

LIBRO VERDE DELLA COMMISSIONE EUROPEA SUL PROCUREMENT DELLA DIFESA.

RISPOSTA ITALIANA AI QUESITI DELLA COMMISSIONE EUROPEA (marzo 2005).

IT Considerations on the Green PAPER on Defence Procurement

1. Introduction

The progressive building of a more effective and comprehensive ESDP, shows inter alia the need to consolidating a long term convergence on military doctrines, capabilities (leading to common requirements, projects and eventually programs), planning among the MS.

One of the useful tools towards the achievement of this ultimate and desired goal relates to the on-going progress focusing on the most appropriate ways and conditions to create a more competitive EDEM, to better operate in the international framework, taking into account its specificities, national security interests, safeguarding and reinforcing the European defence industries.

The goal of a more transparent and open European defence market among Member States, aimed at increasing economic efficiency in the industrial sector as well as ensuring a better allocation of the limited budget resources available in the EU, has to be seen in the frame of the process of political, economical, financial and legal integration presently ongoing within the EU.

The defence industrial sector is reacting to this new scenario mainly by a series of mergers and acquisitions in order to better face an increasing competition. This process was monitored, and in some cases promoted, by National Governments.

According to the Green Paper, the next step of this evolutionary process appears to fall within the responsibility of the Governments, consisting specifically in a revision of the procurement approach that would

guarantee moving from many separate national defence markets towards the integration into a single European Defence market.

The document under review, prepared by the DG Internal Market, provides an analysis of the current scenario of the EU defence market as well as some possible options for the future, to be agreed by MS.

2. Analysis of the GREEN PAPER scenario

The scenario outlined in the paper is characterised by the following concepts:

- Member States' combined MoD expenditure constitutes a large part of Member States public spending;
- such expenditure remains split into national markets;
- the shrinking size of national markets is no longer sufficient to allow for production volumes that can offset the high costs of R, T&D;
- this situation impacts negatively even the civilian sector, given the growing dual use potential of technologies;
- the various initiatives undertaken to this day have had a various range of successes.

With regard to the above the following comments are provided:

- as far as the demand of military goods is concerned, the progressive convergence of the national defence markets is directly tied to the progressive harmonization of the foreign policies of the MS. Such different policies determine a situation in which each member state has different requirements in terms of military forces and systems. Consequently the demand of military goods within the EU is fragmented by national needs and requirements of systems which, as similar as they might be, may still have unique technical specifications tailored for the specific national requirement. In order to accompany the process aimed at developing a better level of cooperation some EU MS have created the inter-governmental organization OCCAR and subsequently the Council established the European Defence Agency. The role of these bodies is to support the process of harmonization of the defence needs and requirements of the Member States in order to reach as much as possible a unified demand of defence goods within the EU. This is going to be a lengthy process and it is too early to reach a conclusions on their success;
- besides the implications of NATO membership for a large number of them, many the EU Member States, in pursuing their foreign policies, rely to a different degree on national industrial basis, not dependent on other nations, able to guarantee the supply of defence goods, even in times of crisis. The process of mergers and acquisitions in the defence industrial sector, still under way at different pace among sectors and the EU Member States, creates an unbalanced situation related to

defence industries that may encourage dominant positions which would be detrimental to the creation of an open market.

In order to appropriately deal with such an issue, some EU Member States have agreed, under the LoI, to a set of measures, including the principle of security of supply, consisting in a commitment to support the performance of contracts by the respective industries with respect to the other signatories. The extension of the application of these principles is instrumental to a successful EDEM.

- the statement that “*although Member States combined military expenditure is considerable, it remains split into national markets*” does not seem to recognise that all procurement for civil use goods falls under the normal EU directives procurement rules and, on such basis, it is accomplished by open competition and not limited to national markets. Furthermore the statement does not take into account the considerable amount and volume of the existing cooperative initiatives among EU MS, which increasingly catalyze public investments and priorities, with positive effects on industrial consolidation and integration, in a more coherent playing field.
- an effective reform of the defence procurement system would require also a harmonization of the EU rules and regulations governing issues such as the transit of defence materials within the Union, the technical regulations, security of supply and the EU Code of Conduct for military exports.

3. Defining action at EU level

The document suggests two alternatives as a possible means towards an evolution of the present situation, and more specifically:

- an interpretative communication from the Commission, giving an explanation of the principles for the interpretation of Article 296 EC, to distinguish between contracts covered by the exemption and those which are not:
- a new directive, establishing a special set of rules for the military market.

With regard to the above, we provide the following comments:

- any development of the Green Paper should take into account that the defense industry has a specific significance for Nations, relating to the control of sensible technologies, safeguarding the manufacturing

capacities of systems, since they represent essential elements to satisfy National Security needs.

- within EU there is a inhomogeneous and unbalanced situation relating to the defense industries, partly due to historical reasons and to different allocation of national resources. This situation may determine the creation of dominant positions which, at the time of the opening of the market, would be an obstacle to competition and actually hamper the creation of an EDEM.
- the interpretative communication is not able to solve an issue which may seem of a procurement/contractual nature but in truth is of a political nature. It would increase conflicts between the national procurement agencies, industry and the European Commission while bringing no positive effect on the opening of the markets;
- the Directive option which, in compliance with EU principles, cannot rule on the area covered by article 296, could be a viable solution but it should be harmonized with EDA's intergovernmental activities in the field of EDEM;
- OCCAR rules and regulations should be appropriately taken into account for further work in this domain;
- programs managed by NATO Agencies, should not fall under the EC Directive, mainly because the commitment to NATO by the NATO Member Countries is autonomous from the EU procurement regulations, which are obviously not applicable to non-EU NATO Members. Furthermore NATO Programs foresee an R, T&D phase for which further considerations apply;
- a special regime should also be foreseen for R, T&D contracts. These contracts are usually awarded to companies possessing the required know-how and expertise in a specific field with the aim of furthering such expertise towards the development of a new process/item/tool to be used for further development or for production. In these cases, in order to accomplish successfully the scope of the contract, the contractor has to possess a given level of technology, determined by the bidder, which is often of a proprietary nature. In such a case a procurement approach involving competition does not appear compatible with the purpose of R, T&D;
- Security of Supply, Security of Information and Urgency are key points in defence procurement and must be completely covered by any new regulation. Specifically the concept of urgency can be linked to situations of crisis in order to allow specific procedures for such occurrences;

- one more specificity of the Defence market that has to be considered in drafting the relevant rules and regulations is the concept of Standardization/Commonality of the logistic life cycle. This means that since each system has its own logistic support, the fielding of more than one system for similar requirements doubles the logistic support in terms of spares, training, personnel and, of course, cost. Any new regulation should allow procurement of equipment/systems, already fielded, for similar requirements, even relative to different branches of the Administration, without competition;
- the various proposals highlighted in the document concerning the procedures to be used for procurement could all be considered, taking into consideration the progress of the ESDP process with regard to the establishment of a common defence policy;
- the so called “Homeland Security” systems’ and materials’ specificity should also be recognized. when appropriate, together with the defence one, in drafting a procurement directive;
- although the offset practices are still a common feature to be taken into account, they should evolve without having a negative impact on the opening of the defence market. Therefore a common reflection must be developed in the appropriate fora, including the drafting of a directive as well as in the transatlantic dialogue.

Questions

1. Do you think it would be useful/necessary/sufficient to explain the existing legal framework in the way presented?

With regard to the explanation of the existing legal framework, the interpretative communication is not able to solve an issue which may seem of a procurement/contractual nature but in truth is of a political nature. It would increase conflicts between the national procurement agencies, industry and the European Commission while bringing no positive effect on the opening of the markets.

As stated in the introduction, a reference to the ESDP process is also useful with regard to the establishment of a common defence policy.

2. Are there other aspects of the Community system in question that should be clarified?

As stated in the introduction, all procurement for civil use goods falls under the normal EU directives procurement rules and, on such basis, it is accomplished by open competition and not limited to national markets. Moreover an effective reform of the defence procurement system would require also a harmonization of the EU rules and regulations governing issues such as the transit of defence materials within the European Union, the technical regulations, security of supply and the EU Code of Conduct for military exports.

3. Do you consider the rules of existing directives suited/unsuited to the specific characteristics of defence contracts? Please give your reasons.

The current Directives regulating the public sector do not suit the specificities and requirements of the defence market. In fact the exceptions in the Directives pertaining to the public procurement do not cover all the foreseeable cases in defence/dual use procurement that may require exceptions to the standard open competition procedures.

4. Would a specific directive be a useful/necessary instrument for creating a European defence equipment market and strengthening the industrial and technological base of European defence?

The Directive option which, in compliance with EU principles, cannot rule on the field of application of article 296, could be a viable solution to be harmonized with EDA's intergovernmental activities in the EDEM.

The implementation of the directive has to be performed avoiding that, within EU, a inhomogeneous and unbalanced situation related to the defense industries could encourage dominant industrial positions which, marketing a more open market, would be an obstacle to competition and actually hamper the creation of an EDEM.

5. What is your opinion regarding the use of a possible directive for purchases by other bodies, such as the European Defence Agency?

The principles of a possible "non art. 296 area" directive could be applied to programs managed by the EDA and other bodies.

6. Procedures: do you believe the negotiated procedure with prior publication to be suitable for the specific needs of defence procurement? In what situation should use of the negotiated procedure without publication be allowed?

The negotiated procedure with prior publication is suitable for the specific needs of defence procurement together with a set of exceptions allowing negotiation without publication in predetermined cases.

7. Scope: what would be the most appropriate way of defining the field of application? A general definition? If so, what? A new list? If so, what? A combination of a definition and a list?

In the "non art. 296 area", a specific list and a definition would be the most appropriate approach.

8. Exemptions: do you think it would be useful/necessary to define a category of products that would be excluded categorically from the directive?

A new directive should recognize the specificity of goods and services, characterized by a particular national security connotation (e.g. homeland security). and not covered by art. 296.

9. Publication: do you think a centralized publication system would be appropriate, if so, how should it function?

Yes, a centralized publication system is necessary.

10. Selection criteria: what criteria do you think should be taken into account in addition to those already laid down in existing directives to take account of the specific features of the defence sector? Confidentiality, security of supply, etc.? And how should they be defined?

Confidentiality and Security of Supply are relevant as selection criteria. With regard to the reform of the procurement approach, other aspects require special attention. As stated in the introduction, programs managed by NATO Agencies should also not fall under the EC Directive, mainly because the commitment to NATO by the NATO Member Countries is autonomous from the EU procurement regulations, which are obviously not applicable to non-EU NATO Members. Furthermore a special regime should also be foreseen for R, T&D contracts. In these cases the contractor has to possess a given level of technology, determined by the bidder, which is often of a proprietary nature. In such a case a procurement approach involving competition does not appear compatible with the purpose of R, T&D;

Security of Supply, Security of Information and Urgency are key points in defence procurement and they have to be completely covered by any new regulation.

One more peculiarity of the defence market that has to be considered in drafting the relevant rules and regulations is the concept of the Standardization/Commonality for the Logistic life cycle. Since each system has its own logistic support, the fielding of different systems for similar requirements doubles the cost. The new directive should allow procurement of systems, already fielded, for similar requirements, even relative to different governmental branches, forgoing competition.

11. How do you think offset practices should be handled?

Although the offset practices are still a common feature to be taken into account, they should evolve without having a negative impact on the opening of the defence market. Therefore a common reflection must be developed in the appropriate fora, including the drafting of a directive as well as in the transatlantic dialogue.