

Directive 2009/81/EC on EU Defence and Security Procurement:

A major step towards creating a truly EU Defence Equipment Market

**To what extent has Directive 2009/81/EC been transposed into Hungarian and
German national laws?**

A comparative analysis

Final Paper on Public Procurement

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Abstract

The European Commission has introduced the EU Defence and Security Procurement Directive 2009/81/EC in 2009 in order to foster the development of an EU defence equipment market by establishing an official framework for cross-border defence procurement within the Union. The sensitive nature of the contracts falling under the scope of the Directive call for specific requirements in terms of complexity, security of information and security of supply, therefore, several innovations have been introduced into the framework of this legislative act. In order to give an insight into the impact of the Directive on the creation of a truly European Defence Equipment Market, this paper seeks to analyse to what extent Directive 2009/81/EC has been implemented into Hungarian and German national laws on defence procurement.

The analysis will establish that the Directive has been fully and within the scheduled timeframe transposed into Hungarian law, while Germany has shown a very slow progress in transposing Directive 2009/81/EC into its national public procurement law. The analysis will identify various barriers, hindering the creation of a truly European Defence Equipment Market. However, irrespective of the imposed barriers and national interests of the Member States, this paper intends to emphasize that it is of paramount importance to implement Directive 2009/81/EC fully and adequately in all EU Member States in order to create and further liberalize a common defence market in the European Union on the long run.

1. Introduction

Defence and security matters have traditionally been subject to national sovereignty, resulting in persistent endeavours of states to retain primary control over the production and trade of arms. The need for defence material and the aim of avoiding dependence on external armament supplies have further strengthened the development of national defence industries.¹

One of the undeniably most remarkable achievements of the European Union and key driver of economic growth is the internal market, promoting the free movement of persons, good, services and capital, thereby leading not only to a significant increase of trade but also to lower prices.²

However, the strong national link of the EU defence industry has confronted the European Commission with serious difficulties in imposing these fundamental economic freedoms on that sensitive area, which is still marked by a high fragmentation along national lines: 74,7% of the overall defence equipment in the Union was procured within national boundaries, while only 25,3%

¹A. Bailes and S. Depauw, 'The EU Defence Market: Balancing Effectiveness with Responsibility', 2011, http://www.sipri.org/research/armaments/transfers/publications/other_publications/conference-report-eu-defence-market-flemish-peace-institute, (last visited on June 3rd, 2012), p.4.

²'Safeguarding the free movement of goods', Enterprise & Industry Online Magazine, January 2011, http://ec.europa.eu/enterprise/magazine/articles/single-market/article_10863_en.htm (last visited on June 3rd, 2012).

are based on (European) collaborative defence equipment procurement.³

Serious concerns about static defence budgets and the affordability of defence equipment as well as the fact that military intervention is still playing an important role in global politics have encouraged the European Commission to introduce protection mechanisms for the EU defence industry in the hope of opening up the national defence markets to cross-border competition.⁴ For this purpose, the Commission adopted the EU Defence and Security Procurement Directive 2009/81/EC⁵ in 2009 fostering the development of a EU defence equipment market by adopting an official framework for cross-border defence procurement within the Union.⁶ The Directive specifically aims to tackle the sensitive issues around security of information and security of supply and had to be transposed into national legislation by 21 August 2011.⁷

In order to give an insight into the impact of the Directive on the creation of a European Defence Equipment Market, this paper seeks to analyse to what extent Directive 2009/81/EC has been transposed into Hungarian and German national laws.

For this purpose, it will first provide some political, economic and legal background information on the creation of a European defence market and the role of Directive 2009/81/EC in this context. Secondly, the main characteristics and aims of the Directive will be explained and its most relevant provisions will be discussed. Based on these main features, the implementation of Directive 2009/81/EC into Hungarian and German law will be separately analysed in order to subsequently assess the quality of implementation and to identify barriers to the European Commission's aim to create a truly EU Defence Equipment Market.

2. Directive 2009/81/EC: A major step towards creating a truly EU Defence Equipment Market

The EU defence market has been a misleading description for many years since it rather referred to a set of independent national markets, each consisting of a distinctive set of supply and demand arrangements, than to a common EU defence manufacturing sector.⁸ The defence

³European Defence Agency Data 2009', http://www.eda.europa.eu/libraries/documents/eda-factsfigures-2009_21_2.sflb.ashx (last visited on June 3rd, 2012), p. 15.

Remark: All Member States of the European Union take part in the European Defence Agency, except Denmark.

⁴J. Edwards, 'The EU Defence and Security Procurement Directive: A Step Towards Affordability?', International Security Programme Paper ISP PP 2011/05, http://www.chathamhouse.org/sites/default/files/0811pp_edwards.pdf (last visited on June 3rd, 2012), p. 3.

⁵Directive 2009/81/EC [2009] OJ L 216.

⁶'Defence Package – Towards an EU Defence Equipment Policy', Defence Industries Reference Documents, January 2011, http://ec.europa.eu/enterprise/sectors/defence/documents/index_en.htm (last visited on June 3rd, 2012).

⁷'New directive on defence and security procurement enters in force', <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1250>, (last visited on June 3rd, 2012).

⁸ K. Hartley, 'A single EU market for defence equipment: organisation and collaboration', :

procurement policies in the Member States have been strongly nationally-oriented resulting in significant varieties, with some of the Member States favouring competitive procurement policy⁹, whereas others, in particular France, have been in favour of preferential purchasing from national champions.¹⁰ National protectionism in defence has been playing a major role and each Member State with indigenous industrial capability has aimed at spending the majority of any investment in defence equipment domestically, thereby protecting the defence industry from any competition and sustaining what has traditionally been regarded as a manufacturing sector of strategic significance nationally.¹¹

Reasons for the domination of national protectionism in the EU defence industry lie in its development since the Second World War, which can be generally divided into three broad periods: the first one encompasses the years from 1945 to 1960, being mainly characterized by Europe's rebuilding efforts with the support of the United States; the second period, from 1960-1990, introducing a movement from US collaboration to ever-increasing EU collaboration; the third period, from 1990 to the present, has been marked by reduced defence spending in response to the end of the Cold War and the establishment of EU frameworks¹² for the purpose of further reducing costs.¹³ The defence equipment market in the EU was marked by a strong fragmentation that led to very low competition and economic inefficiency, thereby constituting losses for both main stakeholders, namely governments and defence companies.¹⁴ The latter depend strongly on home markets, which are however too small to ensure the necessary level of research and development

<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.194.4193&rep=rep1&type=pdf> (last visited on June 3rd, 2012), p. 1.

⁹ Remark: The competitive procurement policy is generally characterized by competition and fixed price contracts and is favoured by for instance the United Kingdom.

¹⁰ Ibid.; K. Hartley, 'A single EU market for defence equipment: organisation and collaboration', : <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.194.4193&rep=rep1&type=pdf> (last visited on June 3rd, 2012), p. 1.

¹¹ Ibid.; Edwards, J., 'The EU Defence and Security Procurement Directive: A Step Towards Affordability?', International Security Programme Paper ISP PP 2011/05, http://www.chathamhouse.org/sites/default/files/0811pp_edwards.pdf (last visited on June 3rd, 2012), p. 3.; J. Edwards, 'The EU Defence and Security Procurement Directive: A Step Towards Affordability?', International Security Programme Paper ISP PP 2011/05, http://www.chathamhouse.org/sites/default/files/0811pp_edwards.pdf, p. 4.

¹² For a summarized overview of EU frameworks from 1990 to the present, see J. Edwards, 'The EU Defence and Security Procurement Directive: A Step Towards Affordability?', International Security Programme Paper ISP PP 2011/05, http://www.chathamhouse.org/sites/default/files/0811pp_edwards.pdf (last visited June 3rd, 2012), pp 5-9.

¹³ Ibid.; J. Edwards, 'The EU Defence and Security Procurement Directive: A Step Towards Affordability?', International Security Programme Paper ISP PP 2011/05, http://www.chathamhouse.org/sites/default/files/0811pp_edwards.pdf (last visited June 3rd, 2012), p. 4. For a detailed historical and political overview of the development after the Second World War, see J. Edwards, 'The EU Defence and Security Procurement Directive: A Step Towards Affordability?', International Security Programme Paper ISP PP 2011/05,

http://www.chathamhouse.org/sites/default/files/0811pp_edwards.pdf (last visited June 3rd, 2012), pp. 4-7. See also DeVore, M. & Eisenecker, S., 'The Three Ages of Armaments Collaboration: Determinants of Organizational Success and Failure' 2010, <http://stockholm.sgir.eu/uploads/The%20Three%20Ages%20of%20%20Collaboration%20SGIR.pdf> (last visited on June 3rd, 2012).

¹⁴ M. Terlikowski, 'Liberalisation of the EU Defence Equipment Market' 2011, http://www.pism.pl/files/?id_plik=6956 (last visited on June 3rd, 2012), p. 35.

spending.¹⁵ Furthermore, fragmentation of markets implies additional administrative costs for defence companies, which need special licenses for the transfer of defence equipment in other EU Member States, while governments on the other hand cannot pay the best price for the equipment procured.¹⁶

Moreover, national defence in today's rather globalized and complex security situation is facing various challenges, such as threats from international terrorism and proliferation of weapons of mass destruction, which demand closer collaboration between national governments.¹⁷

Thus, changes in the global landscape and the ever-growing importance of European Union law and the internal market, resulting in a constantly deepening and widening of the Union, have increased the demand for a common European defence industry and a convergence in European defence national systems.¹⁸

Encouraged by its aim to tackle national defence market protectionism and to assert its authority on defence matters, the European Commission decided to adopt a regulatory framework that does not only remove a major obstacle (national protectionism) towards a common EU defence equipment market but also provides for increased compliance with open market principles¹⁹ The outcome of these ambitions was the defence and security procurement directive in 2009, constituting the cornerstone in the creation of a truly European defence market.²⁰ The Directive's primary goal is to open up national defence markets in the Union in order to create a playing field for the defence industry on EU level and make it subject to EU internal market rules, thereby increasing industrial competition.²¹ In addition, the directive serves to strengthen the Union's common policy to ensure control over trade in dual-use items and conventional weapons for the purpose of preventing arms transfers that might be responsible for armed conflicts and terrorism.²² Directive 2009/81/EC provides for procurement rules regulating transnational defence and security contracts within the Union paying attention to questions relating to security and supply information.²³

¹⁵Ibid.

¹⁶Ibid.

¹⁷M. Scheckenhofer, 'Defence Supply Chain Management: Conceptual Framework and First Empirical Findings', <http://www.ippa.org/IPPC4/Proceedings/03DefenseProcurement/Paper3-3.pdf> (last visited on June 3rd, 2012), p. 2; See also K. Hartley, 'Defence Economics', Discussion Paper, Centre for Defence Economics, University of York, 2006.

¹⁸ A. Kešeljevi and E. Kopa, 'Globalisation of Regionalisation of the Defence Industry in the EU Union', <http://oliver.efri.hr/~euconf/2005/files/1st%20session/5th%20keseljevic%20kopac.pdf> (last visited on June 3rd, 2012), p. 2.

¹⁹J. Edwards, 'The EU Defence and Security Procurement Directive: A Step Towards Affordability?', International Security Programme Paper ISP PP 2011/05, http://www.chathamhouse.org/sites/default/files/0811pp_edwards.pdf (last visited on June 3rd, 2012), p. 8.

²⁰Ibid.; A. Bailes and S. Depauw, 'The EU Defence Market: Balancing Effectiveness with Responsibility', 2011, http://www.sipri.org/research/armaments/transfers/publications/other_publications/conference-report-eu-defence-market-flemish-peace-institute, (last visited on June 3rd, 2012), p.4.

²¹Ibid.

²²Ibid.

²³Ibid.; J. Edwards, 'The EU Defence and Security Procurement Directive: A Step Towards Affordability?', International Security Programme Paper ISP PP 2011/05, http://www.chathamhouse.org/sites/default/files/0811pp_edwards.pdf, p. 8.

A major problem that, however, prevents the European Commission from upholding the directive and ensure its full effect is again the aspect of national defence industrial protection that finds support under Article 346 TFEU, stating that 'any Member State may take such measures as it considers necessary for the protection of essential interests of its security which are connected with the production of or trade in arms, munitions and war material'. Member States have been using this provision and its processors since 1958 to exempt any defence contract from EU procurement rules.²⁴ The European Commission, however, emphasized in an interpretative communication of 2006 that Member States are obliged to assess each procurement contract for the purpose of determining whether or not an exemption from Union rules is justified.²⁵ This communication makes clear that 'it is the Member States' responsibility to define and protect their security interests' but Article 346 is only in place to 'deal with exceptional and clearly defined cases'.²⁶

In spite of this fact, the Member States have however carried on procuring most of the defence contracts within national boundaries in order to retain full sovereign control over defence matters and maintain a national defence manufacturing industry.²⁷ This statement is supported by the official 'Defence Data' of 2009 according to which 74,7% of the overall defence equipment in the Union was procured within national boundaries, while only 25,3% are based on (European) collaborative defence equipment procurement.²⁸ However, since the Directive was due to be transposed into the national legislation of each EU Member State on 21 August 2011, the Member States should have done so by now.

Whether and to what extent the Directive and its main principles have been transposed into national laws will be critically assessed in section 4 and 5 of this paper, which analyse the quality of implementation in Hungary and Germany. In order to do so, attention has first to be given to the main characteristics, features and aims of the Directive. For this purpose, the directive and its most important provisions and main innovations will be discussed in the following section of this paper.

3. Characteristics, Features and Aims of Directive 2009/81/EC

The aim of Directive 2009/81/EC is to create the legislative framework for a unified European defence equipment market and to overcome the current – nation state based –

²⁴Ibid.

²⁵Ibid.

²⁶Interpretive Communication on the application of Article 296 of the Treaty in the field of defence procurement', Commission of the EU Communities, 7 December 2006, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0779:FIN:en:PDF>, (last visited on June 3rd, 2012).

²⁷J. Edwards, 'The EU Defence and Security Procurement Directive: A Step Towards Affordability?', International Security Programme Paper ISP PP 2011/05, http://www.chathamhouse.org/sites/default/files/0811pp_edwards.pdf (last visited in June 3rd, 2012), pp 8-9.

²⁸ Ibid.; 'European Defence Agency Data 2009', http://www.eda.europa.eu/libraries/documents/eda-factsfigures-2009_21_2.sflb.ashx (last visited on June 3rd, 2012), p. 15.

fragmentation thereof.²⁹ While national security remains the sole responsibility of Member States,³⁰ the establishment of a genuinely European and open defence equipment market will create a level playing field at European and global levels.³¹ The liberalization of the European defence market and the introduction of transparent rules for public defence procurement will strengthen the European Defence Technological and Industrial Base on the one hand, and will develop the military capabilities required to implement the European Security and Defence Policy on the other hand.³² The diversity of the European defence-related supplier base will be developed, while special attention will be paid to the involvement of SMEs and non-traditional suppliers in the European Defence Technological and Industrial Base.³³ It is hoped that the European industry's competitiveness will increase as a result of opening Member States' markets for defence companies and encouraging cross-border defence procurement – which would in turn lower prices and raise the effectiveness of public spending.

A *lex specialis*, the directive applies to contracts concerning the procurement of military equipment (equipment specifically designed or adapted for military purposes and intended for use as an arm, munitions or war material and security equipment.³⁴ Thus, the procurement of non-military and non-sensitive equipment is governed by the 2004/18/EC Directive on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (hereinafter referred to as the “Public Sector Directive”). The defence procurement's core principles of equality, non-discrimination and transparency are identical to those of general public procurement and are enshrined in Article 4 of Directive 2009/81/EC. Due to the fact that the purchase of goods and services in military and security equipment is the cornerstone of Member States' sovereignty, Member States may exempt contracts in the aforementioned fields on the basis of Article 346 (1) of the Treaty on the Functioning of the European Union, should the Directive oblige them to supply information, the disclosure of which they consider contrary to the essential interests of their security.³⁵ However, as the aforementioned article of the Treaty practically excludes the whole of the defence industry from EU public procurement law, the European Commission has issued an interpretative communication stipulating that Article 346 should be treated as an exception rather than a standard.³⁶ The justification of the exemption regarding public

²⁹ Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, [2009] OJ L216/76, Preamble (4).

³⁰ Ibid., Preamble (1).

³¹ Ibid., Preamble (3).

³² Ibid., Preamble (2).

³³ Ibid., Preamble (3).

³⁴ Article 1 (6) of Directive 2009/81/EC.

³⁵ Directive 2009/81/EC, Preamble (20).

³⁶ Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement',

procurement contracts are to be assessed on a case by case basis.³⁷

Alongside the exceptions, it is also important to highlight the threshold amounts for defence procurement contracts laid down in Article 8 of Directive 2009/81/EC. According to this provision, the threshold of EUR 412.000 applies for supply and service contracts, whereas the threshold of EUR 5.150.000 applies for works contracts. However, below these thresholds the application of various procurement procedures falls within the discretion of the EU Member States.

Because of the highly sensitive nature and complexity of the contracts covered by the Directive, several innovations have been introduced into the framework of this legislative act. Specific characteristics of the contracts falling under the scope of the Directive call for specific requirements in terms of complexity, security of information and security of supply.³⁸ In order to ensure the security of classified information, contracting authorities may require that the tender contain, *inter alia*, specific commitments or sufficient information on certain elements of the contract.³⁹ The purpose of the stringent information security regulation is of course to protect sensitive information from unauthorized access. Secondly, the security of supply is also provided for by the Directive,⁴⁰ aiming to achieve the timely delivery of goods and services, as well as the compliance with the contractual requirements - particularly in the event of a crisis (Article 23 (d)). In order to ensure the security of both the sensitive information and the supply, contracting authorities may need to lead lengthy and complex negotiations, therefore, unlike in the Public Procurement Directive, the Defence Procurement Directive does not contain any restrictions regarding the application of the negotiated procedure with publication.⁴¹ This lack of specific restrictions allows contracting authorities an accelerated freedom to negotiate all details of the complex defence procurement contracts with their suppliers. Fourthly, the Directive defines specific rules for subcontracting,⁴² aiming to enhance competition also in tenderers' supply chains as well as to provide market access⁴³ to small- and medium sized enterprises. Finally, it is important to note that cooperative programmes with an R&D phase conducted by at least two member states are excluded from the directive.⁴³ This phase must be included to ensure that the product involves new technology and is not simply an off-the-shelf product that is being modified. Cooperative programmes can include the participation of non-EU states as long as at least two member states are

Commission of the EU Communities, December 2006,

<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0779:FIN:en:PDF> (last visited on 3rd June 2012)

³⁷Ibid.

³⁸Directive 2009/81/EC, Preamble (47).

³⁹See Article 22 of Directive 2009/81/EC.

⁴⁰See Article 23 of Directive 2009/81/EC.

⁴¹Remark: Article 30 of the Public Sector Directive defines the cases justifying the use of the negotiated procedure with prior publication of a contract notice.

⁴²Title III of Directive 2009/81/EC.

⁴³Article 13 (c) of Directive 2009/81/EC.

involved.⁴⁴

A further interesting feature of the Defence Procurement Directive is that it does not regulate offsets. Offsets are additions that are usually provided above and over the delivery of the specific product when importing defence equipment. Offsets may have a serious effect on market competition, as the importer may well base the decision (partly) on the attractiveness of the offset package, rather than the defence equipment itself. The European Commission has therefore taken the stance that offsets are to be eradicated from the area of cross-border defence equipment trade within the Community, as “they violate basic rules and principles of primary EU law”.⁴⁵

The Defence Procurement Directive may thus prove to be a key tool in the Commission’s hand to establish open competition in the European public procurement, where awards are granted based on the price and quality of the product offered and not on the offsets.

The deadline for implementing the Directive into the national laws of the Member States expired on 21 August 2011. However, a major difficulty of the transposition was/is the culture of national defence protectionism: a sector of strategic importance, Member States tend to be reluctant when it comes to investment in non-domestic defence equipment, as it is of paramount importance for them to protect their national industries from competition of any kind. However, in order to tackle the present fragmentation of the European defence market and to impose the core economic freedoms on the EU defence industry, the proper implementation of the Directive 2009/81/EC would be indispensable.

4. The Implementation of Directive 2009/81/EC in Hungary

The Directive 2009/81/EC has been implemented into Hungarian law by two government decrees: 228/2004. (VII.30.) Government decree on specific rules regarding the procurement of goods and services serving military, security and police (hereinafter referred to as “228/2004. (VII.30.) Government decree”) and the 218/2011. (X.19.) Government decree on specific rules regarding procurement procedures involving classified data, essential interests relating to the security of state, and procurements necessitating enhanced security measures (hereinafter referred to as “218/2011. (X.19.) Government decree”). The 228/2004. (VII.30.) Government decree was passed in 2004, following Hungary’s accession to the European Union, having taken relevant Community regulations into consideration. In order to ensure compliance with the 2009/81/EC, the

⁴⁴See 'Guidance Note Defence- and security-specific exclusions', Directorate General Internal Market and Services, http://ec.europa.eu/internal_market/publicprocurement/docs/defence/guide-exclusions_en.pdf (last visited on June 3rd, 2012).

⁴⁵See 'Guidance Note: Offsets', Directorate General Internal Market and Services', http://ec.europa.eu/internal_market/publicprocurement/docs/defence/guide-offsets_en.pdf (last visited on June 3rd, 2012).

228/2004. (VII.30.) Government decree has been amended by a number of government decrees.⁴⁶ This act contains more specific rules on the procedural rules of defence procurements than the 218/2011. (X.19.) Government decree, which, on the other hand, enshrines the main innovations of the Directive. Effective as of January 1, 2012, the 218/2011. (X.19.) Government decree overruled the 143/2004. (IV. 29.) Government decree laying down specific procedural rules on procurement related to classified data, and procurements relating to the security of state. This specific Government decree is to be applied to all military procurement procedures started after January 1, 2012.

Both the 228/2004. (VII.30.) Government decree and the 218/2011. (X.19.) Government decree lay down rules on national and Community procurement rules, making frequent reference to the Act on Public Procurement. The structure of the government decrees follow that of the Act on Public Procurement,⁴⁷ and not the Directive 2009/81/EC.

Provisions of the security of information entailed in the Directive have been fully implemented in Article 28, para. 55 of 218/2011. (X.19.) Government decree. Under this paragraph, the contracting authority shall specify in the contract documentation the measures and requirements necessary to ensure the security of such information at the requisite level, when contracts involve, require and/or contain classified information. The Hungarian act allows for the contracting authority to require the tender to contain the same particulars as defined in Article 22 of the Directive, such as a commitment from the tenderer and the subcontractors already identified to appropriately safeguard the confidentiality of all classified information in their possession or coming to their notice throughout the duration of the contract and after termination or conclusion of the contract, in accordance with the relevant laws, regulations and administrative provisions.⁴⁸ The 228/2004. (VII.30.) Government decree on the other hand does not have a separate section or article on the security of information. Instead, it provides for the security of information of tenderers and their offers when laying down specific procedural rules.

Similarly, the rules on the security of supply (Article 23 of the Directive) have been completely transposed into the Hungarian law by the government decrees. Article 29, para. 56 of 218/2011. (X.19.) Government decree allows for the contracting authority to specify in the contract documentation (contract notices, contract documents, descriptive documents or supporting documents) its security of supply requirements. Just like in the Directive, there are eight types of

⁴⁶Government decree 191/2011 (IX.20.) amending the Government decree 228/2004. (VII.30.); the Government decree 87/2005 amending the Government decree 228/2004. (V. 5.), Government decree 191/2011. (IX. 20.) amending the Government decree 228/2004., the Government decree 295/2011 (XII.22.) amending the Government decree 228/2004. (V. 5.).

⁴⁷Act CVIII of 2011 on Public Procurement.

⁴⁸Article 22 (a) of Directive 2009/81/EC.

specific contract documentation that the contracting authority may require from tenderers, for example a certification or documentation demonstrating to the satisfaction of the contracting authority/entity that the tenderer will be able to honour its obligations regarding the export, transfer and transit of goods associated with the contract, including any supporting documentation received from the Member State(s) concerned.⁴⁹ Under the chapter on the Suitability of the Contractor and Subcontractor, the 228/2004. (VII.30.) Government decree also enlists the exact same requirements regarding the security of supply as the Directive. Rather interestingly however, Paragraph 28/A of the 228/2004. (VII.30.) Government decree begins with “In order to provide for the security of supply and information, the contracting authority may specify the following requirements (...)”, but the decree then only transposes the requirements that the Directive allows for the tender to contain inter alia in order to ensure the security of supply enlisted in Article 23 on the Security of Supply, but not those enshrined in Article 22 on the Security of Information.

Defence procurement proceedings are regulated in the 218/2011. (X.19.) Government decree as well as in the 228/2004. (VII.30.) Government decree. The rules set forth in the latter legal act were however subject to amendment by the 347/2011 (XII.30.) Government decree, in order to insure compliance with the 2009/81/EC directive. Thus, under the currently effective regulation, Community defence procurement proceedings may be:

- a) Restricted procedure
- b) Negotiated procedure with prior publication
- c) Competitive dialogue
- d) Negotiated procedure without publication
- e) Framework agreement.

National defence procurement proceedings can be:

- a) Negotiated procedure without prior publication
- b) Competitive dialogue
- c) Simplified procedure
- d) Framework agreement

Rules of the Community proceedings are to be applied in the event that the assumed value of the procurement equals to or exceeds:

⁴⁹See Article 23 (a) of Directive 2009/81/EC.

- a) 109 120 000 Hungarian forints in case of purchasing goods and services.⁵⁰
- b) 1 364 000 000 Hungarian forints in case of construction works.⁵¹

In line with the Directive, neither the 228/2004. (VII.30.) Government decree, nor the 218/2011. (X.19.) Government decree entail any restrictions for the negotiated procedure with publication, thus allowing parties to lead talks on procurement of goods and services of a more sensitive nature. While the negotiated procedure with publication is mentioned in both of the government decrees as a means of Community procurement (the value thresholds of which are defined in the 218/2011. (X.19.) Government decree), the 228/2004. (VII.30.) Government decree is the legal act that lays down the rules for this specific procedure. Starting with the prohibition of discrimination between the applicants, paragraph 57 of the 228/2004. (VII.30.) Government decree allows the contracting authorities to define two successive stages in order to restrict the number of applicants pursuant to Article 26 (3) of the Directive. The number of applicants may be restricted through the definition of the number of tenderers invited to the second stage. The number of applicants in the second stage must be at least three and must ensure the fair competition between tenderers. Should the number of tenderers be higher than the number of tenderers invited to the second stage, the contracting authority has to define the exact selection criteria and preferences in the tender notice. The selection criteria may be based on technical or professional suitability of applicants necessary for the fulfillment of the contract in question. Should the contracting authority intend to restrict the number of applicants at a later stage, it shall inform participants thereof in the publication of the tender.

For safety considerations, under para. 9 (1) of 228/2004. (VII.30.) Government decree, open procedures are excluded from the field of defence procurement, whereas negotiated procedures without prior publication,⁵² special procedures⁵³ and competitive dialogues⁵⁴ may only be held in the specific cases, where authorized by the Government decree.

Rules of subcontracting are laid down by Title III of the Directive. These provisions have been transposed into Hungarian law partly by the 228/2004 (VII.30) Government decree and partly

⁵⁰Value amended by para. 1 of 347/2011 (XII.30.) Government decree.

⁵¹Value amended by para. 1 of 347/2011 (XII.30.) Government decree.

⁵²The exhaustive list of cases can be found in para. 56 of 228/2004. (VII.30.) Government decree.

⁵³Remark: Special procedures can be found under para. 74/A of 228/2004. (VII.30.), the contracting authority may request the application of special procedures in the field of defence procurement, in the event that the attractive offer has been made by foreign governments, foreign ministries, foreign public bodies or international organisations and if the value of the contract does not exceed the threshold value defined in para. 10 (1) of the said decree. The Government decree allows for “special procedures”, in the event that the offer is recorded in an international agreement, memorandum, declaration of agreement or in any other official format and the Government or the competent minister has decided to accept the offer. Provisions of this specific paragraph are in line with Article 12 of the Directive on Contracts governed by international law.

⁵⁴Remark: Competitive dialogues can be found under para. 53/A (2) of 228/2004. (VII.30.) Government decree allows competitive dialogues in the event that the contracting authority is of the opinion that the restricted procedure and the negotiated procedure with prior publication would not allow the granting of the contract.

by the 218/2011 (X.19.) Government decree. Starting with the principles, Article 54, para. 27 of 218/2011 (X.19.) Government decree entails rules on the non-discrimination of subcontractors based on their nationality or country of establishment,⁵⁵ but, interestingly, neither of the Government decrees mention the requirement of transparency in subcontracting. Specific rules of subcontract notices set forth in Article 52 of the Directive have been fully transposed by para. 74/G of 228/2004 (VII.30) Government decree. Substantive provisions of subcontracting laid down in Article 21 of the Directive have been implemented by para. 27 of 218/2011 (X.19.) Government decree. In compliance with Community law, the Hungarian legal act allows the contracting authority to require or oblige the winner of the tender to subcontract a certain percentage, but not more than 30% of the contract value. The contracting authority is entitled to require information on the subcontractors and the share of the value to be subcontracted at any time.⁵⁶ The contracting authority may reject the subcontractors selected by the tenderer/main contractor in the course of the procurement procedure as well as in the course of the fulfillment of the contract. The rejection of subcontractors may only be based on criteria applied for the selection of the tenderers for the main contract. If the contracting authority/entity rejects a subcontractor, it must produce a written justification to the tenderer or the successful tenderer, setting out why it considers that the subcontractor does not meet the criteria.⁵⁷ Under para. 28 (2) of the 228/2004. (VII.30.) Government decree, when at least 10% of the contract value is subcontracted, the contracting authority may require documentation verifying the suitability of the subcontractor, such as the description of works delivered by the subcontractor or evidence that the subcontractor possesses all mechanical instruments and machines necessary to carry out the task etc.

Lastly, cooperative programmes with an R&D phase conducted by at least two member states are excluded from the scope of the 218/2011 (X.19.) Government decree, in compliance with Article 13 c) of the Directive.

The analysis of the implementation of the main innovations of Directive 2009/81/EC into Hungarian law has revealed that all essential provisions have been duly transposed. Thanks to the implementation of the Directive, the system of defence procurement is now more coherent and is in conformity with EU law. Furthermore, the system of defence procurement is now fully in line with the structure of public procurement, and only deviates from it in cases where its nature deems necessary. On the other hand, the application of the current patchwork system of the two government directives that are basically complementing each other is overly complicated and cumbersome. Therefore, while the fact that the Directive 2009/81/EC has been fully transposed into

⁵⁵See para. 54 (1) of 218/2011 (X.19.).

⁵⁶See para. 27 (2) – (3) of 218/2011 (X.19.) Government decree.

⁵⁷See para. 27 (7) of 218/2011 (X.19.) Government decree.

Hungarian law is to be applauded, it would however be desirable to pass a legal act that encompasses all relevant provisions of defence procurement in one single, unified structure.

5. The Implementation of Directive 2009/81/EC in Germany

German public procurement law, which is rooted in both national and European law, aims not only at securing the interests of enterprises and bidders but also at ensuring the application of the main principles of public contracting, namely transparency, competition and equal treatment, which are inherent in every tender procedure.⁵⁸

German public procurement law is characterized by a “multi-layered structure” of legal rules, which can be divided into three different levels of regulation:⁵⁹ The first level consists of legal rules regulating budgetary law (Federal and State Budgetary Regulations - BHO and LHO) as well as competition law (German Act Against Restraints on Competition - GWB).⁶⁰ The second level comprises the Procurement Ordinance (*Vergabeverordnung* - VgV) and the Utilities Regulation (*Sektorenverordnung* – SektVO) constituting a special rule with regard to utilities.⁶¹ The third level contains procurement regulations governing the major procedural provisions concerning not only the award of public works and service contracts (*Vergabe- und Vertragsordnung für Bauleistungen* - VOB/A,⁶² *Vergabe- und Vertragsordnung für Leistungen* - VOL/A)⁶³ but also concerning contracts, which have professional services as their object (*Vergabeordnung für freiberufliche Leistungen* - VOF).⁶⁴

As a Member State of the European Union, Germany is subject to EU law and is consequently under the obligation to transpose EU directives into its national law. This means that the public procurement system of the Union also applies to Germany, implying that German public procurement law must fully comply with the rules and regulations prescribed by EU law. In the course of the past decade, the influence of the Union on the German system of public procurement law has been increasing as a consequence of the adoption of the Procurement Directives, which

⁵⁸M. Burgi, 'Public Procurement Law in the Federal Republic of Germany', Annual Report 2012, http://www.ius-publicum.com/repository/uploads/09_02_2012_9_43_Burgi.pdf (last visited on June 3rd, 2012), p. 3.

⁵⁹Ibid.

⁶⁰Ibid.

⁶¹Ibid.

⁶²*Vergabe- und Vertragsordnung für Bauleistungen (VOB/A)*, available at: <http://www.bmvbs.de/cae/servlet/contentblob/44396/publicationFile/11321/vob-teil-a-und-b-ausgabe-2009-mit-berichtigung-vom-19-februar-2010.pdf> (last visited on June 3rd, 2012).

⁶³*Vergabe- und Vertragsordnung für Leistungen (VOL/A)*, <http://www.bmwi.de/BMWi/Redaktion/PDF/Gesetz/verdingungsordnung-fuer-leistungen-vol-a-2009property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf> (last visited on June 3rd, 2012).

⁶⁴*Vergabeordnung für freiberufliche Leistungen - VOF*, <http://www.bmwi.de/BMWi/Navigation/Service/gesetze,did=191328.html> (last visited on June 3rd, 2012); M. Burgi, 'Public Procurement Law in the Federal Republic of Germany', Annual Report 2012, http://www.ius-publicum.com/repository/uploads/09_02_2012_9_43_Burgi.pdf, p. 3.

have had a significant impact on the German public procurement sector.⁶⁵

The public procurement Directives 2004/17/EC and 2004/18/EC have been fully transposed into German public procurement law by the legal instruments mentioned above.⁶⁶ Further amendments on German Procurement Regulations entered into force in June 2010 for the purpose of better complying with EU law and must be observed by all German awarding authorities for all pan-European awards as of 10 June 2010.⁶⁷

Special emphasis must be put on the fact that German procurement law has as its most characteristic feature a dichotomy, meaning that if the value of contracts equals or even exceeds the established EU-threshold values, then pan-European invitations to tender must be issued according to sections 2 of the Procurement Regulations (VOB/A or VOF), while the pertinent budgetary laws of federal, state and local governments as well as the first sections of the VOB/A and the VOL/A are applicable to public contracts below the EU-threshold values.⁶⁸

German Procurement Regulations have a substantial statutory character for everything above the EU-threshold values since an effective legal protection for candidates and bidders with respect to pan-European contract awards is ensured by an independent legal review procedure in accordance with §§ 107 et seq. GWB. All procurements below the EU-threshold values are subject to internal administrative instructions, providing for no actionable rights in favour of the candidates or bidders to ensure compliance with the regulations of sections 1 of the VOB/A and the VOL/A.⁶⁹ Thus, full legal protection is in principle only granted for public contracts above the EU-thresholds.

Concerning the implementation of EU directives in the field of public procurement law, they are merely applicable to public contracts that are equal or exceed the established EU-threshold values.

If the contracts fall within the scope of directives by meeting the threshold criterion, then EU Law and its system of judicial remedies is applicable.⁷⁰ If the value of public contracts is below the established EU-threshold values, then those do not fall within the scope of the respective directive and are consequently subject to national rules and regulations.

For the procurement of military equipment, the German Ministry of Defence (*Bundesministerium der Verteidigung*) is generally subject to the entire German public procurement

⁶⁵Ibid.; M. Burgi, 'Public Procurement Law in the Federal Republic of Germany', Annual Report 2012, http://www.ius-publicum.com/repository/uploads/09_02_2012_9_43_Burgi.pdf (last visited June 3rd, 2012), p. 4.

⁶⁶'The International Comparative Legal Guide to Public Procurement 2011: A practical cross-border insight', Chapter 14 on Germany by L. Horn, http://www.cms-rpa.com/Hubbard.FileSystem/files/Publication/55c8a972-2a1e-416a-81f0-49d9298e5283/Presentation/PublicationAttachment/d4a4f991-b899-46b5-93b9-4b032cd01530/2011_International%20comparative%20legal%20guide_Public%20Procurement.pdf (last visited on June 3rd, 2012), p. 86.

⁶⁷Ibid.

⁶⁸Ibid.

⁶⁹Ibid, supra note 42.

⁷⁰K. Willenbruch and D. Aydinan, Public Procurement Law in Germany, <http://www.theworldlawgroup.com/files/file/docs/TW%20Procurement.pdf> (last visited on June 3rd, 2012), p. 2.

regime, with an exception of the following exemptions provided for under the Treaties and the directives on EU public procurement: Art. 346 TFEU according to which an exemption applies for the procurement of arms, munition and war material; and it must be highlighted that the award of contracts is exempted from public procurement rules, if

- 1) the contract can be classified as secret
- 2) its performance require to be accompanied by special security measures
- 3) this is required by the protection of Federal States' essential security interests.⁷¹

The Directive 2009/81/EC was adopted by the European Commission for the purpose of fostering, developing and sustaining a European Defence Technological and Industrial Base that is capability driven, competent and competitive.⁷² It aims at extending the application of EU Procurement law to defence and security, thereby tackling national protectionism in that field and support the movement towards a common European defence market.

The Directive's provisions entail special conditions which have been tailored to establish a common European market for defence equipment. By 21 August 2011, all Member States were obliged to adopt, modify and publish the laws, regulations and administrative provisions necessary to comply with the aims of the Directive. As of the end of the transition period, most of the Directive's provisions have direct effect irrespective of whether they are implemented into national law, meaning that the rights granted under Directive 2009/81/EC are enforceable before national courts, which are obliged to interpret existing national public procurement laws in accordance with the Directive.⁷³ Individuals can rely on the rights deriving from the Directive and challenge any actions of their contracting authorities or those of the Member States, resulting from a lack of implementation.⁷⁴ In addition, Member States can be held liable for damages for not having implemented the Directive within the scheduled time-frame.⁷⁵

Germany failed to implement the Directive within the implementation period and has generally shown only very slow progress in transposing the Directive into its national laws, inducing the European Commission to commence breach of treaty proceedings against Germany.⁷⁶

⁷¹See 'The International Comparative Legal Guide to Public Procurement 2011: A practical cross-border insight', Chapter 14 on Germany by L. Horn, http://www.cms-rpa.com/Hubbard.FileSystem/files/Publication/55c8a972-2a1e-416a-81f0-49d9298e5283/Presentation/PublicationAttachment/d4a4f991-b899-46b5-93b9-4b032cd01530/2011_International%20comparative%20legal%20guide_Public%20Procurement.pdf (last visited on June 3rd, 2012), p. 87.

⁷²See Preamble (3) of Directive 2009/81/EC.

⁷³'Application of the European Directive on Defence Procurement from 21 August 2011 onwards', http://www.bakermckenzie.com/files/Publication/7b54a542-5f6e-46ee-8add-ae6e02955046/Presentation/PublicationAttachment/bf2e510f-f74a-4366-8b26-b05cc593ed78/nl_germany_defenceprocurement_aug11.pdf (last visited on June 3rd, 2012).

⁷⁴Ibid.

⁷⁵Ibid.

⁷⁶'Implementing EU Defence Package: Pressure from the EU Commission', http://www.noerr.com/en/PortalData/1/Resources/8_broschueren_newsletter/Noerr_News_Implementing_EU_Defence_Package.pdf (last visited on June 3rd, 2012), p. 1.

At the end of January, Germany was requested to comment its failure to comply with its treaty obligations within two months.⁷⁷ The next step in the proceedings would be according to Article 258 TFEU to bring the matter of the European Court of Justice. However, the subsequent implementation efforts by Germany prevented the involvement of the ECJ. In the Commission's opinion, only a full and correct implementation of the Directive will lead to the desirable effect and ensure a transparent and open internal market.⁷⁸

Directive 2009/81/EC has not yet been fully transposed into German law, but the Federal Government supports since mid-2011 an interim solution by which the direct application of the Directive is clarified in considerable parts.⁷⁹ Furthermore, the existing provisions of VOL/A and VOB/A must be interpreted in conformity with the Directive.

For the implementation of Directive 2009/81/EC into German public procurement law a two-step approach has been pursued.⁸⁰

First, with the entry into force an act amending public procurement law in the field of defence and security (*Gesetz zur Änderung des Vergaberechts für die Bereiche Verteidigung und Sicherheit*)⁸¹ on 14 December 2011, essential elements of the Directive have meanwhile been transposed into the German Act Against Restraints on Competition and are more precisely enshrined in §§ 97 ff. thereof, thereby establishing a legal basis for further procurement regulations.⁸²

Secondly, the Directive's provisions on the procedure, particularly relevant in practice will be implemented into a procurement regulation on defence and security (*Vergabeverordnung für die Bereiche Verteidigung und Sicherheit* (VSVgV))⁸³ which has been decided by the Federal Cabinet (*Bundeskabinett*) on 23 May 2012.⁸⁴ The VSVgV will be fully applicable to the procurement of

⁷⁷Ibid.

⁷⁸Ibid.

⁷⁹Ibid, Government decree 191/2011 (IX.20.) amending the Government decree 228/2004. (VII.30.); the Government decree 87/2005 amending the Government decree 228/2004. (V. 5.), Government decree 191/2011. (IX. 20.) amending the Government decree 228/2004., the Government decree 295/2011 (XII.22.) amending the Government decree 228/2004. (V. 5.), p. 2.

⁸⁰ 'Publications of the Federal Ministry of Economics and Technology', <http://www.bmwi.de/BMWi/Navigation/Wirtschaft/Wirtschaftspolitik/oeffentliche-auftraege.did=190884.html> (last visited on June 3rd, 2012).

⁸¹ 'Gesetz zur Änderung des Vergaberechts für die Bereiche Verteidigung und Sicherheit', <http://www.bmwi.de/BMWi/Redaktion/PDF/Gesetz/aenderung-des-vergaberechts-fuer-die-bereiche-verteidigung-und-sicherheit.property=pdf.bereich=bmwi.sprache=de.rwb=true.pdf> (last visited on June 3rd, 2012).

⁸² Ibid.; Value amended by para. 1 of 347/2011 (XII.30.) Government decree; 'Publications of the Federal Ministry of Economics and Technology', <http://www.bmwi.de/BMWi/Navigation/Wirtschaft/Wirtschaftspolitik/oeffentliche-auftraege.did=190884.html> (last visited on June 3rd, 2012); Government decree 191/2011 (IX.20.) amending the Government decree 228/2004. (VII.30.); the Government decree 87/2005 amending the Government decree 228/2004. (V. 5.), Government decree 191/2011. (IX. 20.) amending the Government decree 228/2004., the Government decree 295/2011 (XII.22.) amending the Government decree 228/2004. (V. 5.), p.2.

⁸³ 'Vergabeverordnung für die Bereiche Verteidigung und Sicherheit (VSVgV)', <http://www.bmwi.de/BMWi/Redaktion/PDF/V/vergabeverordnung-verteidigung-und-sicherheit-entwurf.property=pdf.bereich=bmwi.sprache=de.rwb=true.pdf> (last visited on June 3rd, 2012).

⁸⁴ Ibid.; 'Publications of the Federal Ministry of Economics and Technology',

public contracts in the field of supply and services.⁸⁵ The VSVgV still requires the consent of the *Bundesrat* and is expected to enter into force in July or August 2012.

Until the full and complete transposition of Directive 2009/81/EC into German procurement law by the entry into force of the VSVgV, an official interim 'circular note' (*Rundschreiben*)⁸⁶ of the Federal Ministry of Economics and Technology from 26 July 2011 serves as a guide and transnational legal instrument to matters relating to supply and service contracts in the field of defence and security procurement.⁸⁷

This document has basically codified all essential elements and most important provisions and ensures the reliance on the rights given by Directive 2009/81/EC until its implementation process has been fully completed.

The three procurement principles enshrined in Article 4 of Directive 2009/81/EC are identically codified in § 97 I, II GWB, whereas the general details of judicial review are regulated in §§ 102 - 124 GWB. Again, it is of paramount importance to emphasize that the GWB does only apply if the established EU-threshold values are reached, which are laid down in Article 8 of Directive 2009/81/EC. This provision clearly states that the Directive shall apply to contracts which have a value of or above EUR 412.000 in case of supply and service contracts, while the amount of 5.150.000 applies to working contracts.⁸⁸ The interim 'circular note' clearly states that the thresholds as established by the EU shall apply.⁸⁹

Concerning the protection of classified information as addressed in Article 7 of Directive 2009/81/EC and the security information as specified in Article 22 of the Directive, the content has been one-to-one included into the interim 'circular note', implying that it can be fully relied on all rights enshrined therein.⁹⁰ The same also applies to security of supply as mentioned in Article 23 of the Directive.⁹¹ Moreover, the rules and regulations on subcontracting laid down in Article 21 of Directive 2009/81/EC have been identically transposed into §9 VSVgV, while no attention is given to them in the interim "circular note".

Defence procurement procedures are regulated in Articles 25 to 29 of Directive 2009/81/EC and comprise the following proceedings:

<http://www.bmwi.de/BMWi/Navigation/Wirtschaft/Wirtschaftspolitik/oeffentliche-auftraege.did=190884.html> (last visited on June 3rd, 2012).

⁸⁵ Ibid.

⁸⁶ 'Rundschreiben des BMWi vom 26.7.2011', <http://www.bmwi.de/BMWi/Redaktion/PDF/I/interim-schreiben-anwendung-der-rl-2009-81-eg.property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf> (last visited on June 3rd, 2012).

⁸⁷ Ibid.; 'Publications of the Federal Ministry of Economics and Technology',

<http://www.bmwi.de/BMWi/Navigation/Wirtschaft/Wirtschaftspolitik/oeffentliche-auftraege.did=190884.html> (last visited on June 3rd, 2012)

⁸⁸ Article 8 of Directive 2009/81/EC.

⁸⁹ Ibid.; M. Burgi, 'Public Procurement Law in the Federal Republic of Germany', Annual Report 2012, http://www.ius-publicum.com/repository/uploads/09_02_2012_9_43_Burgi.pdf (last visited June 3rd, 2012), p. 4. Rundschreiben des BMWi vom 26.7.2011, p. 2.

⁹⁰ Ibid.; Rundschreiben des BMWi vom 26.7.2011, p. 7.

⁹¹ Ibid.; Rundschreiben des BMWi vom 26.7.2011, p. 8.

- a) Restricted procedure⁹²
- b) Negotiated procedure with publication of a contract notice⁹³
- c) Competitive dialogue⁹⁴
- d) Negotiated procedure without publication of a contract notice⁹⁵
- e) Framework agreement⁹⁶

Pursuant to Article 25 of Directive 2009/81/EC contracting authorities may choose to award contracts by applying the restricted procedure, the negotiated procedure (Article 25 (2)) or by means of a competitive dialogue in accordance with Article 27 of the Directive.

The restricted procedure and the negotiated procedure with publication of a contract notice are equal according to the Directive, thereby excluding the application of § 3 EG section (2) and (3) VOL/A from their application. An open procedure as it is laid down in § 3(1) EG VOL/A is not prescribed by the Directive.⁹⁷

Concerning the procedural rules for restricted and negotiated procedures, the contracting authorities may rely on the rules codified in clause 2 of VOL/A, such as for instance § 3 EG sections (5) and (6), which correspond entirely with the Directive.⁹⁸

The guidelines given in the context of the competitive dialogue (Article 27) are in conformity with the requirements of not only Directive 2004/17/EC and Directive 2004/18/EC but also Directive 2009/81/EC.⁹⁹ Therefore, contracting authorities can rely on § 3 (7) VOL/A, if a competitive dialogue is supposed to take place, until the entry of the force of the VSVgV. Competitions in the sense of § 3 EG section (8) VOL/A do not fall within the scope of Directive 2009/81/EC.¹⁰⁰

During the transitional period, thus until the entry into force of the VSVgV, contracting authorities may in the cases specified under § 3 EG section (4) VOL/A rely on a negotiated procedure without publication of a contract notice in accordance with the Directive. They may invoke this procedure, in particular, in the following constellations:¹⁰¹

- (1) If also the shortened periods, which are prescribed for the restricted procedure and the negotiating procedure with publication of a contract notice, are not met because of urgency resulting from crises as further specified in Article 28 (1) (c) of the Directive.

⁹² Article 25 of Directive 2009/81/EC.

⁹³ Article 26 of Directive 2009/81/EC.

⁹⁴ Article 27 of Directive 2009/81/EC.

⁹⁵ Article 28 of Directive 2009/81/EC.

⁹⁶ Article 29 of Directive 2009/81/EC.

⁹⁷ Ibid.; Rundschreiben des BMWi vom 26.7.2011, p. 10.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

(2) In cases of research and development services as stated in Article 28 (2) (a) of Directive 2009/81/EC.

(3) For contracts related to the provision of air and maritime transport services for the armed forces or security forces of a Member State deployed or to be deployed abroad as further elaborated in Article 28 (5) Directive 2009/81/EC.

The rules and regulations on framework agreements have been implemented into § 4 EG VOL/A and are in conformity with the Directive.¹⁰² Thus, under the pressure of the European Commission Germany is in the process of fully implementing the procedures enshrined in Articles 25 to 29 of Directive 2009/81/EC into its national public procurement law. Moreover, the special role of research and development in the area of defence and security is of particular importance. Directive 2009/81/EC provides an exception for such services, which is however not applicable to the extent that research and development results remain exclusively with the authorities.¹⁰³ Strictly speaking, a further implementation and interpretation efforts of this exception can result in an exclusion of EU Procurement law.¹⁰⁴

The German legislator has implemented the provisions of Directive 2009/81/EC one-to-one in Article § 100 (4) No. 2 GWB and refrained not only from further restriction but also from further specification, resulting in a very broad interpretation.¹⁰⁵ No major changes to this approach have been introduced in the VSVgV.

The analysis of the implementation of Directive 2009/81/EC into German law shows that Germany has a delay in transposing the Directive's content into its public procurement law. Pushed by the European Commission, Germany has however partially amended its existing national laws on public procurement for the purpose of better meeting its obligations under EU law. Moreover, a specific procurement regulation on defence and security (VSVgV), which is expected to enter into force in July or August 2012, has been introduced by which in particular the Directive's provisions on the procedure will be fully and transparently implemented into German public procurement law. Until its entry into force, an official interim 'circular note' provides guidelines for supply and service contracts in the field of defence and security. As proven above, this document and the existing national laws on public procurement cover all essential elements and most important provisions of the Directive. Contract authorities can therefore fully rely on all rights given by Directive 2009/81/EC until its implementation process has been finalized. The analysis above permits to expect a full implementation of Directive 2009/81/EC in the forthcoming months.

¹⁰²Ibid.; Rundschreiben des BMWi vom 26.7.2011, p. 11.

¹⁰³Ibid.; See para. 54 (1) of 218/2011 (X.19.); 'Implementing EU Defence Package: Pressure from the EU Commission', http://www.noerr.com/en/PortalData/1/Resources/8_broschueren_newsletter/Noerr_News_Implementing_EU_Defence_Package.pdf (last visited on June 3rd, 2012).

¹⁰⁴Ibid.

¹⁰⁵Ibid.

While this development finds acclaim, the multi-layered structure of German public procurement lacks transparency, resulting in difficulties to distinguish EU law rules on defence and security procurement from national ones. It would therefore be advisable to codify all legal rules of the Directives into one unified legal code.

6. A Comparative Analysis and Critical Reflection of the Implementation of Directive 2009/81/EC: Barriers to a Common EU Defence Equipment Market

As the analysis of the implementation of Directive 2009/81/EC into Hungarian and German law clearly shows, some barriers have occurred with regards to the Commission's aim to create a truly EU Defence Market and assert its authority on defence matters.

First of all, there is a systematic barrier resulting directly from the Directive's scope of application. In order to trigger the application of Directive 2009/81/EC, the EU-threshold criteria must be met. For this purpose, the public contracts must be equal or exceed the established EU-threshold values specified under Article 8 of the Directive. If the value of public contracts is below the established thresholds, then those contracts do not fall within the scope of Directive 2009/81/EC and are consequently subject to national rules and regulations. The Member States can make use of the threshold criterion as loophole in the application of EU law, thereby ensuring the national influence.

A further barrier derives from the persistent endeavours of some Member States to adhere to national laws on defence and security procurement instead of working towards a common EU Defence Equipment Market. As the analysis above demonstrates, there are some Member States such as Hungary that have made an effort to implement Directive 2009/81/EC, while other countries have shown a significant reluctance towards the liberalisation of the European defence market. Germany belongs to the latter category as it has been proven above. The divergent attitudes are reflected in differences with respect to the implementation process in both countries. The Directive has been fully and within the scheduled timeframe transposed into Hungarian law, despite the fact that the relevant provisions of the Directive are scattered around in two government decrees making the application cumbersome.

Germany, in contrast, has shown a very slow progress in transposing the Directive's content into its public procurement law, resulting in a delay. Pushed by the European Commission, it is however expected to finalize the implementation process in the forthcoming months. The analysis provided above permits to assume that Directive 2009/81/EC will be fully implemented in Germany. Under the Commission's pressure, the Directive's content has already been fully codified in various transitional German legal instruments.

The main principles enshrined in Article 4 of the Directive have been transposed into both

Hungarian and German law, paving the way for a more transparent and fair system of defence procurement in accordance with the EU standards. Areas of primary importance in the field of defence and military procurement, provisions on the security of information and the security of supply have been fully implemented in both national regimes. In Hungary, Article 22 and 23 have been fully transposed into the government decrees, even though the structure of the transposition is of a rather complicated nature. In Germany, the relevant provisions on the security of information and the security of supply can be found word-by-word in the interim circular note, implying that it can be fully relied on all rights enshrined therein. However, this is only a transitional solution until the final official legal document enters into force. The threshold amounts for contracts as specified in Article 8 of Directive 2009/81/EC have again been fully transposed into both national legal systems. Procurement procedures above the threshold amounts are in both countries identical to those enshrined Chapter V of the Directive. The negotiated procedure with prior publication notice does not entail any restrictions in either of the regimes in order to allow contracting authorities to lead extensive talks with the tenderers. The Hungarian legislator has even lived with the opportunity provided by Art. 26 (3) of the Directive and has introduced a two-stage procedure in order to restrict the number of tenders in the negotiated procedure with publication of contract notice. Open procedures have been excluded from both systems, due to the sensitive nature of defence procurement. Extensive rules on subcontracting have been fully implemented in Hungary, however, the respective rules are partly to be found in 228/2004. (VII.30.) Government decree and partly in 218/2011 (X.19.) Government decree, which does not necessarily make the application thereof uncomplicated. The rules and regulations on subcontracting as laid down in Article 21 of Directive 2009/81/EC have been identically transposed into §9 VSVgV, which is however not in force yet. The interim circular note does not address them specifically and neither does one of the other legal documents. Cooperative programmes with an R&D phase conducted by at least two member states are excluded from the scope of the Directive. This rule has been transposed into Hungarian law by the 218/2011 (X.19.) Government decree, whereas it has been implemented in Germany one-to-one in Article § 100 (4) No. 2 GWB in accordance with the Directive.

The double-layered structure in Hungary and the multi-layered structure of German public procurement law, lack transparency resulting in difficulties to distinguish EU law rules on defence and security procurement from national ones. The rules of Directive 2009/81/EC are in both countries divided into separate legal instruments. It would therefore be desirable to codify all legal rules of the Directives into one unified legal code.

To sum up, the comparative analysis of the implementation process demonstrates that both countries have identically transposed the essential elements and most important provisions of Directive 2009/81/EC into their respective national legislation. While Hungary has already fully

transposed the Directive's content within the scheduled timeframe, Germany is expected to fully implement the Directive in the forthcoming months. Strictly speaking, Germany has also already fully transposed the Directive's content into its national public procurement law, but some fundamental elements are codified in transitional legal documents instead of permanent ones. Germany's transitional solutions are a result of the Commission's persistent pressure to push all Member States to implement Directive 2009/81/EC in order to create a common European defence market. The European Commission is determined to tackle national defence market protectionism by applying the internal market principles to the defence and security sector, thereby fostering open competition and deeper economic integration.

However, it is evident from the observations above that Directive 2009/81/EC and a common European defence market are not equally welcomed by all Member States. Previous attempts to consolidate the demand at the European defence market – such as the establishment of the *Organisme Conjoint de Cooperation en matiere d'Armement* (OCCAR) and the European Defence Agency and the 2007 defence package – were also met with mixed enthusiasm.¹⁰⁶

Germany has traditionally been one of the Union's leading arms producers and the German defence industrial policy can therefore be characterized as a protectionist one. As one of the main arms-producing Member States, Germany adheres to national sovereignty in the field of defence procurement and is therefore in favour of defence equipment procurements within its national boundaries.¹⁰⁷ The 2006 Defence White Paper and the Joint Declaration of the Defence Ministry and the Federation of German Industries of 2007 have both made pleas for the maintenance of remarkably broad industrial sectors. On the other hand, however, the German government is in favour of market liberalization on the long run, since the sharing of common functions (eg. maritime or air security) could be beneficial for Member States. Furthermore, the enhanced European cooperation could save significant resources by preventing double spending – which is one of the primary goals of the Directive. Germany's rather decelerated mode of implementation has not only hindered multinational cooperation, but has also hampered the fulfilment of urgent operational demands.¹⁰⁸ This explains the Commission's threat to involve the European Court of Justice if Germany does not meet its obligation to fully transpose Directive 2009/81/EC into its national legislation. In the long run a more “cautious approach” will be adopted by the European Commission in order to tackle national protectionism and nationally-oriented programmes by the

¹⁰⁶ 'Challenges for the German Defence Industry', http://www.pwc.de/de_DE/de/industrielle-produktion/assets/CEO_Agenda_for_2030.pdf (last visited on June 3rd, 2012), p. 3.

¹⁰⁷ Ibid.; J. Edwards, 'The EU Defence and Security Procurement Directive: A Step Towards Affordability?', International Security Programme Paper ISP PP 2011/05, http://www.chathamhouse.org/sites/default/files/0811pp_edwards.pdf (last visited June 3rd, 2012), p. 2.

¹⁰⁸ A. Seaboyer, 'Budgeting for Defence', March 2011, IP Journal, <https://ip-journal.dgap.org/en/ip-journal/topics/budgeting-defense> (last visited on June 3rd, 2012).

main arms-producing nations such as Germany.¹⁰⁹ It is in the Commission's interest to help to reduce equipment prices and slowly establish a system of case law for non-sensitive national programmes, thereby increasing consolidation, improving competition and lowering prices for non-sensitive national programmes.¹¹⁰

On the other side of the token, Hungary has, due to its economic background, a considerably less ambivalent stance regarding the defence market liberalization. Once an important military equipment supplier of the USSR, Hungary's defence industry has undergone radical changes following the Cold War Era. Following its peak in 1988, the defence industry faced a downward trend with the collapse of the Soviet Union. Production decreases, personnel lay-offs, company closures, business restructuring activities, and corporate privatization processes have shaped the industry in a negative way, yet, despite the high cost of job and infrastructure losses, the Hungarian defence industry has been able to transform itself into a more efficient, flexible, and internationally competitive branch of the national and international economy.¹¹¹ Based on the developments in the defence industry, the incumbent conservative government aims to modernize the Hungarian Armed Forces – the condition of which was exacerbated by the global economic downturn that has hit Hungary hard. Another important aim of the government's so-called "Hadik Strategy" is to strengthen the Hungarian defence industry in order to boost foreign export of military equipment.¹¹² To that end, Hungarian defence industry companies have formed a network with the participation of four defence industry companies owned by the Hungarian Ministry of Defence in the hope that the defence business cluster can win big state tenders.¹¹³ It can therefore be concluded that the liberalization of the European defence market would be to the benefit of the Hungarian firms and economy, explaining Hungary's readiness to implement Directive 2009/81/EC into its national legislation and adapt its national standards to the new market conditions.

It becomes clear that not only legal, but also economic and in particular political reasons play a major role in encouraging or discouraging Member States to support an initiative of the European Commission. Member States pursue primarily their national interests. Even though they are obliged to comply with EU law, they can however impose barriers to the Commission's aims by showing a slow progress in implementing EU law into their national laws – just as Germany did

¹⁰⁹ Ibid.; J. Edwards, 'The EU Defence and Security Procurement Directive: A Step Towards Affordability?', International Security Programme Paper ISP PP 2011/05, http://www.chathamhouse.org/sites/default/files/0811pp_edwards.pdf (last visited June 3rd, 2012), p. 2.

¹¹⁰ Ibid.

¹¹¹ J. Kiss, 'The Transformation of the Hungarian Defence Industry', <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0C54E3B3-1E9C-BE1E-2C24-A6A8C7060233&lng=en&id=16672> (last visited on June 3rd, 2012).

¹¹² 'Orientpress: Hende: Cel a magyar hadiipar ujjaelesztese', February 2012, <http://www.orientpress.hu/95705> (last visited on June 3rd, 2012).

¹¹³ 'Budapest Business Journal: Hungarian defence industry companies establish network', April 2012, http://www.bbj.hu/business/hungarian-defense-industry-companies-establish-network_63239 (last visited on June 3rd, 2012).

while transposing Directive 2009/81/EC into its national public procurement laws – or by finding loopholes to bypass EU law. Article 346 TFEU constitutes for instance such a loophole since it facilitates national defence industrial protection, thereby imposing a serious barrier on Directive 2009/81/EC. Depending mainly on its ability to add value by making defence-industrial manufacturing more efficient and affordable, the Directive will either prove to be a success or failure. In any case, it is undeniable that it constitutes a major step in creating a common European defence market. In the very long run, the prices of military equipment can only become significantly lower by tacking industrial duplication in the EU, what will require a shift in thinking towards sharing more projects to reduce costs and avoid legal conflicts.¹¹⁴ This may eventually result in the creation of a truly EU Defence Equipment Market.

7. Conclusion

This paper has focussed on the implementation of the Directive on EU Defence and Security Procurement as a major step towards creating a truly European Defence Equipment Market. For this purpose, it has aimed to establish to what extent Directive 2009/81/EC has been transposed into Hungarian and German national laws in accordance with EU law.

The analysis has established that the Directive has been fully and within the scheduled timeframe transposed into Hungarian law and also in accordance with EU law. Germany, in contrast, has shown a very slow progress in transposing Directive 2009/81/EC into its national public procurement law, resulting in a delay. Pushed by the European Commission, the Directive's content has already been fully codified in German legal codes on public procurement and in transnational regulatory instruments, being therefore in a legislative limbo. Germany is expected to finalize the implementation process in the forthcoming months. Thus, the comparative analysis of the implementation process demonstrates that both EU Member States have identically transposed the essential elements and most important provisions of Directive 2009/81/EC into their respective national legislation, permitting to classify the overall quality of implementation as very good.

It has furthermore been pointed out that Germany's intention to protect its national champions from the enhanced competition resulting from the market liberalization has made it more reluctant to transpose the Directive than Hungary. The latter has seen an opportunity in the new unified defence procurement regime for its economy and its further development, explaining Hungary's readiness to implement Directive 2009/81/EC into its national legislation and adapt its national standards to the new market conditions.

¹¹⁴ Ibid.; J. Edwards, 'The EU Defence and Security Procurement Directive: A Step Towards Affordability?', International Security Programme Paper ISP PP 2011/05, http://www.chathamhouse.org/sites/default/files/0811pp_edwards.pdf (last visited June 3rd, 2012), p. 2.

The analysis has also identified various barriers, hindering the creation of a truly European Defence Equipment Market. However, irrespective of the imposed barriers and national interests of the Member States, it is undeniable that Directive 2009/81/EC constitutes a milestone in creating a common European defence market by providing a framework for cross-border defence procurement within the Union. The Directive can serve as tool to tackle industrial duplication in the Union and create a truly European environment, which is marked by cooperation, mutual trust and acknowledgement of shared interests. In order to achieve this goal, it is of paramount importance to implement Directive 2009/81/EC fully and adequately in all Member States in order to further liberalize the European defence market. Overcoming the current fragmentation and thereby the consolidation and centralisation of the demand side of the European defence market would be essential. Should the Member States of the European Union fail to act as a unit in the common defence market, the EU might fall behind its biggest competitor the United States and the newly emerging global actors such as China or India and could therefore loose its leading role in the global economy and military.