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Recent EU developments in Defense Procurement & Reform of Arms Transfer Licenses

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 - Pages on defense procurement on our website

http://www.buyusa.gov/europeanunion/eu_defense_procurement.html



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Agenda

- Overview of EU Defense Procurement
 - Context of EU reform of acquisition
 - EU Directive on defense procurement
- Overview of European Defense Agency
 - Voluntary Codes of Conduct
- Tenders Databases
- Overview of EU reform of Licensing
 - Context of Export Controls
 - EU Directive on Intra-EU Transfers



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Introduction

- New EU laws affect US businesses selling defense and security equipment in the EU
- With new EU laws, defense equipment comes under EU Single Market rules
- Ongoing US export control reform & EU transfers/licensing reform



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EC Defense Package

- Market situation
 - European defense procurement concerns linked to the establishment of a pan-European defense market
 - Ensuring conditions for availability of supply: organizing transfers within the EU through reform of licenses
 - Fragmentation, lack of European cooperation
- Solution: “EC Defense Package”

1. EU Defense Procurement Directive
2. Intra-EU Transfers Directive

→ Establishing a European defense industrial base in support of European Security & Defense Policy goals



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Defence Procurement - the legal regime

- International level:
 - WTO: GPA “Government Procurement Agreement”
- European level
 - Treaty on the Functioning of the European Union (“TFEU”)
 - New EU Directive 2009/81 – the “Defence Directive”
- National Level
 - laws
 - practices of the Member States for contracts not covered by any of the above



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EU Defense Procurement Directive

Objectives:

- to introduce competition into defence purchasing
 - based on the principles of transparency and non-discrimination
 - resulting in a common procurement process across the EU
 - NOT intended as a protectionist measure

- to have a process that is "fit for purpose"
 - introduced defense-specific measures e.g. on Security of Supply, Security of Information and sub-contracting

Who does it apply to?

- all 27 EU Member States (plus Norway, Iceland)

What is the timeframe for its introduction?

- Directive to be transposed into national legislation by August 21, 2011
- Guidance Notes from the European Commission winter 2010



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Scope of the Defence Directive

- Military equipment;
 - Sensitive security equipment
 - Supplies, works and services contracts
-
- "Military equipment":
 - specifically designed or adapted for military purposes, intended for use as an arm, munitions or war material.
 - "Sensitive equipment/works/services":
 - means equipment, works and services for security purposes, involving, requiring and/or containing classified information.



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Defence contracts were usually excluded from Community law

- Member States used exemption under Article 346 TFEU:
 - exempts the disclosure of information contrary to essential security interests
 - allows Member States to take whatever steps they think necessary to protect their essential security interests connected with the production of, or trade in, military equipment.
- In the past:
 - there was systematic recourse to Article 346 to procure outside Community law
 - 85% of Member States' defense budgets are spent domestically
- European Commission objective:
 - reduce recourse to Article 346 – not suppress it



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Expected Impact: Positive Aspects

- No “European Preference”
 - Contracting authorities are free to choose to include U.S suppliers
 - 14 EU member States signed U.S. Reciprocal Defense Procurement MoUs: obligation to treat U.S. suppliers like domestic suppliers
- Increased transparency
 - All covered contracts must be advertised in the EU Official Journal
- Increased competition
 - obligation to have a minimum of 3 bidders for each contract opportunity
- The flexible “negotiated procedure” is likely to be standard....



Other Positive Aspects: Protest Mechanism

- Protest mechanism available
 - Before national courts
 - For any breach of the Directive or principles of EU law
- When?
 - During the procedure, during the standstill or after contract award
- Remedies?
 - Set aside of any illegal decision (pre-contract award only)
 - Damages (pre or post-contract award)
- NB: new remedy of ineffectiveness for some concluded contracts!
 - Significant deterrent to unjustified use of Article 346 TFEU



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Other Positive Aspects: EU Enforcement

- European Commission monitors correct application of EU procurement law in defense contracts !
- European Commission may launch investigation before or after contract signature:
 - On its own initiative
 - Or following a complaint from any interested party: open to US-based suppliers! (Contact: U.S. Mission to EU)
- Procedure?
 - European Commission challenges the Member State before the European Court of Justice
 - Member States can be condemned by the European Court of Justice for violating EU Directives or EU Treaty principles and forced to remedy their breach



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Other Positive Aspects: Principles of EU Law Apply

- These principles of EU law govern the bid process
- Breach of these principles can be challenged before the national courts or the ECJ
- They comprise:
 - equal treatment
 - non-discrimination on the basis of nationality
 - transparency
 - proportionality
 - good administration



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EU Directive Expected To Change Offsets Practices!

- “Offsets requirements are restrictive measures which go against the basic principles of the Treaty.”
- “Since they violate basic rules and principles of primary EU law, the Directive cannot allow, tolerate or regulate them.”
- “Any legislation and/or policy which makes offsets requirements mandatory for all or certain defense and/or security procurement contracts constitute an infringement of the Treaty”.

EC Guidance Notes on Offsets



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EC argument: “*Offsets are Incompatible with EU Law*”

- Offsets are “discriminatory”

“Offsets are a legally unacceptable market distortion”

↔ Principle of non-discrimination between economic operators (EU Treaty)

“Offsets give priority to nationality over competitiveness”

↔ Principle of non-discrimination on basis of nationality also in the (EU Treaty)

- *Offsets are about economic justifications*

↔ Protection of national security interests



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Indirect Offsets: not allowed under the Directive!

- Indirect = not related to the object of the contract
- Both civil and military offsets are concerned!
- Contract performance conditions
 - Must be compatible with Community law: not discriminatory
- Contract award criteria
 - Must be linked to the object of the performance of the contract
- See Report on “New EU Policy on Offsets” for more details
http://www.buyusa.gov/europeanunion/security_defense.html



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Allowed Offsets?

- Security of Supply

Direct offsets allowed: MS may “in certain strategic sectors [develop] key industrial capabilities on their own territory and not depend on non-national suppliers”.
EC Guidance Notes on Security of Supply

→ *“The requirement is acceptable – depending on the form!”*

SoS may be used as: selection criterion, award criteria or condition of performance of the contract.

But: “the nationality of a supplier cannot by itself be considered as a SoS requirement”.

- Subcontracting provisions

= an alternative way to secure supply chains

→ Driving competition into the supply chain of prime contractors

Primers may be requested to conduct a competitive procedure to find the best subcontractor; various options possible

See Guidance Notes on Subcontracting



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Defence specific issues - Security of information

- Introduction of rules with regard to handling of sensitive information enabling:
 - bidders to be evaluated (and excluded) at the selection stage on their track record and ability to handle such information
 - evaluation of proposed means of performing the contract and measures for compliance with conditions for performance of the contract



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Defence specific issues - Security of supply

- Introduction of new rules allowing Contracting authorities to:
 - Ask for certification/ documentation regarding bidder's ability to honour commitments
 - Require a commitment from the bidder to establish/maintain the capacity required to meet additional needs resulting from a crisis
 - Indication of any restriction on the contracting entity regarding disclosure, transfer or use of products;
 - Documentation demonstrating that the organization & location of the bidder's supply chain will allow it to comply with the requirements concerning SoS.



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The European Defense Agency

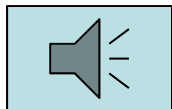
- Procurement policy
- Codes of conduct



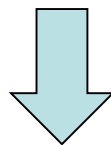
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Shaping Procurement Policy

- EDA = Agency of the EU Council:
Supports the Member States in their intergovernmental activities
- Goals: - Military capabilities
 - Cooperation between Member States
 - Defense research and technology



European Defense & Technology Industrial Base



Develop Market Tools

- Procurement guidelines & tenders databases
Promoting the development of a European defense market
Codes of conduct: cooperation & encourage cross-border bidding

<http://www.eda.europa.eu>



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EDA: Voluntary Codes of Conduct - *not under EU Law*

- **EDA Code of Conduct on Defense Procurement**
Transparency, competition, equal treatment
- **EDA Code on Best Practices in the Supply Chain**
Competition and opportunities for subcontractors
- **EDA Code of Conduct on Offsets (October 2008)**
100% maximum of contract value – Since July 2009
Offsets clearly stated in contract documents
Less weight as award criteria
→ EDA Offsets Portal: Members offsets policies: www.eda.europa.eu/offsets/
- EDA Codes of Conduct apply to contracts exempted from EU Law under EU Treaty Art 346
↔ EU Directive apply to contracts covered under EU law (EU Treaty)



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Two Types of Defense Contracts in the EU

- Contracts covered under the EU Directive
 - Principles of EU law apply
 - Competition, advertising, transparency
 - No indirect offsets allowed; new rules on subcontracting
 - Recourse to national courts + complaint to EC
- Contracts not covered under the EU Directive
 - Exemption under Art 346 TFEU invoked
But: conditions of exemption may be investigated by EC!
 - EDA Code of Conducts on Procurement, Supply chain and Offsets
 - No protection under EU law – no complaint to EC



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Tenders Databases

- European Defence Agency databases
 - government contracts
 - subcontracts with European primers
- EU Official Journal
- CSEU Tenders Databases



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European Defence Agency Tenders Databases

EDA Electronic Bulletin Board: <http://www.eda.europa.eu/ebbweb/>

- Government contracts

Contracts for which conditions of Article 346 apply, but that EU governments want to open to competition

“Vade Mecum”: lists all 26 pMS’ defense procurement policies, regulations, procedures, contact points, offsets policies

<http://www.eda.europa.eu/EbbWeb/vademecum.aspx>

- Subcontracting opportunities

Contracts for suppliers to large European defense companies (Thales, MBDA, Quinetiq, Diehl, BAE, MBDA, SAFRAN, etc.)



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EU and CSEU Tenders Databases

- EU Official Journal
Tenders Electronic Daily
Consultants licensed to resell targeted lists of tenders
<http://ted.europa.eu/TED/main/HomePage.do>
- Our CSEU Tenders Database
All contracts covered by the WTO/GPA
US-based suppliers allowed to bid with US-sourced equipment
Average 10,000 calls for tender advertised
Select “Defence/police” contracts; use keyword search
http://www.buyusa.gov/europeanunion/eu_tenders.html



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Public Procurement Opportunities in Europe

Netherlands/The Hague: Unmanned underwater vehicles

Document No.:	136505-2011
Document type:	Invitation to tender
Publication date:	2011-04-29
Due-date:	2011-06-08 00:00:00
Contract type:	Supplies
Objects:	Unmanned underwater vehicles
Awarding authority:	MINISTERIE VAN DEFENSIE

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Full text

CONTRACT NOTICE
 Supplies
 SECTION I: CONTRACTING AUTHORITY
 I.1) NAME, ADDRESSES AND CONTACT POINT(S)
 Ministerie van Defensie
 Van der Burchlaan 31
 Contact: Defensie Materieel Organisatie
 Attn: D.J.E. Pronk
 2597 PC Den Haag
 NETHERLANDS
 Tel. +31 703164423
 E-mail: dje.pronk@mindef.nl
 Fax +31 703163577
 Internet address(es)
 General address of the contracting authority <http://www.defensie.nl>
 Further information can be obtained at: As in above-mentioned contact point(s)



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The Intra-EU Transfers Directive

- Harmonization, simplification of transfers within the EU
- Respect of export control obligations
- Negative impact on circulation of U.S. equipment in EU:
a comparative disadvantage for US industry



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The Intra-EU Transfers Directive 2009/43/EC

- What is it all about?

New rules for transfers between EU Member States of military equipment from EU Common Military List

→ Harmonization: common tools, common language

→ Simplification: common company certification

- Why should we care?

- New rules may apply to European systems that include U.S. components ↔ Respect of ITAR provisions

- Creation of a public Central Register of European certified defense companies that are recipient of transfers

- Implications ?

- A comparative advantage for European holders of a Transfer license in procurement decisions

- Opening supply chains in more “*predictable*” conditions = Boosting competitiveness of European defense suppliers



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Harmonization, Simplification

Defense transfers between EU Member States are considered as potentially “safe”

- Common tools: General and Global Licenses in all EU Member States
 - multi-purpose licenses (allowing several transfers to several recipients), multi-country destinations
 - Individual Licenses become the exception
- Common language: EU Military List
- Common Certification: recognition of defense companies reliability
 - Recipients of defense transfers to be certified according to agreed criteria throughout the EU
 - Strong company internal compliance program
 - Certification expected to ease integration of SMEs in the supply chain of large integrators

Better integration of EU armed forces



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Respect of Export Control Obligations

- For export of products under transfer license: proof of compliance with the terms of the license's export limitations
→ **compatibility with ITAR ensured**
- Safeguard clause!
Transfer License may be withdrawn + Penalties
Company Certification may be revoked
Obligation to inform the EC
→ **Enforcement:** the European Commission may take a Member State to the European Court of Justice if the Directive is incorrectly applied
- **Central Register of certified companies**
Publicly available on EC website
Updated by Member States
= future tool to verify reliability of European certified recipients!



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Direct Negative Impact on Circulation of U.S. Equipment in the EU

- “*More predictable deliveries = An Incentive to Buy European*”!
- Security of Supply issue
Holding a General License = holding a trump card:

**A security of supply comparative advantage
for European industry in some procurement
decisions**

“Facilitating transfers complements the proposal on defense procurement: indeed, open defense markets presuppose a reasonable expectation that ordered products will be delivered without undue administrative obstacles”.



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Conclusion

- Reforms of acquisition processes + export control reforms: ongoing on both sides of the Atlantic
- Progressive transition from national market based approach to a European one
- MODs budget cuts → EU encourages better security of supply measures among its Member States
- Different way of doing business:
 - take into account new actors from European institutions;
 - take advantage of new transparency obligations and enhanced competitive procedures
- Adapt your offers to new EU rules: become aware of your new rights and obligations, and those of contracting authorities



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Thank you!

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