Article 346, EU Defence Procurement and the European Court of Justice

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1 Introduction

The defence and security of EU Member States is a national matter for each state. The guarantee of the state's external security through its national defines capabilities that belongs to that state's absolute core responsibility. The defence of each Member State is thus a national matter, which means that the EU Member States have no common defense and that European defence issues are not supranational in nature. However, there are a number of intergovernmental defence cooperations between the Member States, e.g. through the EDA, the European Defence Agency.[1] In addition, there are a number of provisions of Union law on how different types of defence and security services and goods shall be procured.

Contracting authorities and entities must for all procurements decide which procurement legislation is applicable to a specific procurement.[2] The provisions of the various regulations differ and opportunities that may exist in some procurements may not be applicable to others. Regardless of the type of contracting authority or entity concerned, decisions must therefore be made for each individual procurement on which legislation is applicable to that particular procurement.

In the case of defence and security procurement, both contracting authorities and entities shall apply the provisions in Article 346 of the Treaty on the Functioning of the European Union (Article 346 TFEU),[3] or the provisions of Directive 2009/81/EC of 13 July 2009 on the coordination of procedures for the award of certain contracts for works, goods and services by contracting authorities and entities in the field of defence and security (Directive 2009/81). Article 346 TFEU states that a Member State under certain circumstances can buy goods, services and works directly, without prior competition, if certain conditions are met.

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1 For more information, see *https://eda.europa.eu/*.

2 A *contracting authority* is an organisation covered by the provisions in the classical Directive, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (Directive 2024/24), while a *contracting entity* is an organisation covered by the provisions in the utilities directive, Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors.

3 Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012, OJ L. 326/47-326/390; 26.10.2012.

If they are not, the procurements have to be done according to the provisions in Directive 2009/81.

2 Article 346 TFEU

Contracts in the field of defence and security relating to works, goods or services that need to be kept confidential in order to protect *essential national security interests* may be covered by the provisions of Article 346 TFEU. Such procurements can be exempted from the entire EU procurement legislation. For such procurements, the contracting authority or entity may decide for itself whether the procurement is to be put out to competition or whether it will contact a suitable supplier directly.

Article 346 TFEU applies to all EU law, including the public procurement directives and the wording is as follows:

> 1. The provisions of the Treaties shall not preclude the application of the following rules:
>
> (a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;
>
> (b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.
>
> 2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.[4]

The exception in Article 346(1)(a) TFEU states that a Member State can refuse to supply information that it considers “contrary to the essential interests of its security”. Even though the article clearly states that it is the Member State itself that shall decide if certain information is of essential interest to its security, that decision can be overruled by the European Court of Justice.[5] The exact type of

[4] Heuninckx, Baudoin, Security of Supply and Offsets in Defence Procurement: What’s New in the EU?, P.P.L.Rev 2014, p. 33, 35.

[5] Trybus, Martin, Buying Defence and Security in Europe: The EU Defence and Security Procurement Directive in Context (CUP 2014) 39, p. 128–129.

information referred to is not stated in the article. It may very well be information in a procurement where the prerequisite for the procurement is that the suppliers receive some secret information. This can be information on the location of secret facilities to be built or information on the design of existing safety-rated technical systems in order to be able to supply complementary systems.

According to Article 346(1)(b) TFEU a Member State may decide to take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war materiel. The qualification is that such measures do not affect conditions of competition in the internal market regarding products which are not intended for specifically military purposes. Article 346 TFEU only protects "essential" security interests. It is up to the Member State itself to interpret the concept of "essential", and the interpretations may, of course, differ between Member States. Thus, security interests that do not reach the degree of "essential" are not protected by the article. Such interests may instead be covered by the provisions of Directive 2009/81. The Member States have, through the Council, determined the goods to which the provisions of paragraph 1 (b) of Article 346 TFEU shall apply in a special list dating from 1958. Provisions shall apply to the following weapons, ammunition and military equipment, including weapons designed to use nuclear energy:

> 1. small arms and automatic weapons, such as rifles, carbines, revolvers, pistols, shotguns and shotguns, except for hunting guns, pistols and other fine-caliber weapons of a maximum caliber of 7 mm;
> 2. artillery and smoke, gas and grenade launchers;
> 3. ammunition for weapons according to paragraphs 1 and 2;
> 4. bombs, torpedoes, rockets, remote-controlled robots and
> 5. military fire control equipment.

The list has never been updated and it is not clear today exactly what products are covered.[6] Article 346(1)(b) does not apply to goods that are not on the list or used "specifically for military purposes".

Recital 10 of Directive 2009/81 states that the list above is generic and should be interpreted broadly in the light of the development of technology, procurement procedures and military requirements. This means that new types of equipment are being developed, for example on the basis of the Union's common military list. It is also stated that the concept of military equipment should further include products which, although originally designed for civilian use, have subsequently

[6] Heuninckx, Baudoin, Security of Supply and Offsets in Defence Procurement: What's New in the EU?, P.P.L.Rev 2014, p. 39, 40.

been adapted to military purposes for use as weapons, ammunition or military equipment.

Of interest for public procurement, the latter part of Article 346 paragraph 1.b TFEU states that measures taken by a Member State to protect its essential security interests in the manufacture or trade in arms, ammunition and military equipment must not impair the conditions of competition in the internal market in respect of goods not specifically intended for military purposes.

It is important to remember that it is for the Member States themselves to decide whether Article 346 TFEU is applicable. However, the decisions of the Member States can be reviewed by the European Court of Justice (ECJ), a review which has been made in a number of decisions presented below.

3 The ECJ and Article 346 TFEU

The ECJ has ruled in some well-known cases on the use of Article 346 TFEU in defence procurements.

3.1 Agusta Bell

The Agusta Bell case was about the possibility for a contracting authority to exclude a procurement from the EU directives on public procurement or to apply the negotiated procurement without publication because the goods in question were intended for military purposes or, alternatively, were secret.[7] When the case was tried, Directive 2009/81 had not yet been adopted. The case was therefore decided in accordance with the provisions of the then-applicable Directive 93/36 on the procurement of goods (now Directive 2014/24) and Article 296 (1) (b) EC (European Treaty) (now Article 346 TFEU).

The European Commission had noticed an old practice in Italy of procuring helicopters directly from the Italian manufacturer Agusta, without competition. The helicopters, under the brands Agusta and Agusta Bell, were procured to meet the needs of various entities within the Italian state. The Commission brought an action before the ECJ, claiming that the general practice in Italy of buying helicopters directly from the manufacturer to meet the needs of both civilian and military units was contrary to Union law. Italy claimed, inter alia, that it had the right to procure the helicopters without competition because the helicopters had dual purposes; they could be used for both civil and military purposes. Italy also claimed that, for reasons of confidentiality, it was entitled to procure the helicopters without competition and referred to the exceptions provided for in Directive 93/36 and the exception provided for in Article 296 EC.

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[7] Judgment of 8 April 2008, Commission v Italian republic (Agusta Bell), C-337/05, EU:C:2008:203.

The ECJ found that, under Union law, Member States have the right to take measures to fulfil their legitimate requirements of national interest, requirements which could have to do with public security or national defence. However, with regard to public security, there are restrictions on the measures that Member States can take. The Treaty specified exceptional and well-defined cases when states could deviate from the scope of Union law. Regarding the exception in Article 296 EC on arms procurement, etc. however, the ECJ found that such measures must not adversely affect the conditions of competition in the common market in respect of goods not specifically intended for military purposes. The Court pointed out that it is up to the Member State wishing to apply the exceptions to show that the exception does not go beyond the conditions set out in the Treaty.

Italy argued that it could exclude the procurement of helicopters from the procurement rules, since they had dual uses. The ECJ, on the other hand, held that the exception did not apply to the Italian helicopters, precisely because they had dual uses. Italy also claimed that the information provided for the production of helicopters was confidential and that the procurement was therefore covered by the exception provided for in Article 2 (1) (b) of Directive 93/36. However, the Court found that Italy had not stated why the confidentiality of helicopter production would be less guaranteed, only because production was entrusted to other companies, and held that it was disproportionate to invoke the exception of confidentiality. Italy had not shown that the purpose of preventing the dissemination of sensitive data concerning production could not be guaranteed by the procurement procedures laid down in Directive 93/36, i.e. in an open or a restrictive procedure.

This was the first time the ECJ had ruled on the provisions of the procurement directives and Article 296 (1) (b) EC on procurements covering essential security interests. It seemed as if the division after the judgment should have been clear; goods and services solely for civilian purposes, and those that could be used for both civil and military purposes, should be procured according to the provisions in the EU public procurement directives. This was true whether the goods or services were used by civilian or military units. Only in cases where the goods or services were *specifically* intended for military purposes could the Member States be allowed to use the exceptions in the procurement directives and in the European Treaty.

3.2 Tiltable turntable

However, a number of years later, in 2012, the ECJ published the judgment in the Tiltable turntable case.[8] The case involved a Finnish contracting authority that had carried out a defence procurement in order to acquire equipment that was intended for specific military purposes, but could also be used for similar civilian purposes. In the case of Agusta Bell, above, the ECJ had ruled that only equipment specifically intended for military purposes was covered by the exceptions in the procurement directives and the European treaty. The interesting question was therefore whether this specific procurement was exempted from competition under the procurement directives and Article 296 (1) (b) EC (now Article 346 (1) (b) TFEU).

The ECJ began by stating that it is not enough for a Member State to refer to the essential security interests of Article 296 EC (now Article 346 TFEU), it must also show that the provisions are applicable in the individual case. The Court was also careful to point out that, irrespective of whether the material in question could be considered to be specially intended for military purposes, the exception from competition must nevertheless appear *necessary* to protect the essential security interests of the Member State concerned.

Furthermore, the ECJ pointed out that the measures which the Member States can take under Article 296 EC (now Article 346 TFEU) must not adversely affect the conditions of competition in the common market for goods not intended specifically for military purposes. Therefore, a contracting authority cannot rely on Article 296 (1) (b) EC (now Article 346 (1) (b) TFEU) to justify an exception for the purchase of equipment which is certainly used for civilian purposes, while it only may be used for military purposes. A commodity falling within one of the categories of equipment specified in the Council list of 15 April 1958, if it can also be used for similar civilian purposes, can only be considered *specifically for military purposes* if

- that is *the purpose* of the contracting authority with the purchase of the goods and
- the product has *special characteristics* that are related to the fact that it has been specifically designed, developed or modified in essential respects for this purpose.

The Court also referred to recital 10 of Directive 2009/81 which states that the term “military equipment” should also include products which, although

[8] Judgment of 7 June 2012, Insinööritoimisto InsTiimi (Turntable), C-615/10, EU:C:2012:324.

originally designed for civilian use, have subsequently been adapted to military purposes for use as weapons, ammunition or munitions.

The ECJ concluded by stating that the national court, which had asked the question, even if it found that the product concerned fell within the substantive scope of Article 296 (1) (b) EC (now Article 346 (1) (b) TFEU), should check whether the Member State had shown that the exception must be applied to protect the State's essential security interests, and that the need to protect these essential interests could not have been met if an invitation to tender had been made in the manner provided for in the EU procurement directives.

3.3 Commission v Finland

In the case Commission v Finland, Finland had failed to burden imported military equipment with import duties by claiming that the material was covered by essential security interests.[9] On that basis, Finland did not want to pay customs duties to the Commission, saying that it was not possible to keep purchases of defence equipment secret if the goods were to be subject to import duties and the customs duties were reported to the Commission. Finland considered that, in accordance with Article 296 (1) (b) EC (now Article 346 (1) b) TFEU), Member States had a wide discretion with regard to measures taken by them to protect their essential security interests relating to goods to which the article was applicable. Thus, according to Finland, Article 296 (1) (b) EC (now Article 346 (1) b) TFEU) allowed Member States to derogate from the EU rules on import duties on imports of equipment intended exclusively for military purposes, with the aim of protecting their essential security interests, taking into account the specific situation of the Member State concerned.

Finland also argued that it was the Member State itself that would assess the measures necessary to safeguard its essential security interests. In order for the ECJ to verify that the Member State concerned had not abused its rights, according to Finland, it was up to the Member State to state the essential security interests it invoked and to show that it had taken the relevant measures that they considered were necessary to safeguard these interests.

The ECJ began by stating that at that time there was no exceptions for Member States to impose import duties on military equipment. It then referred to past practices and noted that the fact that it was up to the Member States to decide on appropriate measures to ensure internal and external security did not mean that such measures fell entirely outside Union law. On the contrary, there were explicit exceptions in the EU Treaty (now the TFEU) which were applicable to situations that could jeopardize public security and which referred to exceptional

[9] Judgment of 15 December 2009, Commission v Finland, C-284/05, EU:C:2009:778.

and well-defined cases. According to the Court, it was not possible to conclude that there was a general reservation in the Treaty which meant that all measures taken with reference to public security fell outside the scope of Union law. Accepting such a reservation, in addition to the specific conditions of the Treaty provisions, would undermine the binding nature of Union law and its uniform application. In addition, the ECJ held that the exceptions in Articles 296 EC and 297 EC (now Article 346 TFEU) should be interpreted restrictively, in accordance with established case-law on the exceptions to the fundamental freedoms.

Regarding Article 296 EC (now Article 346 TFEU), the Court pointed out that the Article, although referring to measures which a Member State considered necessary to protect its essential security interests and the disclosure of which it considered to be contrary to its essential security interests, could be interpreted in such a way as to give Member States the right to derogate from the provisions of the Treaty already by invoking those interests. Instead, it was the Member State that would show that the measures were justified to protect the state's essential security interests. Here, the Court cited, *inter alia*, to the Commission v Spain case.[10] In this case, Spain had failed to prove that the exception from VAT on imports and acquisitions of weapons, ammunition and equipment solely for military use provided for in Article 296 (1) EC (now Article 346 (1) TFEU) was justified by the Spanish legislation to protect Spain's essential security interests. The Court's conclusion was that it is up to the Member State which relies on Article 296 EC (now Article 346 TFEU) to prove that the exception provided for in that Article is necessary to protect the essential security interests of the state.

Finland argued that the EU's customs procedures could not guarantee its security in view of the confidentiality requirements contained in the agreements with the exporting countries. However, the ECJ found that it was EU officials and national officials who applied the EU customs legislation. According to the Court, the obligation that these had to keep sensitive information provided protection for the essential security interests of the Member States. In addition, an obligation on the Member States to transmit certain documents to the Commission did not prevent the Member States, in exceptional cases, from limiting the information provided to the Commission to certain parts of a document, or not to disclose these at all under Article 296 EC (now Article 346 TFEU). In view of this, the ECJ found that Finland had failed to prove that the necessary conditions for the application of Article 296 EC (now Article 346 TFEU) were fulfilled.

[10] Judgment of 16 September 1999, Commission v Spain, C-414/97, EU:C:1999:417.

3.4 Schiebel Aircraft

In the Schiebel Aircraft case, Austria had adopted a requirement that members of bodies representing a company or the shareholders having the right to lead and represent commercial companies intended to trade in military weapons and military ammunition as well as mediate the purchase and sale of military weapons and military ammunition, must be citizens of Austria.[11] The ECJ began by stating that the case was covered by the provisions of Articles 45 TFEU and 49 TFEU, which concern the free movement of workers and the freedom of establishment, as well as Article 346 (1) (b) TFEU. The Court found that the requirement of citizenship was contrary to the provisions of Articles 45 TFEU and 49 TFEU.

The question then was whether the requirement of citizenship could be justified by reference to Article 346 TFEU. When the requirement was introduced, Austria had, without further justification, referred to the derogation provided for in Article 346 (1) (b) TFEU. Again, the Court found that it is not enough for a Member State to refer only to Article 346 TFEU in order to derogate from Union law. The Member State relying on Article 346 (1) (b) TFEU must show that the exception under this provision must be applied in order to protect the essential security interests of the State.

The activities in question, trade in military weapons and military ammunition, as well as the mediation of purchases and sales of these goods, could fall within the scope of the exception provided for in Article 346 (1) (b) TFEU. However, it was not clear how the citizenship requirement was necessary to protect Austria's essential security interests. On the contrary, the Court held that the purpose of the citizenship requirement, to be able to guarantee the reliability of persons authorized to trade in military weapons and military ammunition as well as the mediation of purchases and sales of these goods and to secure the supply of defence equipment and to prevent the dissemination of strategic information, in accordance with the principle of proportionality, must not go beyond what is expedient and necessary to achieve the objective pursued. According to the ECJ, these objectives could have been achieved by means of less restrictive measures, such as regular checks on the manufacture and trade of weapons, administratively sanctioned confidentiality requirements or criminal sanctions prohibiting the dissemination of strategic information. Thus Austria had failed to show that the requirement of citizenship was necessary and proportionate.

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[11] Judgment of 4 September 2014, Schiebel Aircraft, C-474/12, EU:C:2014:2139.

3.5 Staatsdruckerei

In the case Staatsdruckerei, Austria had, on the one hand, directly awarded service contracts for the manufacture of such documents as passports with data chips, provisional passports, residence permits, identity cards, pyrotechnic licenses, license cards in credit card format and credit card registration certificates to the Österreichische Staatsdruckerei, and, on the other hand, retained national provisions which led to an obligation for contracting authorities to award these contracts directly to the said company.[12] Austria pointed out that it wanted to guarantee the authenticity and accuracy of these documents, protect sensitive personal data, ensure a faster handling of the documents, and be able to have effective supervision, and that the provisions were part of the state's security strategy in support of the proceedings. Austria also referred to its essential security interests.

The ECJ began by stating that, in accordance with Article 346 (1) (a) TFEU, no Member State shall be obliged to provide such information the disclosure of which it considers to be contrary to its essential security interests. It also clarified that the provision is drafted in general terms and thus can be applied to, *inter alia*, non-military procurements, such as the printing contracts in question in the case. However, even in this case, the Court found that Member States must show that the exceptions they make to EU law on the basis of essential security interests, whether found in the Directives or in Article 346 (1) (a) TFEU, are necessary, in other words, proportionate. Thus, the Member State wishing to apply these exceptions must demonstrate that the need to protect such interests could not have been met in the context of a procurement procedure established by the various procurement directives.

The ECJ found that none of the reasons stated by Austria meant that the procurement could be exempted from the EU procurement legislation.

3.6 Commission v Poland

In the case Commission v Poland, Poland had added to Polish legislation exceptions not provided for in Directive 2014/24 concerning contracts for the production of certain documents, printed matter and stamps and markings.[13] The Commission claimed that Poland in doing so had failed to fulfil its obligations under Article 1(1) and (3) and Article 15(2) and (3) of Directive 2014/24, read in conjunction with Article 346(1)(a) TFEU. It also referred to the judgment Staatsdruckerei. Poland objected and relied on the requirement of protection of its essential security interests.

[12] Judgment of 20 March 2018, Commission v Austria (Staatsdruckerei), C-187/16, EU:C:2018:194.

[13] Judgment of 7 September 2023, C-601/21, Commission v Poland, EU:C:2023:629.

The Court concluded that as regards the derogation contained in Article 15 of Directive 2014/24, it is for the Member States to define their essential security interests and, in this case, for the Polish authorities to define the security measures necessary for the protection of the national security of the Republic of Poland in the context of the printing of documents such as those at issue in the case. However, measures adopted by the Member States in connection with the legitimate requirements of national interest are not excluded in their entirety from the application of EU law solely because they are taken in the interests of national security. Moreover, the ECJ pointed out that derogations such as those relied on in the action at hand must be strictly interpreted. The Member State must establish that protection of such interests could not have been attained within a competitive tendering procedure as provided for in Directive 2014/24.

Poland argued that the direct award of contracts to an undertaking where the State was the sole shareholder was a way of ensuring continuity in the supply of official documents, by avoiding the risk of bankruptcy of that undertaking. The ECJ however stated that Poland had failed to show that that objective could not be ensured in the context of a call for tenders and that such guaranteed provision would be jeopardised if those services were entrusted to other undertakings, including, as the case may be, undertakings established in other Member States. It also considered that Poland had failed to show that the risk of disruption in the production of the public documents in question resulting from the potential bankruptcy of the economic operator responsible for that production was significantly greater where a public procurement procedure provided for by Directive 2014/24 was used. The court mentioned several ways that Poland could have dealt with any such risks, like that the contract could have provided for guarantee requirements as to financial stability of the candidates. Poland could also have provided for the imposition of other measures, such as, inter alia, an obligation, vis-à-vis the contracting authority, to conclude, where other considerations do not preclude this, contracts with several suppliers in the Polish legislation at hand.

The ECJ also dismissed Poland's arguments regarding the necessity of correct produced documents for elections by stating that as to ensure the efficient conduct and security of elections, Poland had failed to demonstrate that undertakings other than the state-owned company awarded the contract necessarily perform worse than that undertaking and that they could not print those ballot papers and produce those signs in sufficient quantity and in good time. The Court also stated regarding the requirement to impose an obligation of confidentiality that it not in itself prevent the use of a competitive tendering procedure for the award of a contract.

The conclusion of the ECJ was that the disapplication of the public procurement procedures laid down by Directive 2014/24 to contracts relating to the production of the majority of the public documents referred to in the Polish law on public

procurement, but also to the contracts, also referred to in that provision, relating to the production of excise stamps, legal markings, control stickers, ballot papers, holographic signs on certificates of voting rights and microprocessor systems with software for the management of public documents, computer systems and databases necessary for the use of public documents, appeared disproportionate in the light of the objectives on which Poland relied.

However, regarding certain public documents, namely the personal documents of members of the military and their identity cards, the service cards of police officers, border guards, State security agents, officers of the Internal Security Agency, officers of the Intelligence Agency, officers of the Military Counterintelligence Service and professional soldiers appointed to a post in that service, officers of the Military Intelligence Service and professional soldiers appointed to a post in that service, and members of the military police – ECJ stated that those documents presented a direct and close link to the objective of protecting national security, with the result that these may justify additional confidentiality requirements. Any leak of such information could have irreparable consequences for the national security of a Member State, given that such information is liable to be used by third States or, in particular, by criminal gangs or terrorist organisations. In those circumstances, Poland could rely on Article 15(2) and (3) of Directive 2014/24 when it claimed that the nature of these documents was incompatible with the obligation to follow those procedures.

Summary

It is clear from the above judgments of the ECJ that Member States wishing to refer to the exceptions in either Article 346 TFEU or in the procurement directives in support of the direct award of contracts covered by their *essential security interests* are able to do so. In this regard, Member States have a wide discretion to determine what constitutes a significant security interest. However, the possibility is conditional and it is required that the Member State can demonstrate/prove that the exception is necessary to fulfil its purpose, i.e. that the exception is *proportionate*.

4 Conclusion

In summary, it can be concluded that contracts that cover *essential national security interests* and contracts for construction contracts, goods and services of *a sensitive nature* constitute such contracts that may be subject to specific provisions in EU law regarding how they can be procured.

Contracts relating to works, goods or services that need to be kept confidential in order to protect *essential national security interests* are covered by the provisions

of Article 346 TFEU. The concept of essential security interests may include civilian construction works, goods and services as well as the manufacture or trade of weapons, ammunition and military equipment. It may very well be about information in a procurement where the prerequisite for the procurement is that the suppliers receive some information, e.g. information on the location of secret facilities to be built or information on the design of existing safety-rated technical systems in order to be able to supply complementary systems. The essential security interests of the Member States as regards the manufacture or trade in arms, ammunition and military equipment are also protected in Article 346 TFEU. However, in order to be able to exclude a contract under Article 346 TFEU, the Member State has to *provide proof* that the exception must be applied to protect the essential security interests of the State and that the need to protect these essential interests could not have been met if an invitation to tender had been made in the manner provided for in Directive 2009/81/EC or in Directive 2024/24. The *justification* for applying the exception in Article 346 TFEU thus becomes decisive for the legality of the exception.

Contracts for goods and services of *a sensitive nature* are covered by the provisions of Directive 2009/81/EC. By sensitive nature is meant that they have a security purpose and include, require and/or contain classified information. In recital 27 of Directive 2009/81/EC, you can however find the following exception:

> "In the fields of defence and security, some contracts are so sensitive that it would be inappropriate to apply this Directive, despite its specificity. That is the case for procurements provided by intelligence services, or procurements for all types of intelligence activities, including counter-intelligence activities, as defined by Member States. It is also the case for other particularly sensitive purchases which require an extremely high level of confidentiality, such as, for example, certain purchases intended for border protection or combating terrorism or organised crime, purchases related to encryption or purchases intended specifically for covert activities or other equally sensitive activities carried out by police and security forces".

In other words, we can all keep having our spy operations secret.