

EU law and defence procurement

Directive 2009/81/EC

The directive introduces at European level:

- **fair and transparent rules** to help companies access defence and security markets in other EU countries
- **flexibility for contracting authorities** to negotiate in detail all features of complex contracts
- the option for contracting authorities to require **safeguards** (from suppliers) to ensure
 - the **protection of classified information** against unauthorised access
 - **security of supply** so that armed forces receive deliveries in time, particularly in times of crisis or armed conflict.

It covers **specific security and defence procurement contracts for:**

- **Military equipment**, i.e. arms, munitions and war material included in the [1958 list](#) (which defines the scope of Article 346 of the Treaty) plus **related works and services**.
- **Sensitive security equipment, works and services** which involve access to classified information.

Procurement of **non-sensitive and non-military equipment, works and services** by contracting authorities in the fields of defence and security is covered by the general public procurement Directive 2004/18/EC.

Both directives are **subject to Article 346 of the Treaty**, which means that EU countries can exempt defence and security contracts where the rules of Directive 2009/81/EC are not sufficient to safeguard their essential security interests.

What is Article 346 and how is it used?

Article 346 TFEU (formerly Article 296 TEC) allows EU countries to exempt defence and security contracts if the application of European law would undermine their essential security interests:

- Article 346 (1)(a) allows EU countries to keep secret any information the disclosure of which they consider contrary to the essential interests of their security.
- Article 346 (1)(b) allows EU countries to take measures they consider necessary for the protection of their essential security interests in connection with the production of/ trade in arms, munitions and war material (specified in the [1958 list](#)) Measures taken under Article 346 (1)(b) may not adversely affect competition on the common market for products not specifically intended for military purposes.

Derogation under Article 346 is a serious political and legal issue. The Treaty contains strict conditions for its use, balancing member countries' security interests with EU principles and objectives. According to the Court of Justice, the use of the derogation must be limited to clearly defined and exceptional cases and interpreted in a restrictive way.

Exemption must be

necessary for the protection of an EU country's **essential security** interests (i.e. interests vital to the country's military capabilities, not economic interests).

EU countries must assess each procurement contract individually to determine whether the conditions for the exemption are met. They must verify in particular:

1. What is the **essential security interest**?
2. **What connection** is there between the security interest and the procurement contract?
3. **Why** would EU rules undermine the essential security interest?

EU countries are responsible for defining and protecting their essential security interests, and for defence procurement.

However, the Commission is responsible for ensuring that EU law is correctly applied, and may ask EU countries to justify the exemption of a procurement contract, or bring a matter before the Court if it considers that the exemption has been abused.

Why cover security as well as defence?

Today, armed forces and (non-military) security forces often work closely together (e.g. to protect borders or during crisis management operations) and increasingly use equipment which is interoperable and based on the same technology.

Also, protection against terrorism or organised crime requires the use of sensitive equipment and access to classified information. For these reasons, **non-military procurement can be as sensitive as military procurement** and require the same security safeguards during the award process.

Arms trade with non-EU countries

Directive 2009/81/EC does not change the situation for arms trade with non-EU countries, which is governed by WTO rules and in particular the [Government Procurement Agreement](#) (GPA). **EU countries decide whether or not to open competition to non-EU suppliers**, in compliance with the GPA, and awarding authorities are free to invite EU companies exclusively, or to include non-EU companies.

Offsets

Many governments have traditionally required **economic compensation from non-national suppliers** for the purchase of defence equipment abroad. Such "offsets" can take different forms (subcontracts for local companies, direct investments, etc.), but they always aim at fostering the local industry of the purchasing country. Offsets therefore **entail discrimination by their very nature** and stand in direct contrast to the Treaty (primary law). Consequently, Directive 2009/81/EC (secondary law) can neither allow nor regulate them.

The Directive does not explicitly address offsets. However, its rules and procedures aim to ensure that contracts are awarded in compliance with Treaty principles. Procurement practices which go against the principles of openness, transparency and non-discrimination are **incompatible with the directive**, whether explicitly mentioned in the directive or not.

Discriminatory measures such as offsets can be justified only through a Treaty-based derogation, in particular Article 346 TFEU. If an EU country invokes Article 346 for offset requirements, it must demonstrate that the conditions for the use of Article 346 are met.

European Defence Agency Code of Conduct

The Code of Conduct has the same objective as Directive 2009/18/EC (to help companies access defence markets in other EU countries), but it is a **non-binding political agreement** which includes a set of **general principles for defence (not security) procurement**. EU countries may apply these principles to the award of **defence contracts exempted from EU rules** on the basis of Article 346.

The Code therefore comes into play only in cases where the Directive does not apply.