

Newsletter

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EU Directive on Defence Procurement about to have direct effect in most of the EU Member States

Transition period ends 21 August 2011

About eight months after the European Commission published its “guidance notes” on the implementation of the European Directive on procedures for the award of contracts in the fields of defence and security (DIR 2009/81/EC) it has become apparent that the Directive will not be implemented by most of the European Union Member States in the scheduled timeframe. Although the transition period ends on 21 August 2011 currently only France, Greece and Latvia have fully adopted and implemented laws to comply with this Directive.

However, this does not result in the inapplicability of the rules established by the Directive in all other Member States; in fact, most of the regulations will have direct effect once the transition period ends irrespective of whether they are implemented into national law.

Direct application of EU Directives

While the application of an unimplemented Directive is not explicitly mentioned in any of the EU Treaties, the European Court of Justice established the principle of direct effect, i.e. direct application of directives without implementation into national law, and laid down the following criteria for establishing such direct effect:

- be sufficiently clear and precisely stated,
- be unconditional or non-dependent, and
- confer a specific right for the citizen to base his or her claim on.

Most of the rights provided by DIR 2009/81/EC meet these requirements and are therefore directly applicable in the Member States, even if it has not been implemented into nation law, yet.

Offset policies have to be adjusted

Notably, the procurement principles providing that economic operators shall be treated equally and in a non-discriminatory manner have to be observed. Consequently, offset requirements are to be considered a violation of DIR 2009/81/EC. Therefore, Member States have to adjust their offset policies soon. In general, national procedures have to be adjusted for the purposes of DIR 2009/81/EC and its rules on advertising and transparency have to be regarded. This goes along with a restricted application of Art. 346 of the Treaty on the Functioning of the European Union (TFEU) as the Directive already sets out its own regulations of exceptions and exclusions. Contracts may still be awarded

directly if Art. 346 TFEU can be duly invoked, but whether the preconditions are met or not can now be subject to judicial review.

Legal protection and Member State liability applies

Since all the regulations on legal protection meet the conditions for direct application, once the transition period has ended, the rights granted in DIR 2009/81/EC will be immediately enforceable before national courts. Individuals can rely on DIR 2009/81/EC and challenge any actions of the Member States and any of their contracting authorities. In addition, national courts are obliged to interpret already existing national laws in accordance with the meaning of DIR 2009/81/EC, even if this would violate national law.

Finally, the unimplemented Directive automatically gives rise to Member State liability. This issue arises when the damage to the injured party is caused by the lack of implementation by the Member State. In this case Member States are obliged to pay damages to the injured party because they did not provide the rights granted in DIR 2009/81/EC.

Conclusion

The regulations established by DIR 2009/81/EC will have direct effect once the transition period has ended on 21 August 2011. Candidates or tenderers can challenge any decision by the Member States, i. e. the contracting authorities, resulting from the lack of implementation or the incorrect implementation of DIR 2009/81/EC against a Member State irrespective of whether the provisions of DIR 2009/81/EC are implemented into national law. On top of that, Member States can be held liable for damages for not implementing the Directive in the event of infringement of individual rights granted by it.



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