



# **Vlth IPA REGIONAL PUBLIC PROCUREMENT CONFERENCE Workshop**

**Bernard Piekarski**  
**French MOD – Armament directorate**

## **Implementing Directive 2009/81/EC: a practitioner's views**

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# **Implementing Directive 2009/81/EC: a practitioner's views**

- **Defence procurement in Europe before 2009/81/EC Directive,**
- 2009/81/EC Directive purposes,
- The difficult exercise of transposition,
- Consequences of the Directive in the MS,
- Does this Directive work properly ?

# **Defence procurement in Europe before 2009/81/EC Directive : Situation**

- Before means before August 21<sup>st</sup>, 2011,
- Article 346 TFEU was applied for armament acquisition. In some MS, for any MOD acquisition,
- Article 346 TFEU = no law, no regulation, no remedies,
- In some Member States, guides to help and to maintain a certain level of competition,
- In France, a special regulation for armament acquisition. Advertising in French official journal with web site was mandatory except for secret. Same remedies as for any public acquisition.

# **Defence procurement in Europe before 2009/81/EC Directive : Consequences**

- Industry fragmentation,
  - Most European companies are unable to compete with US companies, but..
  - Fragmentation of research and development,
  - Low efficiency, high prices,...
- Offsets,
  - Most member states required offsets,
  - Offsets are a great disturbance of internal market,
  - Offsets are a discrimination on the ground of the nationality.

# **Defence procurement in Europe before 2009/81/EC Directive : Consequences**

- Buy national,
  - This option is anyway limited since no MS is able to build every defence equipment it needs,
  - Even at that time, European cross-border Defence acquisition was more important than in the civilian field.
- No remedies : candidates are unsatisfied and may not come back for other competitions, or may increase prices,

# **Defence procurement in Europe before 2009/81/EC Directive : Consequences**

- Corruption in Defence acquisition
  - No regulation, no law, secret, no transparency, no remedies,
  - In some countries laws about corruption may not apply,
  - High price and value equipment,
  - Complex equipment : it is necessary to be a specialist to understand advantages/disadvantages of a product,
  - Complex equipment : Negotiation is necessary to buy.

# Implementing Directive 2009/81/EC: a practitioner's views

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- **2009/81/EC Directive purposes,**
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# 2009/81/EC Directive purposes

- Limit use of art 346 TFEU, without any change of the TFEU wording,
- Give an adapted and flexible regulation, outside GPA,
- Higher threshold, mixed contracts, free access to negotiated procedure, security of supply, security of information, larger possibilities to exclude a candidate, subcontracting, remedies regime with a few specific features, ...



# 2009/81/EC Directive purposes

- **How does it work ?**
  - Since the directive is flexible and adapted to Defence acquisition, there are little number of reasons not to use it,
  - It is a fault to use an exclusion of the Directive when Directive may be applied. Art 11 : “***None of the rules, procedures, programmes, agreements, arrangements or contracts referred to in this section may be used for the purpose of circumventing the provisions of this Directive.***” (comes from few ECJ cases).

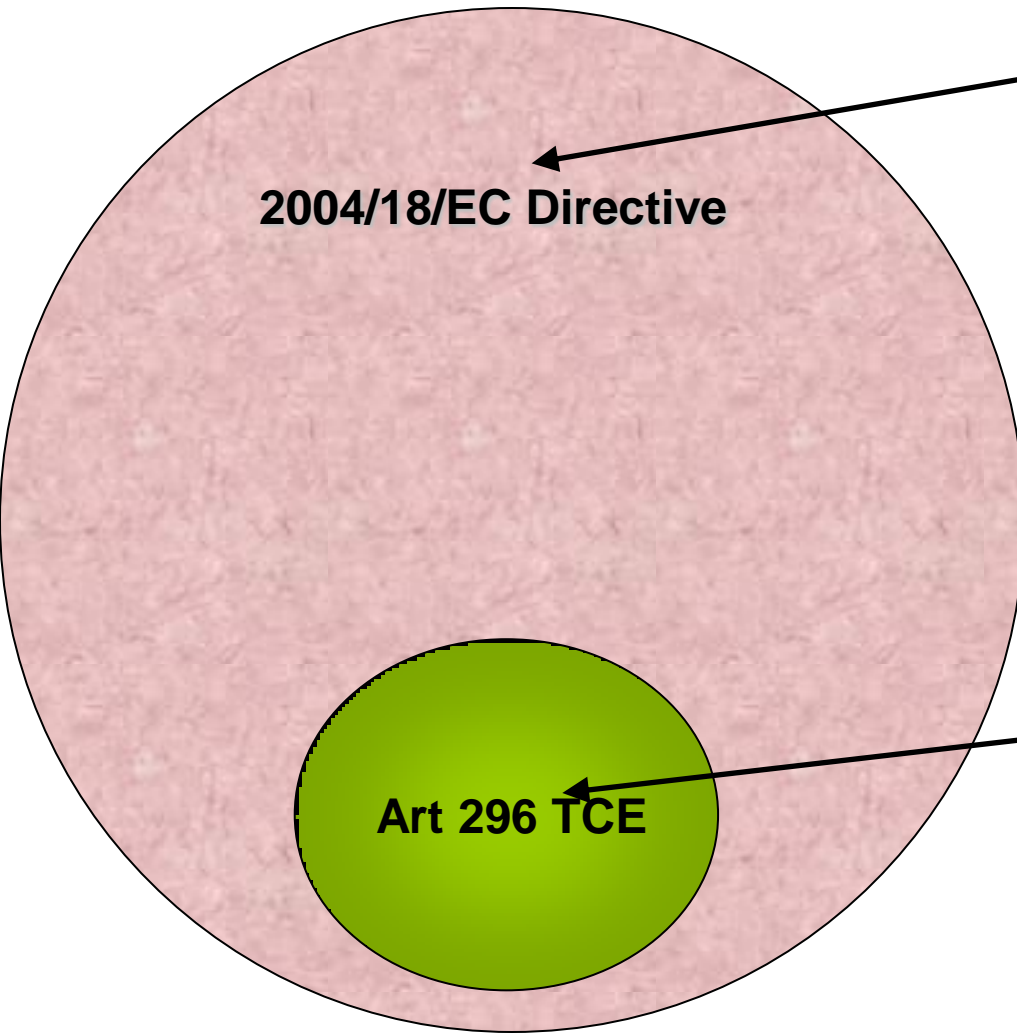
**Before 2009/81 Directive**

**All contracts**

**2004/18/EC Directive**

**Art 296 TCE**

**Arms, ammunition, war  
equipment + **essential  
security interests or  
secret****



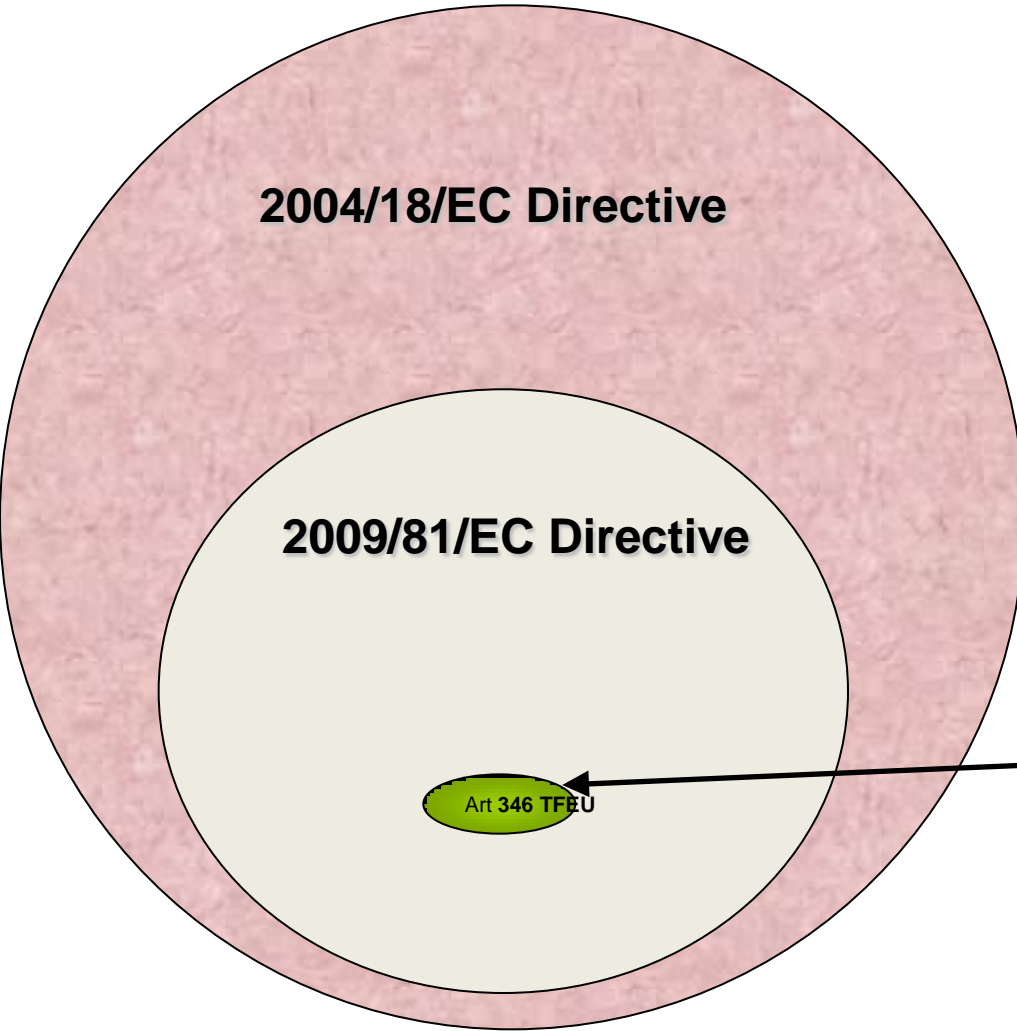
**NOW**

**2004/18/EC Directive**

**2009/81/EC Directive**

Art 346 TFEU

**Arms, ammunition, war equipment +  
essential security interests or  
exceptional secret**



# 2009/81/EC Directive

- **Scope**

- Large scope for Defence and Security,
- Outside the scope of GPA,

- **Main exclusions:**

- Art 346 TFEU, International agreement, International organisation purchasing for its purposes, Cooperation, Intelligence, government to government contracts, Research.
- **But exclusions must not circumvent the Directive:  
The use of an exclusion must be decided case by case and must be more or less necessary.**

# 2009/81/EC Directive

- **Security of information**

- (Nothing exists in 2004/18/EC Directive),
- Candidates: possibility of exclusion (see art 39), confidential or secret clearance may be required or a fixed delay may be given to candidates to get the clearance. A candidate national clearance is OK but is checked,
- Performance conditions (art 22):
  - ability to safeguard classified information,
  - Transparency about subcontractors to allow contracting authority to check their capabilities for security of information,
  - Commitment to obtain same ability from subcontractors.

# 2009/81/EC Directive

- **Security of supply :**
  - (nothing exists in 2004/18/EC Directive),
  - Candidates: possibility to exclude candidates from participation in a contract (see Directive, art 39)
  - Candidates: technical and professional ability in relation with security of supply (art 42,1 h..),
  - Performance conditions (art 23):
    - Export control, transit, location of the supply chain, capacity to satisfy additional needs, capacity to maintain and modernize, information of any change in the industrial organization,
    - Export control in the EU should not interfere.
  - Possibility of non competitive procedure in case of urgency resulting from crisis.

# 2009/81/EC Directive : Offsets

- Not a word about offsets in the Directive,
- See Commission guidance note about offsets,
- Offsets are a discrimination on the ground of the nationality which is prohibited by TFEU,
- And outside treaty = art 346 TFEU ?
  - Arguing on necessity to apply art 346 TFEU is often difficult,
  - Even inside art 346 TFEU, it is necessary to prove that requiring offset is an essential interest of security which cannot be linked with economic purposes : impossible.

# 2009/81/EC Directive : EDTIB

- **Recital 2** : “The gradual establishment of a European defence equipment market is essential for strengthening the European Defence Technological and Industrial Base and developing the military capabilities required to implement the European Security and Defence Policy.”
- **Recital 18** : “ (..) This exclusion means also that in the specific context of defence and security markets, Member States retain the power to decide whether or not their contracting authority/entity may allow economic operators from third countries to participate in contract award procedures. (..) “
- 2/3rd of MS have different solutions to be able to exclude any non EU operator from their procedures, more or less efficient.
- Think European first !



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# The difficult exercise of transposition,

- Directive has been published on the OJEU on August 21<sup>st</sup> 2009, transposition was mandatory within 2 years,
- One MS transposed before time limit (ES), most MS transposed with a few months delay, 4 MS with over one year delay,
- Transposition may be an easy exercise when you have little number of laws and regulations,
  - DK transposition is a simple copy of the Directive with a foreword,
  - In France it has been very difficult.

# The difficult exercise of transposition,

- Two different views for transposition in many MS:
  - 1.- Be as close as possible to 2004/18 EC Directive transposition text, to remain in a well known area, and to ease transposition,
  - 2.- Get rid of everything which is not adapted to defence acquisition and which is not in the Directive, be as far as possible from 2004/18 EC Directive transposition text, to get maximum freedom.
- French Solution. In most MS, solution 1 seems to have been preferred.

# The difficult exercise of transposition,

- Architecture of transposition is different from one MS to the other. Link with 2004/18 and 2004/17 Directive transposition texts.
  - Fully separated texts: one Directive, one text
  - Fully integrated texts : 3 or 4 Directives, even more, one text : not understandable (HU)
  - One directive one text except for high level features which are common,
  - An architecture with different levels of texts (DE),

# The difficult exercise of transposition,

- Architecture of transposition is different from one MS to the other.
  - An architecture with two levels of texts and some articles identical and which are simply reported (“article XXX applies”) (FR)
  - Two main texts and 2009/81 Directive transposition text applies only when it is different from 2004/18 Directive transposition text : very difficult to understand and it is an error to consider that there is a main directive (2004/18) and two secondary directives (2004/17 and 2009/81).

# **The difficult exercise of transposition,**

- Field of application : any procurement authority, entity... for defence and security
  - Some MS excluded some entities, local governments, but all this is of little economic importance and the Commission has written to those MS,
- Exclusions : Some MS added sentences to enlarge exclusions, especially art 346 TFEU field,
  - It is a fault, certainly with such an intention.
- Security of supply : the limit between what may be necessary and a major disturbance of the competition is thin.
- Subcontracting : extreme complexity. In some MS, additional laws about subcontracting (FR..)..  
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# Consequences of the Directive in the MS,

- A new regulation, complicated, with some specific European concepts, for people used to buy without regulation, or from time to time, to buy with 2004/18 Directive,
- France has been probably less disturbed since there was a specific regulation before, with some similarities with the Directive. But European legal concepts (proportionality, subsidiarity..) are not French concepts,
- Directive has been made by and for Defence people. There are very little number of security contracts.



# Consequences of the Directive in the MS,

- A great effort of training is necessary,
- Since national transposition texts are generally a bit different from the Directive, training on the Directive may be not sufficient,
- Guides, adapted to local practices and regulations are necessary,
  - Commission has written 7 “guidance notes” which may be useful to write national guides.

# Consequences of the Directive in the MS,

- **For defence acquisition** what should remain inside 2004/18/EC Directive field :
  - Strictly non military equipment. Most services and works probably may be in one or other Directive since one or other Directive is not circumvented.
- What should be inside 2009/81/EC Directive field :
  - Armament, support, test facilities, training, everything which has any military specific device (trucks since they are green..).
- What may be outside Directive :
  - Research contracts, art 346 TFEU (nuclear defence, electronic warfare development, some specific communication development), some intelligence (very secret equipment), cooperation.

# Consequences of the Directive in the MS,

- **Exclusions : What means circumventing the Directive ?**

- Using art 346 TFEU for economic reasons, when a national company requires to be supported,
- Asking NATO Support Agency (NSPA) to buy when the Directive may be used,
- Government to Government contract when a European company is able to deliver same kind of equipment : FMS case to buy new F16 aircrafts,
- Mixing contracts when the exclusion may be performed through a separated contract,

# Consequences of the Directive in the MS,

- **Exclusions : What means circumventing the Directive ?**
  - Using “For national eyes only” without justifying the exclusion of article 346 TFEU and justifying discrimination on the ground of nationality is essential for national security (essential national security could be implicated if Directive is used),
  - Organizing a link between R/D excluded contract and the following contract through intellectual property rights.
- **Offsets are prohibited in any case.**

Any law or regulation about offsets should be cancelled

# **Consequences of the Directive in the MS,**

- **Research remains the only limited way to support the industry.**
  - Research is an exclusion of the Directive,
  - Research is often not adapted to competition,
  - Research is, at the end, a profit for everybody.
- **Cooperation (real cooperation, with a phase of research) remains the best way to develop and organize the industry in Europe and to get what you need.**

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# Implementation of Directive 2009/81/EC - Statistics - TED notices from 2011.08.21 to 2013.03.31

COUNTRY	BUYER PROFILE	CONTRACT AWARD NOTICE	NOTICE FOR VOLUNTARY EX ANTE TRANPARENCY	CONTRACT NOTICE		PRIOR INFORMATION NOTICE	NB	%	
GERMANY (DE)	1	163		235	21,7%	7	406	18,1%	
AUSTRIA (AT)		1		2	0,2%	1	4	0,2%	
BELGIUM (BE)		2		8	0,7%		10	0,4%	
BULGARIA (BG)		11	1	14	1,3%	1	27	1,2%	
CYPRUS (CY)				3	0,3%	1	4	0,2%	
DENMARK (DK)		26	59	42	3,9%	3	130	5,8%	
SPAIN (ES)	1			0	0,0%		1	0,0%	
ESTONIA (EE)		1		1	0,1%		2	0,1%	
FINLAND (FI)		37	25	63	5,8%		125	5,6%	
FRANCE (FR)	1	132	44	515	47,6%	3	695	31,0%	
GREECE (GR)				0	0,0%		0	0,0%	
HUNGARY (HU)	1	23		11	1,0%		35	1,6%	
ITALY (IT)	2	194	11	23	2,1%	82	312	13,9%	
IRELAND (IE)				0	0,0%		0	0,0%	
LATVIA (LV)		2		3	0,3%		5	0,2%	
LITHUANIA (LT)		3	3	12	1,1%		18	0,8%	
.LUXEMBOURG (LU)				0	0,0%		0	0,0%	
MALTA (MT)				0	0,0%		0	0,0%	
NETHERLANDS (NL)		6		0	0,0%		6	0,3%	
POLAND (PL)	2	3	2	7	0,6%		14	0,6%	
.PORTUGAL (PT)				0	0,0%		0	0,0%	
CZECH REPUBLIC (CZ)		10		36	3,3%	36	82	3,7%	
ROMANIA (RO)		1		5	0,5%		6	0,3%	
UNITED KINGDOM (GB)		43	187	79	7,3%	10	319	14,2%	
SLOVAKIA (SK)		5	3	6	0,6%	3	17	0,8%	
SLOVENIA (SI)				1	0,1%		1	0,0%	
SWEDEN (SE)		4	1	17	1,6%		22	1,0%	
TOTAL	8	667	336	1083	100,0%	147	2241	100,0%	

# Does this Directive work properly ?

- Contract notices are the most important,
- France publishes approximately half of contract notices, followed by Germany (21%) and the UK (7%). France, Germany, the United Kingdom and Finland publish 82% of contract notices. In addition, for Italy, the number of award notice is clearly greater than the sum of contract notices and notices for voluntary ex ante transparency. Spain, Greece, Ireland, Luxembourg, Malta and Portugal do not use Directive 2009/81/EC.



# Does this Directive work properly ?

- **After nearly 2 years :**
- Use of offsets still remains, regulation about offsets still remains in a few member states, (NL, DK, IT ....)
- There are still FMS cases where there should not be,
- Some member states have little number of contract notices or no notice at all,
- **Not yet !**

# Does this Directive work properly ?

- Transposition has been more difficult and longer than expected,
- Using this Directive remains complicated,
- Most member states MOD see great advantages in the Directive,
- Commission seems to have the will to make it work, with European court of justice.

# **Implementing Directive 2009/81/EC: a practitioner's views**

Thank you

**Bernard PIEKARSKI**

bernard.piekarski@dga.defense.gouv.fr