to accommodate the majority of the potential secrecy consideration on the substantive rules of the Defence Directive, thus reducing the necessity to use Art. 346 TFEU[102].

b) Intelligence activities

Art. 13(b) regards a tailor-made exclusion of contracts for purposes of intelligence activities. This provision is based on the assumption that contracts related to intelligence are by definition too sensitive to be awarded in a transparent and competitive procedure.

c) Research and development

[98] Commission Guidance Note, Defence- and security-specific exclusions.
[99] Art. 12(a) Defence Directive.
[100] Art. 12(b) Defence Directive.
[101] Art. 12(c) Defence Directive.
[102] Trybus, 'The tailor-made EU Defence and Security Procurement Directive: limitation, flexibility, descriptiveness, and substitution', *European Law Review* 2 (2013), Vol. 38, Issue 1, pp. 3-29.

Exclusion 13(c) covers contracts awarded in the framework of co-operative programme based on research and development, conducted jointly by at least two Member States for the development of a new product and, where applicable, the later phases of all or part of the life-cycle of this product. Hence, the decisive criterion is the nature of the programme and its purpose, i.e. the development of a new product. It is necessary to distinguish between these cooperational R&D programmes on the one hand, and national programmes on the other hand in which case the exclusion from the directive covers only the development phase[103]. Exclusion under 13(c) refers to the large collaborative programmes, such as the Eurofighter/Typhoon aircraft between two or more Member States which are a regular occurrence for the development of new equipment[104].

Art 13(c) seeks to achieve maximum flexibility to award R&D contracts directly, Recital 28 explicitly includes programmes managed by international organizations, namely OCCAR, NATO or European Defence Agency, which then award contracts on behalf of Member States. Cooperative programmes may or may not be restricted to EU Member States. In any case, the wording of the exclusion implies that the programme must be based on a genuinely cooperative concept[105].

In case that Art. 13(c) would apply, the Member States are still obliged to notify the Commission of such an agreement and indicate the share of R&D expenditure, the cost-sharing agreement and the intended share of purchase per Member State, if any. If a contract relating to R&D falls outside Art. 13 of the Defence Directive, a Member State may still be able to rely on Art. 28(2)(a) and (b) which allows for a negotiated procedure without publication for R&D services other than those under Art. 13. It concerns contracts that are wholly remunerated by the contracting authority and accrue exclusively to the contracting and service contracts and supply contracts for products manufactured purely for the purpose of R&D, with the exception of quantity production to establish commercial viability or recover research and development. Nonetheless, flexibility in the award of research and development contracts should not preclude fair competition in the later phases of the life cycle of a product. The research and development contracts should not be used beyond the stage as means of avoiding the provisions of the Defence Directive[106]. Consequently, the definition of R&D has been limited by the Directive to three areas: fundamental research, applied research and experimental development[107].

[103] Commission Guidance Note, Research and Development.
[104] Trybus, 'The tailor-made EU Defence and Security Procurement Directive: limitation, flexibility, descriptiveness, and substitution', *European Law Review* 2 (2013), Vol. 38, Issue 1, pp. 3-29.
[105] Commission Guidance Note, Defence- and security-specific exclusions.
[106] Recital 55 Defence Directive.
[107] Art. 1(27) Defence Directive, further elaborated in Recital 13.

3.4. Procedures

3.4.1. Applicable procedures

Although the core of the Defence Directive is modelled on the existing EU procurement regime, certain defence-specific provisions have been introduced. Unlike the Public Sector Directive, the Defence Directive does not provide for an open procedure at all on the ground that it does not adequately account for the special requirement of secrecy and confidentiality[108]. The contracting authorities are expressly offered a free choice between the use of restricted and negotiated procedures with notice. However, the *restrictive procedure*, although less labour-intensive compared to negotiated procedure with notice, does not have the same importance as it has in other Directives[109]. The restricted procedure is preferred by the contracting authorities in cases when the specifications of the equipment to be procured are well defined and negotiation is not necessary[110].

It can be inferred from recital 47[111] of the Defence Directive that the negotiated procedure with publication becomes the default procedure for the Defence Directive which can be applied freely without need to justify this choice on the basis of legally prescribed situations[112]. This procedure is very flexible. It does not mention the rights of the tenderers to the confidentiality of the information they provide, a formal closure of negotiations, or a best and final offer phase contrary to the competitive dialogue. This could lead to abuse of this procedure and consequently make it more prone to legal challenges[113].

The *competitive dialogue* can be used under the conditions set out in Art. 27 in cases of particularly complex contracts where the contracting authority considers that the use of the restricted procedure or the negotiated procedure with publication of a contract notice will not allow the award of the contract.

The *negotiated procedure without prior publication of a contract notice* is limited only to regulated situations enumerated in Art. 28. The general provisions of the Directive are still applicable. The provision contains, besides the situations covered also by the Public Sector Directive, several

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[108] Gabriel and Weiner, 'The European Defence Procurement Directive: Toward Liberalization and Harmonization of the European Defence Market', *Procurement Lawyer*, Vol. 45, No.2 (2010), pp. 23-27.
[109] Trybus, 'The tailor-made EU Defence and Security Procurement Directive: limitation, flexibility, descriptiveness, and substitution' *European Law Review* 2 (2013), Vol. 38, Issue 1, pp. 3-29.
[110] Heuninckx, 'The EU Defence and Security Procurement Directive: Trick or Treat?', *Public Procurement Law Review* 1 (2011), pp. 9-28.
[111] Recital 47 of the Defence Directive states that such contracts are claimed to be characterised by specific requirements in terms of complexity, security of information or security of supply, and that therefore extensive negotiations are often required to satisfy these requirements when awarding contracts.
[112] Art. 25(2) Defence Directive.
[113] Heuninckx, 'The EU Defence and Security Procurement Directive: Trick or Treat?, *Public Procurement Law Review'* (2011), 1, pp. 9-28.

military- and security- specific situations. Delimitation of situations when such a procedure is applicable is important given the fact that the nature of this procedure comes close to procuring outside the directive with only limited procedural rules.

It can be concluded that in comparison with the Public Sector Directive the rule on the choice of procedure contained in the Defence Directive allows for more flexibility[114]. Preference of the negotiated procedure is intended to accommodate the specific needs of defence and security procurement[115]. However, the regulation of procedures to be applied in the defence and security procurement raises also some questions to be addressed later in this paper.

3.4.2. Technical specifications

Technical specifications contained in the Art. 18 of the Defence Directive are comparable to those contained in the Public Service Directive. However, apart from that, the Defence Directive provides also for specific conditions concerning security of information and security of supply, representing the key characteristics of the defence procurement. Consequently, whichever procedure is used, certain safeguards have been introduced to address the sensitivities inherent in the defence procurement. Prior to the adoption of the Defence Directive the two of the biggest issues raised by stakeholders were the need to ensure the security of supply of products in times of crisis and the confidentiality of information[116]. There was no consistent, EU-wide approach to the security of information and security of supply. Only different national rules applied which required different national standards. As a result, it was very difficult for non-national contractors to tender for and win contracts. In order to ensure that sensitive information is not leaked during the tendering process and performance of the contract, Art. 22 stipulates that contracting authorities are allowed to include in their documentation measures requiring the bidders and their identified subcontractors to make appropriate commitments to safeguard the confidentiality of all classified information in their possession throughout the tendering process, during performance and after the termination of contract. The list of requirements that a contracting authority may impose on the tender under Art. 22 is only demonstrative. Article 23, covering the security of supply, on the other hand, allows contracting authorities to require several commitments going beyond those usually found in a standard procurement procedure in order to ensure that contracting authority will be able to procure additional supplies – such supplies might be exceeding what was originally tendered for, or after the expiry of the contract or in the event of crisis. Even though these requirements appear to be

[114] Trybus, 'The tailor-made EU Defence and Security Procurement Directive: limitation, flexibility, descriptiveness, and substitution', *European Law Review* 2 (2013), Vol. 38, Issue 1, pp. 3-29.
[115] Recital 47 of the Defence Directive.
[116] Kennedy-Loest, Pourbaix, 'The new EU Defence Procurement Directive', *ERA Forum* 11 (2010), p. 402.

incompatible with traditional rules of public procurement, necessary provisions throughout the procedure have been introduced to meet specific needs of this sector. The provision therefore entitles contracting authorities to ask for additional commitments whereby one of the key defence-specific aims is to be ensured: the continuing supply of defence material and/or services to the armed forces, without regard to external circumstances such as war, international unrest, embargoes and disruption of supply chain.[117] Although such a procedure is justifiable from the operational point of view, legal questions may be raised in this regard. More specifically, since the terms and conditions of additional supply are yet to be agreed upon it suggests that a new agreement should be awarded in a new tender process.

3.4.3. Selection stage

Qualification requirements of the bidders are especially important in this field in order to ensure procurement from reliable, capable and experienced economic operators. Thus, these qualifications concern the bidder and not the bid itself. They are contained in Articles 39 to 46 and correspond to the qualification rules of the Public Sector Directive. In the defence and security sectors economic operators need security clearances certifying their ability to handle confidential information. However, there is no EU-wide regime on security clearances and thus the bidders have to comply with national security clearances based on the principle of mutual recognition[118]. Such a system might lead to problems if individual national systems are not equivalent, thus having the effect of hampering the aim of opening the defence market of one Member State to economic operators from other Member States. With regard to defence-specific requirements concerning security of information and security of supply, an economic operator may for instance be excluded from participation in a contract where it has been convicted of an offence concerning its professional conduct, such as, for example, infringement of existing legislation on the export of defence and/or security equipment[119]. An economic operator may be excluded from the participation in a contract if he is found guilty of grave professional misconduct, such as breach of security information or security of supply in relation to previous contract.[120] A candidate can be also excluded where it is found that he is not sufficiently reliable to exclude risk to the security of the Member State.[121] In the context of technical capacity, the contracting authorities are permitted to require evidence of tenderer's ability to handle classified information at the required level of protection.[122]

[117] Heuninckx, 'The EU Defence and Security Procurement Directive: Trick or Treat?', *Public Procurement Law Review* (2011), 1, pp. 9-28.
[118] Kennedy-Loest, Pourbaix, 'The new EU Defence Procurement Directive', *ERA Forum* 11 (2010) , p. 402.
[119] Art. 39(2)(c) Defence Directive.
[120] Art. 39(2)(d) Defence Directive.
[121] Art. 39(2) Defence Directive.
[122] Art. 42(1)(j) Defence Directive.

3.4.4. Advertising and transparency, time limits

Publication of a prior information notice is dealt with under Art. 30(1) of the Defence Directive. In the same way as under Public Sector Directive, publication of such notice is obligatory only where the contracting authorities shorten the time-limits for the receipt of tenders from 40 to 36 days, but under no circumstances under less than 22 days.[123] In contrast to the Public Sector Directive, the Defence Directive does not contain any minimal estimated value of the contracts or framework agreements which have to be exceeded in order to apply the publication obligation.[124] Obligation to publish a prior information notice[125] or contract notice[126] applies to all procedures but the negotiated procedure without prior publication of a contract notice. When the contract is awarded or the framework agreement is concluded the contracting authorities shall send a notice within 48 days after the award/conclusion[127]. The Defence Directive further contains the same rules on the form and manner of publication of notices[128]. Overall, the provided time limits are also the same as provided for in the Public Sector Directive

3.4.5. General rules on the conduct of the procedure

The candidates may be required to meet minimum levels of ability required for specific contracts. Such requirements must be proportionate with regard to the subject-matter of the contract and shall be indicated in the contract notice[129]. In the restricted procedure, negotiated procedure with publication and competitive dialogue, the contracting authorities may limit the number of suitable candidates they invite to tender or with which they will conduct a dialogue. The minimum number of candidates may not be less than three in all above-mentioned procedures and has to be based on objective and non-discriminatory criteria[130]. In that respect the Defence procedure differs from the Public Sector Directive which distinguishes between restrictive procedure where the minimum number of candidates cannot be lower than five[131] and negotiated procedure with publication and competitive dialogue where the minimum of candidates can be only three.[132] Nevertheless, procedures under both Directives provide for the possibility to continue with the procedure by inviting the candidates or candidate with required capabilities even though the number of candidates meeting those criteria is lower than the minimum number stipulated by the Directive.

[123] Art. 33(3) Defence Directive.
[124] Art. 21(1) (a) to (c) Defence Directive.
[125] Art. 30(1) Defence Directive.
[126] Art. 30(2) Defence Directive.
[127] Art. 30(3) Defence Directive.
[128] Art. 32 Defence Directive.
[129] Art. 38(2) Defence Directive.
[130] Art. 38(3) Defence Directive.
[131] Art. 44(3) Public Sector Directive.
[132] *Ibid.*

However, contrary to the Public Sector Directive, the Defence Directive also provides for the possibility to suspend the procedure and republish the initial contract notice in case that the contracting authority considers that the number of suitable candidates is too low to ensure genuine competition[133]. In that case, a new deadline for submission of requests to participate is fixed and the candidate selected upon the first publication shall be invited in accordance with Art. 34. Moreover, the contracting authorities still may cancel the ongoing procedure and launch a new procedure[134].

3.4.6. Award Criteria

Similar to the respective provisions of the Public Sector and Utilities Directive, Art. 47 provides for two award criteria: the lowest price and the economically most advantageous tender. Given the specific characteristics of the security/defence sector and complexity of armament contracts, the lowest price criterion is of less importance. The economically most advantageous tender allows, on the other hand, to take account of, apart from price, number of other aspects connected to the subject matter of the contract, such as quality, technical merit, cost-effectiveness, etc. Moreover, apart from aspects covered also by the Public Sector Directive, the Defence Directive explicitly adopted several other aspects characteristic of defence and security, such as security of supply, interoperability and operational characteristics. It is to be noted however that the list of criteria under Art. 47 is not exhaustive anyway. Therefore, many other sub-criteria can be taken into account as long as the requirements of non-discrimination and transparency are respected[135]. It can be argued that by stipulating and thus describing defence- and security specific standards, contracts performance conditions, qualification and award criteria, the Defence Directive raises awareness among contracting officers to use them. It also helps, together with limitations and more flexibility brought by the Defence Directive, to limit the attractiveness to use Art. 346 TFEU[136].

3.4.7. Offsets and subcontracts

a) Offsets

The issues of offsets and subcontracts are closely connected since both fields are relevant for the industrial participation. Offsets are a regular occurrence in number of Member States in situations when a contract is awarded to economic operators from other countries than that of the contracting authority. They may take different forms. Direct offsets of military nature concern, for example,

[133] Art. 38(3) third subparagraph.
[134] Art. 38(3) third subparagraph, last sentence.
[135] Art. 4 Defence Directive.
[136] Trybus, 'The tailor-made EU Defence and Security Procurement Directive: limitation, flexibility, descriptiveness, and substitution', *European Law Review* 2 (2013), Vol. 38, Issue 1, pp. 3-29.

industrial participation of local companies in the production of equipment procured. Indirect offsets limited to the military sphere would be applied when supplier awards sub-contracts to local defence companies for other military products. Offsets may be also indirect and non-military when, for example, the foreign supplier commits himself to mobilise foreign investment in civil economy of the buying country's economy[137]. The practice differs from state to state. In essence however, Member States require compensation (offsets) from non-national suppliers when they produce defence equipment abroad. In some Member States, offsets constitute a legal requirement as e.g. an award criterion, in other countries offsets are not required at all[138].

Whereas the Defence Directive facilitates subcontracting, the offsets are not mentioned in the Directive at all. However, even though offsets are not covered by the Defence Directive, the Commission issued an entire Guidance note on offsets from which it is obvious, although it is a non-binding instrument, that offsets are undesirable and cannot be tolerated in the Defence Directive[139]. The Commission clearly expresses its opinion that offset requirements go against basic principles of the Treaty because they discriminate against economic operators, goods and services from other Member States and impede the free movement of goods and services[140]. The Defence Directive is a legal instrument intended to secure respect for the basic provisions of the Treaty in the specific field of defence and sensitive security procurement[141]. As already touched upon earlier, restrictive measures infringing primary law can be justified on the basis of one of the Treaty derogations, in particular Art, 346 TFEU. In the line with the CJEU case-law, such derogations must be limited to exceptional cases and interpreted strictly.

b) Subcontracting

Tenderers are in principle free to select their own subcontractors. Whereas the Public Sector Directive provides for considerable freedom for successful tenderer to organize further subcontracting[142] (with the only exception of public works concessions[143]), the relevant provisions of the Defence Directive contain general provisions giving the possibility for contracting authorities to require the successful tenderer to award parts of the prime contract to third parties. In this way, the competition is driven into the supply chain and creates more opportunities for the SMEs. The subcontracting rules under Defence Directive resulted as a compromise between

[137] Commission Guidance Note, Offsets, para 1.
[138] Trybus, 'The tailor-made EU Defence and Security Procurement Directive: limitation, flexibility, descriptiveness, and substitution', *European Law Review* 2 (2013), Vol. 38, Issue 1, pp. 3-29.
[139] Commission Guidance Note, Offsets, para 2.
[140] Commission Guidance Note, Offsets, para 18.
[141] Commission Guidance Note, Offsets, para 9.
[142] Art. 25 Public Sector Directive.
[143] Art. 60 Public Sector Directive.

Member States with developed and diversified defence industries[144] and other Member States possessing only limited capabilities[145].

Four options for subcontracting requirements can be distinguished in the Defence Directive. Under Art. 21(1) the tenderer shall be free to select its subcontractors as long as the selection is not discriminatory on the grounds of nationality. The second option, in line with the second paragraph of the provision, allows the contracting authorities to require the Member States to require the primary contractor to indicate what share and which parts of the contracts it may intend to subcontract as well as the subject matter of the subcontracts and identity of the subcontractor. These two options correspond to the relevant provisions of the Public Sector Directive[146].

The remaining two options for subcontracting requirements represent an innovation of the Defence Directive reflecting the attempt to transfer the competition of the defence industry to the supply chain in all types of contracts and not only in the area public works concessions . In this respect there have been concerns raised that the defence contractors would receive less work from a particular contract than they may have anticipated and moreover, that the Directive would impose a costly and time-consuming burden on them in terms of running competitions to subcontract their primary contracts which they have won[147]. The contracting authority may oblige or may be required by Member State to oblige the successful tenderer to award all or certain subcontracts on the basis of competitive procedure provided for in Arts. 50 – 54 of the Defence Directive.[148] Finally, the contracting authority can require the successful tenderer to subcontract to third parties a share of the contract on the basis of the competitive procedure. The maximum percentage may not exceed 30% of the value of the contract.[149]

The introduction of a competitive procedure for the award of sub-contracts is another significant change in comparison to Public Sector Directive. The tenderers may be required to conduct a form of transparent and competitive selection process which excludes participation of the tenderer's subsidiaries or affiliated companies[150]. If a subcontract has a value exceeding the thresholds laid down in Art. 8 of Defence Directive, the successful tenderer is obliged to make its intention to subcontract known by way of the subcontract notice containing information enumerated in Annex V.[151] A subcontract must be published in accordance with the publication requirements.[152] A

[144] France, Germany, Italy, Spain, Sweden and United Kingdom.
[145] Kennedy-Loest, Pourbaix. 'The new EU Defence Procurement Directive', *ERA Forum* (2010) 11, pp. 399-410.
[146] Art. 25 Public Sector Directive.
[147] Kennedy-Loest, Pourbaix, 'The new EU Defence Procurement Directive', *ERA Forum* 11 (2010), pp. 399-410.
[148] Art. 21(3) Defence Directive.
[149] Art. 21(4) Defence Directive.
[150] Kennedy-Loest, Pourbaix, 'The new EU Defence Procurement Directive', *ERA Forum* 11 (2010), pp. 399-410.
[151] Art. 52(1) Defence Directive.
[152] Art. 32 Defence Directive.

subcontract notice is required with the exception of when it meets the conditions for the negotiated procedure without notification.[153] In cases that the subcontract does not exceed the thresholds laid down in Article 8, successful tenderers are still obliged to apply the principles of transparency and competition[154]. The successful tenderer is not required to subcontract if it proves to the contracting authority in a satisfactory manner that none of the subcontractors participating in the competition or their proposed bids meet the criteria indicated in the subcontract notice and thereby would prevent the successful tenderer from fulfilling the requirements set out in the main contract[155].

3.5. Legal remedies

The Defence Directive has introduced a system of special legal remedies and review procedures with regard to defence and security contract awards[156]. In order to ensure proper application of the Directive, it is indispensable to establish an efficient review system for challenging the award procedure before a contract in question is signed.[157]. Apart from some variations the review system introduced by the Defence Directive is based on the Remedies Directive[158][159] which is applied in other procurement regimes. Nevertheless, in order to address the particularities of the defence and security procurement, the review procedure under the Defence Directive takes also into account the protection of defence and security interests. Moreover, the Directive recognizes the possibility that an infringement of its provisions should not be corrected in case that exceptional circumstances of the case concerned require certain overriding reasons[160]. In the context of the Member States' obligation to guarantee that bodies responsible for review procedures have an adequate level of confidentiality regarding the classified information, they are allowed to install a specific body with the sole jurisdiction for the review of contracts in the field of defence and security[161].

The bidders have the opportunity to challenge any decision of the contracting authority regarding the award of a contract that falls within the scope of the Defence Directive. The challenged decisions have to be reviewed effectively and as rapidly as possible in accordance with conditions

[153] Art. 28 Defence Directive.
[154] Art. 52(7) Defence Directive.
[155] Art. 53 Defence Directive.
[156] Title IV, Articles 55-64 Defence Directive.
[157] Recital 72 Defence Directive.
[158] Directive 2007/66/ with regard to improving the effectiveness of review procedures concerning the award of public contracts
[159] Gabriel and Weiner, 'The European Defence Procurement Directive: Toward Liberalization and Harmonization of the European Defence Market', *Procurement Lawyer*, Vol. 45, No.2 (2010), pp. 23-27.
[160] Recital 73 Defence Directive.
[161] Art. 56(10) Defence Directive.

set out in Articles 56 to 62[162]. Available remedies include interim measures, suspension measures and damages[163].

When a body of first instance reviews a contract award decision, Member States must ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The suspension period shall not end before the expiry of the standstill period[164], i.e. minimum of 10 calendar days with effect from the day following the date on which the contract award decision is sent to tenderers and candidates concerned by fax or electronic means (15 day when other means of communications are used)[165]. Application of the standstill period thereby allows for effective review and prevents a hasty 'race to signature'[166]. However, the Defence Directive does not provide for automatic suspensive effect but only where provided for by the Directive[167]. When the review body considers the potential consequences of the interim, suspension measures, the effect of those measures shall be determined by national law[168]. In case that the negative effects of interim measures exceed their benefits the review body is allowed to decide not to grant such measure[169]. The decisions of bodies responsible for review must be susceptible to judicial review[170].

When provisions of the Directive have been infringed on one of the grounds listed in Art. 60(1), the review body shall consider such contract as ineffective. The consequence of a contract being ineffective shall be provided for by national law which may provide for retroactive cancelation of all contractual obligations or limit the scope of the cancellation to those obligations which still have to be performed. In the latter case, application of alternative penalties shall be provided for[171]. Nevertheless, as already indicated, the review body may not consider a contract ineffective, even though it has been awarded illegally if it is found that overriding reasons relating to general interest in particular relating to defence and/or security interests require that the effects of the contract should be maintained[172]. Economic interests can be considered as overriding reasons only if ineffectiveness would lead to disproportionate consequences. This however does not concern economic interests directly linked to the contract concerned[173]. In case that a contracting authority

[162] Art. 55(2) Defence Directive.
[163] Art. 56(1) Defence Directive.
[164] Art. 56(3) Defence Directive.
[165] Art. 57(2) Defence Directive.
[166]Gabriel and Weiner, 'The European Defence Procurement Directive: Toward Liberalization and Harmonization of the European Defence Market', *Procurement Lawyer*, Vol. 45, No.2 (2010), pp. 23-27.
[167] Art. 56(4) Defence Directive.
[168] Art. 56(7) Defence Directive.
[169] Art. 56(5) Defence Directive.
[170] Art. 56(9) Defence Directive.
[171] Art. 60(2) Defence Directive.
[172] Art. 60(3) Defence Directive.
[173] Art. 60(3) Defence Directive, 2nd and 3rd paragraph, Defence Directive.

has decided to express its intention to conclude a contract by publishing a notice for voluntary ex ante transparency provided for in the Art. 64 of the Directive, the contract concerned cannot be considered ineffective under Art. 60(4) second paragraph.

In case of infringement of relevant provisions of the Defence Directive, the ineffectiveness or alternative penalties shall be provided for[174]. They include fines on the contracting authority or the shortening of the duration of the contract. The review bodies may be conferred with a broad discretion as to assessing all the relevant factors. Award of damages does not constitute an appropriate alternative penalty[175].

Moreover the Commission may, prior to the contracts being concluded, invoke a corrective mechanism when it considers that a serious infringement of Union law has been committed during a contract award procedure.[176] The Commission may notify the Member State concerned and request the correction of the infringement by appropriate means[177]. Within 21 days of receipt of the notification the Member State shall communicate to the Commission its confirmation that the infringement has been corrected, reasoned submission as to why the correction has not been made or a notice that award procedure has been suspended by the contracting authority or by its own initiative.[178]

IV. Comparative analysis

In the following, the international procurement setting of OCCAR will be contrasted with the procurement framework of the Defence Directive. The analysis of the position of the individual firm focuses on the discretion of the contracting authority, the procedure, the remedy or review safeguards and the subcontracts.

4.1. Discretion of Contracting Authority

In case of the OCCAR framework, the discretion of the approving authority is visible in various domains. Basically, the approving authority in the OCCAR framework has great discretion with regard to technical specifications. Although the approving authority is required to produce selection and award criteria and state them in its procurement strategy, these are not pre-determined within hard law. This leaves open the possibility for the approving authority to design selection and award

[174] Art. 61 Defence Directive.
[175] Art. 61(2) Defence Directive.
[176] Art. 63 Defence Directive.
[177] Art. 63(2) Defence Directive.
[178] Art. 63(3) Defence Directive.

criteria in order to discriminate against other companies. In explanation, the approving authority could design criteria that only one specific firm would be able to fulfill. Also, both for the competitive dialogue phase and for the competitive procedure, the time limit shall be sufficient[179]. Nevertheless, neither does the OCCAR Convention nor any of the OMPs specify concrete time limits for the approving authority to employ. This means that the approving authority has great discretion with regard to time limits then. This could potentially be used to discriminate against firms that are known to need more time for an offer, e.g. due to their complex organizational structure.

This however is clearly in contrast to the principle of competition that is promoted in point 3.1.2 of OMP5. Instead, it would rather enable clientelism and discrimination. In spite of pre-drafted templates for selection criteria, the approving authority is not required to use these and can therefore determine the selection and award criteria on its own discretion. Due to the fact that several states are participating in these joint projects and are cooperatively agreeing on technical specifications, it is however more difficult to discriminate against firms based within countries participating in the respective project. Discrimination against companies in states not participating in the project is already explicitly provided for in Art. 6 of the OCCAR Convention which states that preference should be given to firms based in states participating in a project if it meets the selection and award criteria. The states participating in a joint project therefore even could feel to have an incentive to adapt the criteria in a discriminatory manner, so that the approving authority may use this Art. 6 of the OCCAR Convention. Ultimately, the participating states can influence the whole following procurement process according to this discretion. In these circumstances the individual firm is in a situation in which it could easily be discriminated against. Due to the fact that it is discriminated against from the very beginning and such a discrimination would amount to exclusion, it could not claim legitimate expectations however.

In contrast to the OCCAR framework, the Defence Directive is explicitly based on the principle of equality, non-discrimination and transparency. Even in case that the Defence Directive does not apply, the general procurement principles of EU Treaties still remain applicable, such as, *inter alia*, non-discrimination, transparency, proportionality and effective judicial protection[180]. Abiding by these principles constitutes an indispensable qualification for the opening-up of the national defence markets and creating a truly European market in a sector where contractors from other

[179] Point 5.2.2.2.2 and Point 4.1.4 of the OMP5 respectively.
[180] Heuninckx, 'Lurking at the boundaries: applicability of EU law to defence and security procurement', *Public Procurement Law Review* (2010), 3, pp. 91 – 118.

Member State may participate under the same non-discriminatory conditions as the local contractors.

One of the most significant innovations of the Defence Directive has been that the contracting authorities may freely choose between the restricted procedure and a procedure with publication of a contract notice to award contracts. The competitive dialogue and, in particular, the negotiated procedure without publication of a contract notice can be applied only in certain, very specific cases listed in the Directive when other procedures are entirely inappropriate. However, also within each of the procedures covered by the Directive the contracting authorities have to act in an objective and transparent manner. Contracts shall be awarded on the basis of criteria laid down in the Directive taking into account qualitative conditions of economic operators. Discretion of the contracting authorities should be further delimited by provisions on a review procedure whereby it shall be ensured that decisions taken by contracting authorities are effectively and rapidly reviewed. Furthermore, the Directive provides for possibility of judicial review of such decision.

However, a certain extent of discretion of the contracting authorities may emanate from the specific nature of the defence and security procurement itself. Especially in the context of the exclusions provided for by the Directive, it is up to the contracting authority to assess whether the contract to be awarded contains e.g. sensitive information of national security interests and therefore to decide not to apply the defence procurement rules. Even though the case law has taken a clear stance as to the necessity of narrow interpretation of every exclusion in the light of the proportionality principle[181], the practice of the contracting authorities has to be closely followed in order to prevent creating more advantageous conditions for economic operators from the state of the contracting authority concerned, ultimately to the detriment of the cross-border market in the defence sector. Non-application of the Directive by means of exclusions would put individual economic operators in a less favourable situation since in that case the benefits of the Defence Directive, such as invoking review remedies, would not be possible as well. It goes without saying that much depends on the implementation of the Directive into the national legal systems.

It is to be noted that although, at least in theory, the Public Sector Directive applies in cases where the Defence Directive is not applicable, Member States have been generally unwilling to use the procedures under Public Sector Directive for defence procurement on the grounds that it is inappropriate for the defence procurement procedures. Consequently, the conditions of the procurement of defence-related goods, services and works depend also on the political will of individual Member States to invoke Art. 346 TFEU and derogate from application of EU

[181] *See* e.g, Cases C-414/97 *Commission v Spain*, para 22, C-157/06 *Commission v Italy*, para 68.

procurement rules completely. In such cases, an economic operator would be very limited, if not completely pushed out, from participation in procurement procedures taking place in a different Member State. The Defence Directive attempts to limit the possibility of Member States to invoke the derogation provision of 346 TFEU and keep defence- and security-related acquisition within the EU procurement rules. Overall in comparison to the OCCAR framework, the Defence Directive has limitations to the use of discretion. Therefore, the contracting authority is less likely to be able to discriminate against the individual firm in the context of the Defence Directive than in the other procurement regimes.

4.2. Legal remedies

Review possibilities are very important for the individual firm if appropriate competition is to be ensured. As examined in the foregoing section, the legal framework of the international organization OCCAR grants individual firms only a complaint possibility[182]. However, contracts themselves usually have arbitration clauses built into them. The arbitration tribunal is the only instance, meaning that an appeal is not possible. Also, the arbitration tribunal is rather weak when it comes to enforcement. In Annex II of the OCCAR Convention on arbitration, it is simply stated that 'the parties to the dispute shall implement [the decision] without delay'[183]. Nevertheless, there is no explicit mechanism to ensure that the decision of the arbitration tribunal is indeed adhered to.

Within the Defence Directive, individual firms have the possibility to have the decision of the contracting authority reviewed in an objective and timely manner. In contrast to the Public Sector Directive, the provisions on review are incorporated directly into the Defence Directive. Review procedures provide the economic operators with important safeguards when an individual operator feels to be impaired by the contracting authority's decision in the context of the procurement procedure. The economic operator has to be provided with the possibility to challenge the decision concerned before the Court. Equally important in this respect is the provision of a standstill clause which aims to ensure that the economic operators' claims for review are really effective. In comparison to the international framework of OCCAR, the Defence Directive goes further in terms of enforcement. This is due to the CJEU as an established body in the European framework able to enforce decisions onto the Member States. The OCCAR framework however might envisage the typical shortcomings associated with enforcement procedures in international law.

However, the possibility of review is restricted in the Defence Directive. Even if the Directive has been infringed the contract still may not be considered ineffective if there are overriding reasons

[182] *See* procedure under annex OMP5-I.
[183] Art.9 of Annex II of the OCCAR Convention.

present, i.e. if the consequences of this effectiveness would seriously endanger the State's security interests[184]. This might be to the detriment of a competing firm.

Finally, the Defence Directive is not clear as to the question of possibilities of a subcontractor to challenge procurement decisions of the contracting authority. It can be assumed that it would be allowed to submit such challenge as a 'person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement' in the light of Art. 55(4) of the Defence Directive.

Overall, although there are still are some shortcomings , the Defence Directive provides for better legal protection of the interests of individual firms, particularly with regard to the more developed system of enforcement of the Court's decisions. Thus the individual firm is better off in legal terms within the framework of the Defence Directive.

4.3. Procedures

In general, the approving authority within OCCAR may have huge discretion before the start of the competitive procedure, but must comply with the requirements it set out afterwards. Throughout the process, procedural equality between the economic operators is adhered to. Moreover, the individual firm has the right to be informed on changes to the procedure. The competitive procedure shall be the standard for procuring, but discretion of the authorities may be used to use a non-competitive procedure. This would of course not be beneficial from the viewpoint of the average individual firm because it would be excluded of the procurement. Also, Art. 24(4) of the OCCAR Convention prescribes that a competitive procedure may be closed for every company of a state not participating in the respective programme that is tendered for. This ultimately leaves the OCCAR participating states with great discretion for competition of firms based in other states. Firms from states not participating in the programme might therefore not be treated equally to firms based in states that do participate in the respective programmes. The same applies also for sub-contractors, because OCCAR may exercise discretion if it feels that national security interests of the participating states are touched upon[185].

Within the Defence Directive the default procedure for the defence procurement has become the negotiated procedure with publication of a contract notice to award contracts. The competition should be secured by the requirement that at least three candidates must be invited to submit a

[184] Art. 60(3) Defence Directive.
[185] Point 4.3.1.2.1 of OMP5.

tender for negotiation, unless there are enough suitable candidates meeting the criteria published in a contract notice[186].

The absence of the open procedure in the Defence Directive may be seen as a drawback from the point of view of individual economic operator willing to participate in defence procurement procedure. Usually, there are not that many companies able to provide defence equipment or related services. Consequently, it is not probable that there will be many tenderers participating in procurement procedure. Therefore, the reason not to include the open procedure on the basis of reducing the number of potential tenderers does not seem to be well justified. On the contrary, the open procedure would allow the economic operators to compete for the award of the contract in the most competitive environment which, at the end of the day, would be beneficial also form the point of view if the costs and quality of procured goods, supplies or services. Thus, the absence of the open procedure is to the detriment of both the individual firm and the contracting authority.

In respect of the negotiated procedure without publication, this procedure can be used only in certain very specific cases. It has to be ensured that such a procedure is not abused by the contracting authorities in order to procure under less strict rules. In cases of justification for the use of this procedure on the grounds of practical, operational problems[187], this line of reasoning would not apply however. Examples of exceptional circumstances in this regard may represent procedures for additional deliveries by the original supplier in partial replacement of the existing supplies or for the extension of such supplies where a change of supplier would oblige to contracting authority to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation or maintenance[188]. If such exceptions would not be applied strictly, the contracting authority could be given too much of flexibility allowing it to prevent other economic operators from successfully participating in procurement of supplies of this kind. The same applies to the awarding of contracts to only one particular economic operator on the grounds of technical reasons or reasons connected with the protection of exclusive rights[189]. Once the selection and award criteria within the OCCAR framework are established, they cannot be amended in the course of the procedure. The Defence directive, on the other hand, provides for a list of defined procedures where only two of them can be applied under the full discretion of the contracting authority. Moreover, a non-discriminatory approach towards the economic operator is ensured throughout any of these procedures in the directive.

[186] Art. 38(3) Art.
[187] Art. 28(1)(c), Art. 28(5) Defence Directive.
[188] Art, 28(3)(a) Defence Directive.
[189] Art. 28(1)(e) Defence Directive.

4.4. Subcontracts

The individual firm can find itself in two positions with regard to subcontracting in the OCCAR framework. On the one hand, the position in this regard is can be that of a prime contractor whereby the individual firm would be free to take own decisions on the basis of the principle of competition[190] except if vital security interests of contracting states are touched upon. On the other hand, a firm could find itself in the position of being a subcontractor. While there is sub-contractor competition in the competitive procedure, this must also be the case if the prime contractor was chosen according to a non-competitive procedure[191]. Individual firms being subcontractors therefore enjoy equality vis-à-vis other firms in the procedure.

Also in the Defence Directive, the award of subcontracts by successful primary contractors to other economic operators represents a significant means of how the competition in the defence sector can be driven by the supply chain. In particular, this represents an opportunity for SMEs whose capacities would not be sufficient to compete for the entire contract in the primary procedures. With regard to the cross-border level of the EU defence market, subcontracting is important in the sense that also economic operators from Member States with only limited industries may participate in procurement procedures and compete with operators from countries with developed industry capabilities. Smaller firms thus have more chances of participating in the procurement process and thus are less likely to successfully tender for a contract.

The Defence Directive has introduced additional options for subcontracting requirements which should contribute to the promotion of market access of SMEs, free movement and effectiveness and dissemination of best practices. Namely, the contracting authority may oblige the successful tenderer to subcontract to third parties a share of the contract up to the 30% of the value of the contract. The subcontractors are also not to be discriminated on the grounds of nationality.

Moreover, the successful tenderer may be obliged by the contracting authority to apply specific provisions on subcontracting to all or certain subcontracts. If the thresholds set out in the Directive are met, the primary tenderer may be obliged to publish a subcontract notice with the list of objective and non-discriminatory criteria consistent with the criteria applied by the contracting authority for the selection of the tenderers for the main contract[192]. Interestingly, the subcontracting provisions do not contain specific subcontract award criteria. Thus, it can be inferred that the primary tenderer is free to choose them independently from the provisions of the Directive provided

[190] Point 4.3.1.1.1 of OMP5.
[191] Point 4.3.1.1.2 of OMP5.
[192] Art. 53 Defence Directive.

that they still comply with EU procurement principles. This fact may render the access of new economic operators into the habitual supply chain of primary tenderers more difficult.

Additionally, the Defence Directive has not explicitly incorporated any provision prohibiting the offsets requirements when procuring from economic operators based in other countries than the country of the contracting authority. Despite that, the Commission has issued a clear statement that offset requirements cannot be tolerated in the ambit of defence procurement. Such an approach can only be welcomed from the perspective of economic operators since the offset requirements are prone to distort the cross-border market since they lead to preferential treatment of the local economic operators. Overall, the individual firm is granted chances on the level of the subcontracting tenders. Although there are still problems remaining in this regard, small firms are better off in comparison to the situation before the directive. If compared to the OCCAR framework, it is to be noted that the approving authority in OCCAR can rely on its discretion when national security is at stake also with regard to subcontractors. The framework of the European Defence Directive is therefore friendlier to the individual firm on the subcontracting level than the OCCAR framework, although OCCAR provides for possibilities here as well.

V. Conclusion

When comparing both procurement regimes, it becomes apparent that the European Defence Directive constitutes an important step forward with regard to the legal position of an individual firm. This can be seen by a number of areas in which the Defence Directive has evolved.

Firstly, the Defence Directive establishes a stronger review mechanism than the OCCAR framework by adopting a framework providing the individual firm with the opportunity to challenge a decision of the contracting authority. Moreover, such a decision must be susceptible to the review by national judicial authority. Consequently, the economic operator may invoke in front of the CJEU that the Directive provisions has not been duly implemented into the national legislation.

Secondly, the Defence Directive puts emphasis on the non-discrimination and transparency on the basis of nationality between individual economic operators. Within the OCCAR system the approving authority has great discretion before the procedure in order to shape the upcoming procedure by means of selection and award criteria, whereas during the competitive procedure itself not many exceptions apply. One of these exceptions is that competition among individual economic operators can more easily be restricted in favour of states participating in a project. The Defence Directive on the other hand attempts to attain an EU-wide defence market where economic operators from different Member States are treated equally from the very start. However, it is

mainly due to the specificity of the defence and security market that the non-discriminatory approach is still limited to some extent. Under various exclusions listed in the Directive, it is in the discretion of a contracting authority to assess whether certain exclusion applies on the grounds of an essential security interest of a Member State. In this respect the absence of an explicit prohibition of offset requirements seems unconvincing.

Thirdly, the Defence Directive has provided for more opportunities for the economic operators to participate in the defence market as subcontractors. Especially SMEs might benefit from the requirement which may be imposed on the primary contractor to subcontract up to 30% of the value of the contract. Furthermore, subcontractors shall also not be discriminated against on grounds of nationality. Even though not expressly stipulated, the subcontractors may arguably be allowed to challenge a decision of contracting authority, e.g. when the latter rejects the selection of subcontractors by the primary tenderer. The OCCAR framework in this regard tries to place a similar emphasis within the subcontracting level. Nevertheless, the approving authority ultimately retains the power to interfere also on the subcontractor level in exceptional circumstances. Once the approving authority decides to interfere into the procurement process on this level, there is no level playing field anymore for the individual firm.

The average individual firm would favour the procurement procedures under the Defence Directive for these reasons. Nevertheless, the individual firm would not completely refrain from applying to the OCCAR framework due to the fact that contracts procured in this framework have until now involved great sums of money.

The main problem however is that it is still up to the Member States and their political will to decide to what extent they attempt to invoke the derogation clause of Art. 346 TFEU as well as whether the contracting authorities interpret exclusions form the directive on the basis of security reasons in line with the narrow interpretation of the exclusions established by the CJEU. The proper implementation of the directive into the national law is crucial in this respect. In case that the directive meets its goal and most of the defence procurement procedures will be kept inside the EU procurement framework the individual economic operators should be provided with sound guarantees in the light of the non-discrimination and transparency principle.

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