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DRAFT REPORT

on the implementation of Directive 2009/81/EC, concerning procurement in the fields of defence and security, and of Directive 2009/43/EC, concerning the transfer of defence-related products
(2019/2204(INI))

Committee on the Internal Market and Consumer Protection

Rapporteur: Kris Peeters

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EXPLANATORY STATEMENT - SUMMARY OF FACTS AND FINDINGS

Procedure and sources

On 6 November 2019, the rapporteur was entrusted with the task of preparing a report on the implementation of 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 (hereinafter the ‘Defence Procurement Directive’)¹ and Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community (hereinafter the ‘Transfers Directive’)².

The purpose of this implementation report is to inform Parliament about the state of implementation of the two Directives in order to allow the plenary to draw conclusions and to make recommendations for concrete actions to be taken, whether in terms of improving implementation or possibly proposing legislative revisions. The report will take stock of the implementation and application of the two Directives in Member States, their effect on opening up the internal market for defence products and establishing a European Defence Equipment Market (EDEM), and their contribution to the consolidation of the European defence and technological industrial base (EDTIB), with a focus on SME involvement.

Since his appointment, the rapporteur has collected information and relied on a number of sources in the preparatory work on this report, including the following:

- an online exchange of views with two experts and the shadows rapporteurs, held virtually on 23 June 2020;
- Study on the implementation of the “EU Defence Package: Defence Procurement and Intra Community Transfers Directives” by the European Parliament Research Service (DG EPRS), finalised in September 2020;
- a meeting at technical level with DG DEFIS on 15 July 2020.

As a result of the findings gathered through these sources, the rapporteur identified the following main three areas of focus for the present report: the need for better implementation and enforcement of the Defence Package, the prospects for the establishment of a European Defence Equipment Market (EDEM), and the ascertainment of the current level of participation of SMEs in defence procurement markets.

Defence Package - introduction

The objectives of both Directives — comprising the so-called ‘Defence Package’ — was to open up the internal market for defence products, facilitate cross-border procurement, and build an EU-wide industrial base in the European defence and security sectors. There were delays in many Member States in transposition and implementation. The Commission

¹ OJ L 216, 20.8.2009, p. 76–136.

² OJ L 146, 10.6.2009, p. 1–36.

completed its first evaluation report in 2016, taking stock of the implementation practices from 2009 until 2016. While the Commission had difficulties in gathering sufficient input from Member States, it concluded nonetheless that no revision of the Directives was necessary. At that time, IMCO decided not to take any action in terms of replying to the evaluation.

Need for better implementation and enforcement

The Rapporteur believes that better implementation of both Directives remains crucial in order to achieve fully the objectives of the Defence Package. Continuing problem of uneven use and low degree of application by Member States of both Directives is striking and moreover, exacerbated by the impact of COVID-19, Brexit, and future defence spending cuts, as well as by budgetary constraints on R&D and R&T. In this context, it is important to underline that the Commission has initiated a number of infringement proceedings. Most recently, five infringement cases were launched in 2018, out of which two cases remain pending.

Defence Procurement Directive

In order to improve the effectiveness of Defence Procurement Directive and in turn its efficiency, with the aim of increasing competition, transparency and non-discrimination across Member States, the Directive has to be effectively implemented. However, the Rapporteur sees that the essential impediment to full and proper implementation of that Directive, remains:

- the systematic use of the exclusion provision by Member States under the Directive as well as Article 346 TFEU foreseeing solely an ex-post invocation in case of potential litigation, despite the interpretative guidance³ issued by the Commission. It has to be underlined that several Member States introduced in their legislation a specific procedure applying to contracts covered by article 346(1)(b) TFEU, still making it difficult to assess whether the article 346 exception has been used for justified reasons of protection of national essential security interests, or just as a way to limit the application of Directive 2009/81/EC. That raises questions whether the issue of exclusions has still to be addressed both in legislative terms (in order to limit the use) and in terms of control and enforcement action by the Commission;
- the insufficient level of cross-border penetration and of SME participation in defence contracts;
- the low level of cooperation, common planning, common understanding of needed defence capabilities, and alignment on technological and strategic sovereignty within the Union.

At the same time, the Rapporteur would like to underline some positive trends on the progressive implementation of the Directive:

³ Commission notice on guidance on cooperative procurement in the fields of defence and security (Defence and Security Procurement Directive 2009/81/EC) (2019/C 157/01), and Commission notice on guidance on the award of government-to-government contracts in the fields of defence and security (Article 13(f) of Directive 2009/81/EC of the European Parliament and of the Council) (2016/C 450/01).

- the increasing number of contract notices and contract award notices by Member States (Tenders Electronic Daily (TED) data), which is still quite recent in comparison to non-defence procurement Directives. However, this increasing trend seems not to be apparent when it comes to the voluntary ex-ante transparency notices;
- increasing publication rate (i.e. the proportion of procurement that have been tendered competitively through TED) from 8,5 % in the 2011–2015 period to 21,14 % over the years 2016–2018, just to compare with the rate of procurements tendered under the general Directive which accounted for 24 % in average.

Transfers Directive

The 2016-Commission-evaluation identified a number of barriers to effective application of the Transfers Directive, resulting either from its transposition or from its provisions. Amongst the main issues identified were the need to increase uptake of the existing legislative framework on transfers of defence-related products, to improve the availability of General Transfer Licences ('GTLs') throughout the Union, and to examine the limited application of the certification scheme.

Major problems seem to originate from the lack of harmonisation in the implementation of GTLs across Member States, slow uptake of new licencing options and certification, and a varied level of the extent to which possible exemptions from prior authorisation had been taken up between Member States. While some Member States use all the possibilities for exemptions offered by the Directive, some only use few options and some do not use any. Moreover, transfers between Member States remain a complicated issue that continues to create a lot of administrative burden. That consideration refers especially to the use of General Transfer Licences, where bureaucracy and persisting divergences between Member States on exports to third countries constitute main obstacles. The Rapporteur believes that this necessitates some improvements regarding a common understanding of which items are sensitive and need to be controlled, and which ones are not.

Establishment of a European Defence Equipment Market (EDEM)

Procurement policy is only one of several contributing factors to a long-standing Union ambition to develop the EDEM and ensure the efficiency and competitiveness of the EDTIB. Numerous other linked issues have become increasingly relevant in recent years, including emerging Member State consensus on the need for technological and strategic sovereignty, the need for greater defence spending overall and greater investments in key technology and capabilities, as well as an evolving security landscape. An in-depth analysis of the interplay of the Defence Package with other EU defence policy initiatives (PESCO, EDF, CARD, EDAP) is an additional dimension of consideration going beyond the scope of this report. However, taking into consideration the complexity of the defence market in the EU, the establishment of a fully-fledged EDEM remains a real challenge calling for more coherent procurement and industrial policy. To this end, as stressed in many studies, the quasi-total absence of dedicated NACE or NC codes hinders any attempt to measure the evolution of the structure of the European defence industry. In absence of such data, it is merely impossible to assess the true Europeanisation of defence value-chains (especially as they have been experiencing a relative hybridisation with non-defence ones, such as electronics) or the cross-border market access of defence SMEs and mid-caps.

However, the Rapporteur believes that the objectives of the Defence Package Directives, namely fostering competition, transparency and non-discrimination across Member States, can strongly contribute to the establishment of the EDEM and its potential remains to be fully developed.

Participation of SMEs

The principal issues faced by SMEs in the European defence procurement market were summarised in the Commission Recommendation (EU) 2018/624 on cross-border market access for sub-suppliers and SMEs in the defence sector⁴, as well as during the exchange of views held with experts on 23 June 2020 and through the EPRS study. Alongside the general market entry barriers of geographic distance, linguistic barriers, and lack of cross-border market knowledge, the SMEs in the defence sector also face additional administrative hurdles in terms of the particular complexity of defence procurement documentation and the scale of defence procurement tenders, security of supply concerns, the complexity of the subcontracting provisions, and the high costs of certification.

Against this complex backdrop remains the varied and uneven implementation of the Defence Package Directives across the Union, as outlined above. The goal of increasing SME participation — in addition to the wider goals of opening up the internal market, achieving greater security of supply and improving competitiveness — has therefore only been partially achieved. Moreover, the lack of statistics and data for measuring the cross-border access of the defence market by SMEs is also problematic.

It has also to be noted that the subcontracting provisions under the Defence Procurement Directive, were also not of great effect in increasing SME participation in the defence procurement market in terms of indirectly facilitating market access and opening up supply chains to greater cross-border competition. The provisions of the Directive enable Member States to impose an obligation on successful bidders (usually prime contractors) to publicly tender parts of the contract to SMEs and sub-suppliers via competitive procedures. However, the level of use of subcontracting provisions seems very low (only 26 subcontract notices have been published since 2011), which demonstrates the unsuitability of these provisions with both Member States' needs and industrial reality. Moreover, the Directive does not introduce any incentive for the opening of value-chains. On the contrary, the future European Defence Fund seems to be a better tool to structure these value-chains at European level.

Moreover, the assessment of the added value of the certification mechanisms available under Article 9 of the Transfers Directive remains below expectations. According to the Register of the Certified Defence-related Enterprises (CERTIDER), the number of certified enterprises remains rather low, with 66 companies being certified across the EU, which is an increase of merely 27 compared to five years ago. This could be caused by the fact that SMEs are not usually the market participants set to benefit from certification, as the process targets primarily recipients of defence-related products, such as system integrators or Original Equipment Manufacturers (OEMs). In addition, the complexity and expense of the certification process also deter SMEs.

Rapporteur's position

⁴ Commission recommendation (EU) 2018/624 of 20 April 2018 on cross-border market access for sub-suppliers and SMEs in the defence sector.

Taken into account all challenges related to the implementation of the Defence Package Directives, the Rapporteur considers that certain elements of the Defence Procurement Directive and Transfers Directive can be further improved, for example, greater consistency with general Public Procurement Directive. However, the Rapporteur believes that no revision of these Directives is necessary since the existing regulatory framework should be sufficient if correctly implemented and properly used.

Furthermore, the Rapporteur stresses the necessity of a strong enforcement policy where the Commission acts on a proactive basis and is not afraid to start infringement procedures when needed, for example in cases of systematic use of the exclusions. The Rapporteur considers that in order to achieve a strong enforcement policy, it is essential for the Commission to have access to qualitative data.

With regard to the further implementation of the Defence Package, the Rapporteur welcomes the work of the Commission and believes that future cooperation between the Commission and Member States on the implementation of the Directives is needed to achieve the objectives of the Defence Package.

The Rapporteur further notes that the level of SME participation in the defence market remains low. He therefore believes that thorough analysis should be made on the reasons why SMEs do not succeed in fully entering the single market for defence products. He welcomes the work already done by the Commission and emphasizes that they should continue to take appropriate measures in order to support SMEs.

The Rapporteur then highlights that, in order to achieve an open EDEM, Member States will have to work on their cooperation, mutual trust, common planning...

Finally, the Rapporteur considers that there have been multiple changes that affect the European Defence Equipment Market since the Defence Package entered into force, for example the establishment of PESCO. He is thus of the opinion that there should be a follow-up analysis of the efficiency of the Defence Package in the light of these changes in order to achieve an open EDEM.

MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

on the implementation of Directive 2009/81/EC, concerning procurement in the fields of defence and security, and of Directive 2009/43/EC, concerning the transfer of defence-related products (2019/2204(INI))

The European Parliament,

- having regard to 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/EC¹ ('Defence Procurement Directive'),
- having regard to Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community² ('Transfers Directive'),
- having regard to the report from the Commission to the European Parliament and the Council of 30 November 2016 entitled 'on the implementation of Directive 2009/81/EC on public procurement in the fields of defence and security, to comply with Article 73(2) of that Directive' (COM(2016)0762),
- having regard to the report from the Commission to the European Parliament and the Council of 30 November 2016 entitled 'Evaluation of Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community' (COM(2016)0760),
- having regard to the Commission notice of 30 November 2016 entitled 'Guidance on the award of government-to-government contracts in the fields of defence and security (Article 13.f of Directive 2009/81/EC)' (C(2016)7727),
- having regard to the Commission Recommendation (EU) 2018/624 of 20 April 2018 on cross-border market access for sub-suppliers and SMEs in the defence sector³,
- having regard to the Commission notice on guidance on cooperative procurement in the fields of defence and security (Defence and Security Procurement Directive 2009/81/EC (2019/C 157/01))⁴,
- having regard to the European Parliamentary Research Service (EPRS) study of September 2020 entitled 'EU Defence Package: Defence Procurement and Intra Community Transfers Directives',
- having regard to Rule 54 of its Rules of Procedure, as well as Article 1(1)(e) of, and

¹ OJ L 216, 20.8.2009, p. 76.

² OJ L 146, 10.6.2009, p. 1.

³ OJ L 102, 23.4.2018, p. 87.

⁴ OJ C 157, 8.5.2019, p. 1.

Annex 3 to, the decision of the Conference of Presidents of 12 December 2002 on the procedure for granting authorisation to draw up own-initiative reports,

- having regard to the opinion of the Committee on Foreign Affairs,
- having regard to the report of the Committee on the Internal Market and Consumer Protection (A9 0000/2020),
- A. whereas the Defence Procurement Directive seeks to introduce fair and transparent rules for defence procurement in an effort to make it easier for defence companies in the Member States to access other Member States' defence markets;
- B. whereas the Transfers Directive sets out to improve the functioning of the European defence equipment market (EDEM), promote integration of the EU defence supply chain and increase security of supply, by simplifying the rules and procedures for intra-EU transfers of defence-related products;
- C. whereas both directives set out to boost the internal market for defence-related products and to strengthen the competitiveness of the EDEM;
- D. whereas the 2016 Commission evaluation concluded that the objectives of the Defence Procurement Directive had only been achieved partially, since it allowed for an initial increase in competition, transparency and non-discrimination in the EU's defence procurement market, but much more progress in Member States' consistent use of the directive was needed to achieve those objectives fully;
- E. whereas the EPRS study pointed out the limited effect of the Defence Procurement Directive on the Europeanisation of defence value chains;
- F. whereas the 2016 Commission evaluation showed that differences in how the Transfers Directive had been transposed posed major barriers to its effective application, which resulted in slow or incomplete application in individual Member States, a general lack of harmonisation in requirements and procedures between Member States, and highly diverging conditions and limitations in the General Transfer Licences (GTLs) published by Member States;
- G. whereas, in addition to the general market entry barriers of geographic distance, linguistic barriers, and lack of cross-border market knowledge, small and medium-sized enterprises (SMEs) in the defence sector also face additional administrative hurdles such as concerns regarding the security of supply, the complexity of the sub-contracting provisions, and the high costs of certification;

Improving the functioning of the internal market for defence products through better implementation and enforcement of the Defence Package

1. Welcomes some of the positive trends witnessed in the progressive implementation of the Defence Procurement Directive, namely the increasing number of contract notices and contract-award notices issued by Member States, and the increasing proportion of procurement that has been tendered competitively through Tenders Electronic Daily (TED); stresses, however, that a very high volume of procurement expenditure is still

incurred outside the directive;

2. Underlines that one of the main barriers to the full and proper implementation of the directive remains the systematic use of the provisions relating to exclusion by the Member States, in particular those laid down in Article 346 of the Treaty on the Functioning of the European Union;
3. Believes, in this regard, that the Commission should take a more proactive role in monitoring the exclusions used by the Member States in their awarding of contracts outside the scope of the Defence Procurement Directive, and should not be mainly reliant on received complaints filed by the industry;
4. Considers that there is still a strong need to focus on the effective implementation of the Defence Procurement Directive, considers that, for that to happen, the Member States should focus on ensuring equal treatment, transparency and competition and that the Commission should focus on providing the Member States with further guidelines on the application of the provisions laid down in the directive;
5. Considers that some aspects of the implementation of the Defence Procurement Directive could be improved, such as the Member States' use of the open procedure as provided for in Directive 2014/24/EC⁵ and how consistently they apply that directive whenever possible; believes, however, that no revision of the Defence Procurement Directive is needed at this point, since the existing regulatory framework is sufficient if correctly implemented and properly used;
6. Calls, therefore, on the Commission to continue monitoring and providing guidance to the Member States in order to ensure consistent use of the directive and therefore fully achieve its objectives;
7. Observes that, in respect of the Transfers Directive, the take-up of new tools, including GTLs, is rather low compared to Individual Transfer Licences (ITLs), which were intended to be replaced by the new tools;
8. Observes, further, that there was a slower and lower than expected uptake of certification, and that there are still barriers to effective application of the directive, with low levels of awareness, particularly among SMEs, of the tools available under the directive, and the system used by the Member States in their export controls, in addition to the lack of harmonisation in the implementation of GTLs, which act as major barriers to the effective application of the directive;
9. Considers, therefore, that the Transfers Directive has only partially achieved its main objectives, in particular that of smoothing the circulation of defence-related products within the internal market and of having an efficient internal market, greater security of supply and improved competitiveness;
10. Underlines the importance of having a genuine internal market for intra-EU transfers of defence-related products, where national authorities are aware of what and to whom products are transferred and where the export authorisations and other restrictions to exports are brought to a required minimum;

⁵ OJ L 094 28.3.2014, p. 65.

11. Notes, in this context, the progress achieved by the Commission with its recommendations on the scope of application and conditions of GTLs;
12. Calls on the Commission to further improve the directive's implementation in individual Member States by continuing its dialogue with national authorities in order to resolve outstanding issues;
13. Calls on the Member States to take due account of the Commission recommendations on the scope of application and conditions of GTLs and to avoid adding conditions for transfers under GTLs, which would contradict or undermine the conditions listed in the recommendations;
14. Calls on the Commission to make the follow-up to the recommendations on the scope of application and conditions of GTLs a priority, including by considering the possibility of converting the recommendations into binding provisions, with a view to a progressive harmonisation as an overarching objective for the coming years;
15. Calls on the Commission and the Member States to increase efforts in raising awareness of the directive's tools and benefits, in particular among SMEs;
16. Takes note of the Strategic Compass intended to conduct a common threat analysis; believes that the Defence Package should be one of its building blocks contributing to the export control policies;
17. Calls on the Commission and Member States to improve the quality and availability of data, such as TED data, in order to facilitate the monitoring on implementation of these two directives;
18. Calls on the Commission to be bold in enforcing the directives, including, where necessary, by making use of infringement procedures;

Combating market fragmentation and increasing SME participation

19. Notes that SMEs appear to be less successful in winning contracts under the Defence Procurement Directive than in general EU public procurement; notes, further, that the subcontracting provisions of the directive have clearly not been used on a regular and structured basis by Member States' authorities; finds that some Member States experience these provisions as complex and difficult to use, which partially explains the limited impact of the directive;
20. Considers, therefore, that the goal of increasing SME participation has only been partially achieved;
21. Is of the opinion that the subcontracting provisions of the directive had no or a very limited impact on the cross-border access of sub-suppliers and defence SMEs; calls on the Member States to ascertain that their internal procedures are not blocking SMEs' participation in tendering processes in the fields of defence and security;
22. Calls on the Commission to continue its work and thoroughly examine the causes behind the lack of SME participation;

23. Considers that Member-State action could significantly improve cross-border market access for SMEs and sub-suppliers in the defence sectors, and therefore calls on the Member States to seriously take into consideration and follow when possible the Commission recommendations;
24. Calls on the Member States to make more systematic use of existing tools at EU level, such as the Enterprise Europe Network, to support SMEs' cross-border activities;

Achieving an open European defence equipment market

25. Considers that better implementation of the directives is critical in order to attain the overarching objective of improving the functioning of the internal market for defence products and of contributing to the establishment of an open EDEM;
26. Calls on the Commission to work towards increasing the uptake of the legislative framework on transfers of defence-related products, improving the availability of GTLs throughout the EU and addressing the limited application of the certification scheme, which should boost development of the EDEM and thereby improve the functioning of the internal market for defence products;
27. Calls on the Commission to undertake specific actions that set out to build more trust among the Member States in the area of defence and security in order to boost their cooperation and create a genuine single market for defence products;
28. Calls on the Member States to boost the EDEM through cooperation on projects under the Permanent Structured Cooperation and the European Defence Fund; notes in this regard that lessons learnt and best practices stemming so far from the implementation of the Defence Package should be shared among the Member States in order to remedy an uneven level of their implementation;
29. Considers that, since the adoption of the two directives, the EDEM has experienced many changes; calls on the Commission to analyse the efficiency of the tools available in the light of those changes;
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30. Instructs its President to forward this resolution to the Council and the Commission.