

November 2006

COMMENTS ON IN ADVANCE OF THE INTERPRETIVE COMMUNICATION ON THE APPLICATION OF ARTICLE 296 OF THE TREATY IN THE FIELD OF DEFENCE PROCUREMENT

I. BASIC COMMENTS

UNICE supports the Commission's intention to submit an Interpretive Communication concerning Article 296 of the Treaty in the field of defence procurement.

It is particularly important in our view that this communication makes it clear that Article 296 of the Treaty does not mean that defence procurement is automatically exempted from the scope of the EC Public Procurement Directives.

A second important assertion is in our opinion that the Commission, which according to Article 298 of the Treaty has the authority to go to the European Court of Justice, can be called upon to investigate suspected infringements of Article 296 of the Treaty, and the Member State in question must provide detailed evidence that it has sufficient the criteria of Article 296.

We note that after submission of the proposed Interpretive Communication the Commission intends to draw up proposals for a new directive for defence procurement not covered by the scope of Article 296 of the Treaty. While the Commission currently sees a 'borderline problem' between Article 296 of the Treaty and the EC Public Procurement Directive, we would like to point out that it must also be aware that similarly difficult problems of demarcation exist between the scope of the new directive and the Public Procurement Directive and will have to be resolved.

We would also like to make clear that in our opinion, a specific new directive for defence procurement makes is not necessary and makes no sense. The prerequisites for the correct awarding of competitive contracts would exist if all actors were on an equal footing and treated as such.

II. SPECIFIC COMMENTS ON THE DRAFT COMMUNICATION¹

- Re: Introduction, paragraph 3 (page 3)

In the first sentence the words 'procurement *law*' should be replaced by 'procurement *policy*', because the fragmentation of the markets for the procurement of defence goods is not primarily caused by the law governing the awarding of contracts, but mainly by the different fundamental views of procurement *policy* of the Member States. In the second sentence, the second clause ('which have widely ...') should be removed - at its core the fragmentation of the defence markets is not characterised by different suitability criteria and announcement procedures, but primarily by diverging structures and framework conditions of the defence industry in the Member States and diverging national export licensing practice.

- Re: Introduction, paragraph 4, bullet point 1 (page 3)

¹ Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement, Draft dated 13.07.06.

The word 'uncertainties' should be replaced by 'different use'. Looking at it realistically, the problems of the application of Article 296 of the Treaty arise in the main from the fact that the application of Article 296 by Member States' varies from state to state.

- Re: Introduction, paragraph 4, bullet point 2 (page 3)

Without a clear and precise explanation, we are unable to understand the assertion that is made that the Public Procurement Directive are unsuitable for many defence contracts.

- Re: Introduction, paragraph 6 (page 4)

In the second sentence, the word 'misinterpretation' should be replaced by 'misuse'. It should be made explicitly clear that general reference to Article 296 of the Treaty without the existence of the necessary prerequisites – in particular without *essential* security interests being concerned – is not merely a misunderstanding of the application of EC law but is in fact *illegal*.

- Re: Number 2, paragraph 2, last sentence (page 6)

The statement that derogation under Article 296 of the Treaty touches the core of European Community law and is a legally and politically serious matter can only be underlined with emphasis. Therefore, infringements of this provision are not to be taken lightly, but as serious breaches of Community law.

- Re: Number 4, paragraph 1, last sentence (page 7)

The statement that a Member State can only use Article 296 of the Treaty to procure products on the Council's list, if the conditions of this provision are fulfilled, is of essential importance. We support the Commission in this statement as a core element of the Communication.

- Re: Number 4, paragraph 3, penultimate sentence (page 7)

The development of a common European market for defence equipment mentioned here is to be welcomed.

- Re: Number 6, paragraph 1 (page 8)

The message of this paragraph is contradictory. The statement in the second sentence that the concept of essential security interests is vague is not compatible with the statement that Article 296 of the Treaty, which is based on this concept, is only applicable in 'clearly defined cases'.

- Re: Number 7, paragraph 1 ff. (page 9 f.)

We support the statement that the Commission can be called upon to investigate suspected infringements of Article 296 of the Treaty, and that the Member State in question must provide sufficient evidence of the conditions required to fulfil the criteria of Article 296 of the Treaty. Even if the Commission guarantees confidentiality, it remains to be seen whether countries will behave in a uniformly communicative way; there are justifiable doubts. It is probable that a Member State which contravenes Article 296 of the Treaty will only react satisfactorily if the case goes before the ECJ.