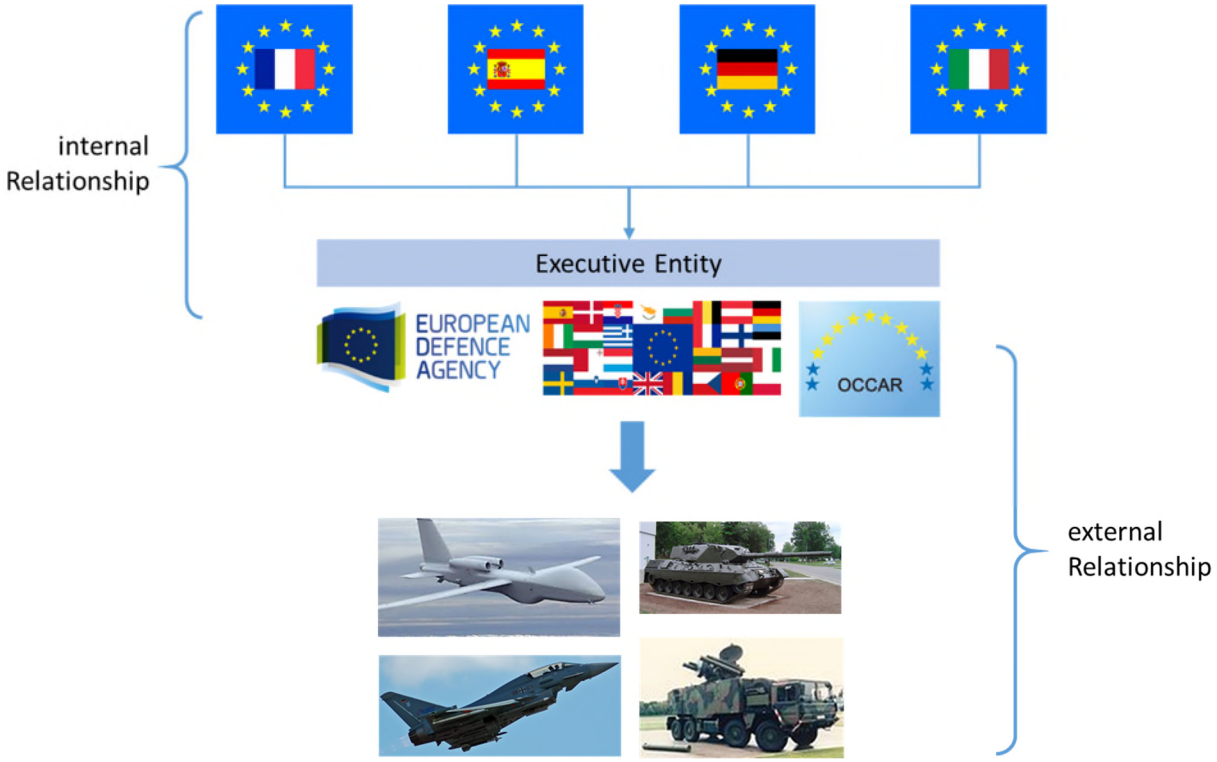
Joint procurement in the defence and security sector – A (procurement) lawless area?

6 October 2020

Strengthening cooperation in defence and security procurement among member States has become an important concern of the European Union. Last year, the Commission addressed the issue of joint procurement in the defence and security sector in a separate guidance note. The Commission stressed the need for more cooperation in order to reduce costs, promote cross-border competition and facilitate cooperation between the European armed forces. In particular due to PESCO and the EDF, more joint procurement procedures are to be expected.

Joint procurements are typically structured in such a way that the participating EU member States assign the task of procuring the good (or service) in question to a single entity. This so-called **Executive Entity** is usually either one of the participating EU member States or a supranational organisation such as OCCAR, NATO or EDA. It conducts the procurement procedure and usually acts as agent for the EU member States.



Joint procurement may appear to be conducted in a lawless field without the possibility of any judicial review. The following questions therefore arise:

- Are member States bound by their national procurement law when assigning an Executive Entity the task of procuring for them?
- Are Executive Entities bound by any form of procurement law when choosing their supplier(s)?
- Can a company take action against an unfair award to a competitor?

The following will provide brief answers to these questions, allowing the reader to get an introduction to this topic.

A safe haven from procurement law?

The key question regarding joint procurement procedures is how this affects competition in the European defence and security market. One could be concerned that cooperation allows member States to avoid public procurement law altogether, enabling them to choose a supplier without being bound to determine him in the course of a competitive procedure. However, this is not the case. Regardless of how exactly a joint procurement is structured, public procurement law applies:

- The member State's act of assigning the task of procuring a good to an Executive Entity is subject to the Defence Directive (Directive 2009/81) and the respective national public procurement laws transposing the Directive. Normally, this would mean that the assignment itself would have to be subject to a competive procedure. However, the Defence Directive provides for several exemptions. Depending on the type of Executive Entity, they provide EU member States with the option to directly award the task to an Entity without the need to carry out a competitive procurement procedure. The following table provides a summary of which exemptions are available with respect to different Executive Entities.

	Government to Government (Art. 13 (f))	International Rules (Art. 12(a)-(c))	Central Purchasing Bodies (Art. 10)	Public - Public Cooperations	Research & Development (Art. 13(c))	Art. 346 TFEU
EUROPEAN DEFENCE AGENCY	⊖	⊖	⊕	⊕	⊕	⊖
	⊕	⊕	⊕	⊕	⊕	⊖
OCCAR	⊖	?	?	?	⊕	⊖

- Thus, the Executive Entity usually does not have to be determined through a competitive procurement procedure. However, this does not mean that the procurement of the goods itself is exempted from public procurement law. The exemp-

tions allowing EU member States to not apply public procurement law when assigning the task of procuring the goods usually require the Executive Entity itself to apply the procedural rules of the Defence Directive or comparable rules. If an EU member State or the EDA performs this task, that is certainly the case since both have to apply the Defence Directive even if they act as Executive Entities. OCCAR and NATO have their own procurement regimes. Whether they meet the standard of the Defence Directive – as required by the relevant exemptions – remains however an open question.

- Executive Entities therefore always have to apply a procurement law regime that is based on the Defence Directive or that at least provides for a comparable standard. Either way, this leads to – as default – Executive Entities having to conduct a competitive procedure prior to awarding a contract. Therefore, any deviation to the detriment of competition is only possible in exceptional cases (such as the procurement of a technology subsequent to its research and development on behalf of the Executive Entity). Even then, EU primary law will apply to such an award since Art. 346 TFEU is not applicable to joint procurements.

No way to fight back?

Both the assignment by EU member States to an Executive Entity and the Executive Entity's decision to award a contract are subject to some form of public procurement law, at least one comparable to the Defence Directive. Therefore, companies that feel discriminated may challenge both acts according to the applicable law regime. This especially applies in case of suspicion that the applicability of (national) public procurement law was intentionally circumvented as this is always prohibited.

Companies seeking legal protection have to of course decide which act they want to have reviewed. Challenging the award of the contract by the Executive Entity usually promises a higher chance of success. However, especially if a company believes that the Executive Entity is not employing a procurement regime that meets the standard of the Defence Directive, challenging the assignment to the Executive Entity by one or several EU member States may be the better option.

Summary

It is not true that joint procurement is a (procurement) lawless area. EU member States and the purchasing Executive Entity generally have to observe public procurement law also when jointly procuring goods or services in the defence and security sector. Companies that are envisaged as a contractor should ensure that the (direct) award adheres to the applicable public procurement law. They otherwise risk that the (direct) award is challenged by a competitor. Companies that feel that there are no grounds for a (direct) award of a contract to a competitor are not left without remedies.

BLOMSTEIN will monitor and report on further developments. If you have any questions about the potential impact on your company or industry, please do not hesitate to reach out to Pascal Friton and Christopher Wolters at any time. More detailed answers to the questions outlined above can be found in their article published in European Procurement & Public Private Partnership Law Review (EPPPL 1/2020, p 24 - 41) and Pascal and Christopher are happy to share their insights with you.