
Public Defence Procurement in Denmark

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1 Introduction and Directive 2009/81/EC

The Danish defence procurement landscape is a complex and multi-layered domain where national security imperatives intersect with European Union (EU) rules, creating a unique framework for military acquisitions. This article explores Denmark's approach to defence procurement, focusing on the implementation of Directive 2009/81/EC and the nuanced interpretation of Article 346 of the Treaty on the Functioning of the European Union (TFEU).

Directive 2009/81/EC is designed to harmonise the processes for awarding defence and security contracts across EU Member States. It aims to create a more integrated European defence equipment market, thereby enhancing transparency and competitiveness while ensuring that national security concerns are adequately addressed. Despite the Directive's goal to streamline defence procurement within the EU, it acknowledges the paramount importance of national security, which remains the sole responsibility of each Member State.

Additionally, Article 346 TFEU provides Member States with a legal basis to exclude certain defence and security contracts from the usual EU rules where necessary to protect essential national security interests. In the context of Denmark, this article explores how the Danish Government applies this provision in practice, particularly in cases where national defence needs require bespoke solutions that may not fully align with EU procurement directives.

2 Implementation of Directive 2009/81/EC into Danish law

The process of implementing EU directives into Danish law is crucial for ensuring that European rules become part of the national legal framework.

Unlike EU regulations, which are directly applicable, directives necessitate that Member States enact their own corresponding national legislation to fulfil the objectives outlined in the directives within a designated timeframe. In Denmark, this vital process typically involves the drafting of new legislation or the amendment of existing laws by the Danish Parliament. Alternatively, the process

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may include the issuance of executive orders by the relevant minister to address specific details or urgent needs.¹²

In the context of defence procurement, Denmark has effectively implemented Directive 2009/81/EC through the issuance of Executive Order No. 892 on 17 August 2011, which officially came into effect on 19 August 2011.

This Directive has established a framework for the procurement of defence and security products and services within Denmark. It aims to foster an environment of increased competition and enhanced transparency within the EU defence sector. By adhering to the standards set by Directive 2009/81/EC, Danish defence procurement not only aligns with European objectives, but also ensures that the procurement processes are fair, open and competitive, contributing to a more integrated and efficient European defence market.

3 Scope of Directive 2009/81/EC

The Directive applies to contracts awarded in the fields of defence and security equipment, however, with reservations to a few articles of the TFEU, including Article 346.

A contract regarding supplies falls within the scope of the Directive when the supply is considered military equipment or sensitive equipment in accordance with Article 1(6) and 1(7) of the Directive.

This means that, in order to be seen as military equipment, supplies must be specifically designed or adapted for military use and intended for use as weapons, munitions or war material *or* that supplies have to be sensitive equipment, which is intended for security purposes and involves, requires and/or includes sensitive information.

Contracts on works or services must be either specifically for military purposes or sensitive works and sensitive services in order to be covered by the Directive; however, all contracts regarding works, supplies and services which are directly related to military or sensitive equipment for all elements of its life cycle are also within the scope of the Directive.

¹ Fra EU-regler til dansk lov / Folketingets EU-Oplysning.

² 2.14.7.1. Generelt om implementering af EU-regulering | Lovkvalitet.

4 The role of Article 346 TFEU in Danish defence procurement

Article 346 TFEU allows EU Member States to take necessary measures to protect their essential security interests connected to the production of or trade in arms, munitions and war material. This provision is critical in the context of defence procurement, as it offers a legal basis for exceptions to the general rules of the internal market in situations where national security is at stake. The application of Article 346(1)(b) has four cumulative conditions which must be upheld in order for a Member State to use the exception to the general rules. The measures must (1) regard the production of or trade in arms, munitions and war material, (2) contain a necessary security interest, (3) be proportional and (4) must not lead to undue distortion of competition within the EU. The integration of Article 346 into Danish defence procurement practices demonstrates Denmark's effort to align its national security interests with its obligations under EU law, navigating the delicate balance between securing defence capabilities and adhering to the principles of the single market.³

5 Key differences between the Defence and Security Directive and the Public Procurement Directive

The Defence and Security Directive (Directive 2009/81/EC) and the Public Procurement Directive (Directive 2014/24/EU) both guide the procurement processes within the EU, but are tailored to meet different needs and circumstances.

The most significant differences arise from the nature of the contracts they govern:

Scope of application: The Defence and Security Directive specifically addresses procurement in the fields of defence and sensitive security. In contrast, the Public Procurement Directive covers a broader range of public-sector procurements, including goods, works and services not inherently related to national security.

Flexibility in procedures: The Defence and Security Directive provides greater flexibility in procurement procedures to protect essential national security interests. This includes allowing negotiations without prior publication of a contract notice, a flexibility not typically permitted under the Public Procurement Directive.

³ Vurdering i henhold til artikel 346 TEUF | erhvervsstyrelsen.dk.

Confidentiality and security: Due to the sensitive nature of defence and security contracts, the Defence and Security Directive includes provisions that prioritise confidentiality and security measures which are more stringent than those in the Public Procurement Directive.

6 Mixed contracts

Article 16 (Directive 2014/24/EU) specifically addresses the conditions under which public contracts can combine elements of both defence and non-defence procurement. This Article provides the legal framework for determining how these mixed contracts should be handled when they involve elements that could fall under the more specialised Defence and Security Directive.

Article 16 allows contracting authorities to procure mixed contracts, where part of the procurement involves non-defence goods, works or services, and part involves defence or security aspects that might typically fall under the Defence and Security Directive. The key criterion for using Article 16 is determining whether the non-defence parts of the contract are so significant that the contract should be split or if the whole contract can be justified under defence procurement rules due to the predominance of security needs.

The decision to treat a mixed contract under the defence procurement rules hinges on whether the defence-related elements are predominant. If the defence aspects are essential for the fulfilment of the contract's primary objectives and are intertwined with the non-defence elements, the entire contract might justifiably be treated as a defence procurement.

Article 16 provides flexibility by allowing mixed contracts to be treated entirely under the defence procurement rules if justified, thereby simplifying the procurement process for contracts that have critical security implications. However, this flexibility comes with a requirement for restriction in justifying the decision to ensure that the principles of transparency, competition and non-discrimination are not unduly compromised.

The Defence and Security Directive complements Article 16 by providing detailed procedures for handling contracts that are critical for national security. This includes e.g. specialised procedures. The Directive allows for less transparent procurement processes when necessary to protect essential security interests. This includes negotiated procedures without prior publication of a contract notice, which can be crucial for urgent or sensitive defence needs.

Both directives emphasise the need for proper justification when deviating from standard procurement procedures. For mixed contracts, this means that if the whole contract is treated under the Defence and Security Directive, the contracting authority must document why this approach is necessary for the security aspects to be effectively integrated and protected.

Both directives are designed to align with broader EU laws on public procurement, ensuring that even when exceptions are applied for defence reasons, appropriate oversight remains in place to prevent misuse of the more flexible procurement options.

7 Practice from the Danish Complaints Board for Public Procurement

According to Danish Executive Order No. 892 of 17 August 2011, the Danish Complaints Board for Public Procurement is designated as the national competent authority for the enforcement of the rules in executive orders and Directive 2009/81/EC.

7.1 *Fayard A/S v. the Danish Ministry of Defence Acquisition and Logistics Organisation (DALO)*

The decision of 13 June 2022 by the Danish Complaints Board for Public Procurement (“Complaints Board”), *Fayard A/S v. the Danish Ministry of Defence Acquisition and Logistics Organisation*,⁴ provides a compelling insight into the interplay between Article 346 TFEU and the EU procurement rules.

This case revolves around the actions of the Danish Ministry of Defence Acquisition and Logistics Organisation (hereinafter “DALO”), which issued a Voluntary Ex-Ante Transparency Notice in the EU Official Journal of Tenders. The notice indicated DALO’s intent to negotiate with a Danish consortium on the supply and upkeep of ships for the Danish Navy, without resorting to competitive tendering, citing Article 346 TFEU.

Subsequently, a Danish shipyard complained to the Complaints Board, contending that the conditions outlined in the Treaty provision were not met. The shipyard argued that insufficient competitive tendering violated fundamental EU principles of fairness and transparency.

The Complaints Board did not uphold the appeal.

The complainant argued that DALO could not award the contract using the exemption in Article 346 TFEU, as the winning tenderer did not have access to a shipyard or other construction facility in Denmark. The complainant therefore argued that the award did not ensure that the vessels were constructed and maintained in Denmark and thus did not ensure the purpose of exempting the contract from competitive tendering, cf. Article 346 TFEU.

⁴ The Complaints Board for Public Procurement’s decision of 13 June 2022, *Fayard A/S v. the Danish Ministry of Defence Acquisition and Logistics Organisation*.

DALO countered by asserting the necessity of nationality-based discrimination, affirming that principles of fairness, transparency and proportionality were maintained. Additionally, DALO cited precedents, such as *Saab Danmark A/S v. Forsvarets Materieltjeneste*,⁵ to argue that once the conditions of Article 346 TFEU are satisfied, the procurement is exempt from additional treaty-based or general EU procurement rules.

The Complaints Board rejected the complaint, citing provisions for subcontractors in the contract between the contracting entity and the selected supplier as a means to safeguard national security interests. Moreover, the Complaints Board emphasised that no obligation for competitive tendering existed for procurements covered by the Treaty provision. The contracting authority had conducted a form of competitive tendering through a market dialogue prior to selecting the supplier.

It should be noted that DALO, as the tenderer in this case, holds the responsibility for procurements related to Denmark's national security maintenance. Consequently, DALO assesses whether an acquisition is necessary to protect Denmark's essential security interests, thus justifying non-competitive tendering under the Treaty provision.

Furthermore, one could argue that once it has been established that a contract falls under the Treaty provision, EU procurement law no longer applies, relieving the contracting authority of obligations regarding equal treatment, transparency and proportionality. Although this may seem counterintuitive given the pervasiveness of EU law principles, it underscores the distinct legal realm governed by the Treaty provision.

7.2 Grandt Defense ApS v. the Danish Ministry of Defence Acquisition and Logistics Organisation

Under Article 28 of the Directive, contracting authorities may award contracts by a negotiated procedure without prior publication of a contract notice. Under article 28(1)(e), this applies for works contracts, supply contracts and service contracts, when for technical reasons or reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator.

The Complaints Board's decision of 28 November 2022, "*Grandt Defense ApS v. the Danish Ministry of Defence Acquisition and Logistics Organisation*",⁶ provides an insight into an interpretation of the requirements in Article 28(1)(e) of the Directive. This case revolves around the actions of DALO, which issued a Voluntary Ex-Ante Transparency Notice in the EU Official Journal of Tenders

⁵ The Complaints Board for Public Procurement's decision of 16 February 2009, *Saab Danmark A/S v. Forsvarets Materieltjeneste*.

⁶ The Complaints Board for Public Procurement's decision of 28 November 2022, *Grandt Defense ApS v. the Danish Ministry of Defence Acquisition and Logistics Organisation*.

on 7 December 2021. The notice indicated DALO's intent to enter into two framework agreements with the existing supplier: one regarding the purchase of ballistic protective vests and one regarding the purchase of spare parts and service of the vests.

Some relevant background information on the case is that, in 2012, DALO signed an agreement with the United States Government on the delivery of a system for ballistic protective vests. The agreement was concluded without a call for tenders in accordance with Article 13(f) of the Directive on certain government-to-government agreements. Since 2012, the system underwent various adaptations and changes based on the needs of the contracting entity, and the agreement was subsequently replaced by a 7-year framework agreement without tendering. Due to a need for customisations and various accessories, the Voluntary Ex-Ante Transparency Notice was then published with the intent of entering into the two 10-year framework agreements with an option to extend for seven years with the existing supplier.

As a result of this, the Complaints Board received a complaint from a potential supplier claiming that the requirements in Article 28(1)(e) were not fulfilled, since the existing supplier was not the only supplier of the requested services in the framework agreements.

During the complaint procedure, DALO further justified the award of the agreements based on the purchase being an additional procurement covered by Article 28(3)(a). The wording of Article 28(3)(a) is as follows:

“3. For supply contracts:

(a) for additional deliveries by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority/entity to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance.

The length of such contracts, as well as that of recurrent contracts, may not exceed five years, except in exceptional circumstances determined by taking into account the expected service life of any delivered items, installations or systems, and the technical difficulties which a change of supplier may cause;”

The Complaints Board found that the existing supplier had patented a significant part of the value of the supplied protective vest system and that a significant part of the value of the remaining part of the supplied system is compatible with the patented part.

During the complaint procedure, DALO stated that it would not phase out the existing vest system and a complete replacement would result in a loss of up to DKK 500m, which would also lead to existing usable equipment being rendered useless. The Complaints Board found that DALO was not obliged under the procurement rules to launch a tender for procurement of a new vest system to replace the existing one, regardless of the estimated value of the framework agreements awarded being DKK 850m-DKK 1.2bn.

It is undisputed that not only the existing supplier, but also other companies on the market could provide the vests systems. However, the existing supplier had patented a significant part of the supplied body armour system and a significant part of the value of the remaining part of the supplied body armour system is compatible with the patented part. Allowing other suppliers that would be able to supply compatible parts to the existing supplier's patented parts would mean that DALO will not be able to hold one supplier solely responsible for the overall vest systems. Considering the personal safety nature of the procurement, the Complaints Board found it reasonable that DALO demanded that one supplier alone would be held responsible.

Based on the above and the safety importance of all parts of the vest system being supplied by the same supplier, including to ensure compatibility, the Complaints Board found that a single-supplier situation existed. The conditions for applying the exception in Article 28(1)(e) of the Directive were therefore fulfilled.

7.3 Acapulka AS v the Danish Ministry of Defence Acquisition and Logistics Organisation

On 15 May 2024, the Complaints Board delivered a decision regarding a procurement dispute between Acapulka A/S and DALO. This case centres on DALO's non-competitive direct procurement of sleds from Fjellpulken AS, valued at approximately DKK 1.021 million, which was challenged by Acapulka A/S for alleged violations of procurement law.

Acapulka A/S filed a complaint asserting that DALO's direct award without a public tender was in breach of the transparency and equal treatment principles mandated by sections 2 and 55 of the Danish Public Procurement Act. They contended that the conditions stipulated in section 80(5) of the Act, which could allow for such a direct award in specific urgent circumstances, were not met. Furthermore, Acapulka argued that DALO had not adhered to procedural obligations by failing to publish a contract award notice within 30 days as required under section 129(1) of the Act.

The Complaints Board examined whether DALO's actions were justified under the exemptions provided by Article 346 TFEU. DALO defended its decision by emphasising the sudden and urgent need for specialised sleds capable of operating in the harsh winter climates of Latvia, vital for NATO's operational presence in the region. This need arose unexpectedly, negating the possibility of a standard tendering process.

In its deliberation, the Complaints Board highlighted that the procurement fell within the scope of Directive 2009/81/EC on defence and sensitive security procurement, which accommodates such urgent necessities under specific conditions. The Complaints Board pointed out that the documentation provided by DALO adequately demonstrated an urgent operational requirement that could not be foreseen, thus fitting the criteria for an exemption under the cited Directive and Article 346 TFEU.

Consequently, the Complaints Board ruled in favour of DALO, stating that the procurement did not violate the principles of equal treatment and transparency, as the conditions for the exemption from standard procurement requirements were clearly met. This decision underscored the permissible flexibility within EU and national laws to accommodate the immediate and unforeseeable requirements of national security.

This case serves as a significant precedent in balancing the stringent demands of procurement law with the pragmatic needs of national defence operations. It also provides critical insights into the application of Article 346 TFEU, illustrating the conditions under which national security considerations can justifiably override the general rules of competitive tendering.

8 Expansion of the scope of the Defence and Security Directive

As the European Union outlines a broader strategic framework for security and defence, the expansion of the Defence and Security Directive to include cybersecurity contracts becomes increasingly pertinent. The EU's Strategic Compass for Security and Defence, approved in March 2022, emphasises the need for a robust response to evolving threats in the digital domain. This strategic document,⁷ detailed on the Council of the European Union's official website,⁸ underlines the necessity for the EU to enhance its cybersecurity capabilities as a critical component of its overall defence strategy. It highlights the creation of an EU Hybrid Toolbox to detect and respond to a range of hybrid threats, including

⁷ <https://data.consilium.europa.eu/doc/document/ST-7371-2022-INIT/en/pdf>.

⁸ <https://www.consilium.europa.eu/en/press/press-releases/2022/03/21/a-strategic-compass-for-a-stronger-eu-security-and-defence-in-the-next-decade/>.

cyber threats, and the further development of the EU Cyber Defence Policy to be better prepared for and respond to cyberattacks. This policy enhancement aims to strengthen actions in the maritime, air and space domains as well as in cyberspace, notably by expanding the Coordinated Maritime Presences to other strategic areas and by developing an EU Space Strategy for security and defence.

Given this strategic direction, there is a compelling argument for classifying significant IT and cybersecurity initiatives as military material under Directive 2009/81/EC. Such a classification would streamline procurement processes for critical cybersecurity technologies, enabling EU Member States to deploy these essential defences swiftly and efficiently, in line with the urgent imperatives highlighted in the Strategic Compass. This approach not only aligns with the EU's long-term security objectives, but also addresses immediate cybersecurity challenges that threaten both infrastructural and national security across the EU.

Furthermore, the Strategic Compass commits to boosting the EU's intelligence capacities and the Single Intelligence Analysis Capacity (SIAC) framework, which will enhance the EU's situational awareness and strategic foresight. It also outlines the need to act more decisively in securing access to strategic domains and protecting EU citizens from hybrid threats. Incorporating cybersecurity measures under the Defence and Security Directive facilitates a coordinated and rapid response to such threats, consolidating EU's defence capabilities in a manner that is agile and aligned with modern warfare demands.

By classifying cybersecurity initiatives as military material, the EU would ensure that the procurement of these critical technologies is treated with the urgency and security measures they require. This not only helps in fostering a more secure European digital infrastructure, but also supports the Strategic Compass's vision of a more proactive and resilient EU in the face of complex security challenges. Thus, the expansion of the Defence and Security Directive to include advanced IT and cybersecurity contracts is both a strategic necessity and a response to the dynamic and potentially hostile digital landscape faced by the EU.⁹

⁹ <https://data.consilium.europa.eu/doc/document/ST-7371-2022-INIT/en/pdf>.