Frequently Asked Questions (FAQs) on Interpretative Communication on defence procurement

(See also IP/06/1703)

What is Article 296 of the Treaty?
Article 296 of the Treaty offers an exemption for cases where the application of European law would undermine Member States' security:

- Article 296 (1)(a) allows Member States to keep secret information the disclosure of which they consider contrary to the essential interests of their security.
- Article 296 (1)(b) allows Member States to take measures they consider necessary for the protection of their essential security interests which are connected with the production of and trade in arms, munitions and war material. The latter are specified in a list established in 1958. Measures taken under Article 296 (1)(b) shall not adversely affect the conditions of competition on the common market for products which are not intended for specifically military purposes.

What is the problem with Article 296 TEC?
The application of Article 296 can create problems, because it is vague and open to interpretation. First, the field of application of Article 296 is not always clear, in particular since the 1958 list is rather generic. Second, uncertainties persist on the conditions for the use of the exemption, since there is no commonly agreed definition of "essential security interests" and what is necessary to protect them.

In practice, Member States have used the exemption provided by Article 296 very differently and often extensively. This is incompatible with the case law of the European Court of Justice, which states that Article 296 must be limited to exceptional and clearly defined cases. Moreover, the extensive use of the exemption hampers fair and open intra-European competition.

What are the objectives of the Interpretative Communication?
The objective of the Interpretative Communication is to prevent possible misuse and misinterpretation of Article 296. Explaining the principles governing the use of Article 296 in the light of the Court's case law, it gives guidance to contract awarding authorities for their assessment of which procurement contracts can be exempted from Internal Market rules.
How is Article 296 to be used?
Derogation under Article 296 is a politically and legally serious matter. The Treaty therefore contains strict conditions for the use of the exemption, balancing Member States' security interests with the principles and objectives of the Community. According to the Court of Justice, the use of the derogation must be limited to clearly defined and exceptional cases and interpreted in a restrictive way.

This means in particular that Article 296 does not provide for an automatic exemption of defence procurement in general. On the contrary, Member State must carefully carry out, for each procurement contract, a case-by-case assessment of whether the use of the exemption is legitimate, with respect to both the field and the conditions of application of Article 296.

Which equipment can be exempted from the rules of the Internal Market under Article 296?
Article 296 (1)(b) applies to products included in the 1958 list. Only the procurement of equipment which is designed, developed and produced for specifically military purposes, as well as services and works directly related to them, can be exempted from Community rules on the basis of this provision.

Article 296 (1)(a), by contrast, can also cover the procurement of dual-use equipment for both military and non-military security purposes.

In both cases, the exemption is only justified if the conditions for the application of Article 296 are fulfilled.

What are the conditions for the application of Article 296 to defence procurement?
The application of Article 296 to defence procurement is subject to several conditions:

- Exemption from Community rules must be necessary for the protection of Member States' essential security interests;

- Only the protection of essential security interests justifies an exemption. Other interests connected with the production of or trade in defence equipment, in particular economic and industrial interests, are by themselves not sufficient;

- The security interests at stake must be "essential". This implies that possible exemptions are limited to defence procurement contracts which are of highest importance for Member States' military capabilities.
How can it be verified whether the conditions for the application of Article 296 are fulfilled?

Given the specific nature of defence procurement, it is not possible to determine ex-ante which contracts can be exempted. Member States must therefore make a case-by-case assessment to determine for each procurement contract individually whether the conditions for the exemption from Community rules are met. They must verify in particular:

1) Which essential security interest is concerned?
2) What is the connection between this security interest and the procurement contract in question?
3) Why would the use of the Public Procurement Directive undermine in this specific case its essential security interests?

As guardian of the Treaty, the Commission can verify, if necessary, whether the use of Article 296 is justified. In this case, it is for the Member state concerned to demonstrate that the application of Community rules to the contract in question would undermine its essential security interests.

Does the Commission also make an assessment of Member States' essential security interests?

No. It is Member States’ prerogative to define and protect their essential security interests, and their decision which military equipment they want to procure. However, as guardian of the Treaty, the Commission may ask Member States to furnish evidence for the justification of the exemption of a procurement contract. It can also bring a matter directly before the Court if it considers that a Member State is making improper use of the powers provided for in Article 296. In this case, it is for the Member State to prove that the use of the exemption is necessary for the protection of its essential security interests.

What does the Interpretative Communication imply for Member States' offset policies?

According to the Interpretative Communication, indirect non-military offsets are in general not covered by Article 296, since the latter Article protects only security interests and must be interpreted in a restrictive way. This means that civil offsets must respect Community rules even if they are related to a defence procurement contract which is exempted on the basis of Article 296. Moreover, the Interpretative Communication recalls that Member States must make sure that possible offset arrangements do not adversely affect competition on markets for non-military products.

What impact is the Interpretative Communication expected to have?

The Interpretative Communication aims at preventing possible misuse and misinterpretation of Article 296. This should contribute to a more restrictive use of the exemption. Applying Community rules to a greater number of defence contracts, in turn, would enhance transparency and openness of European defence markets. This would be beneficial to both the competitiveness of industry and the efficiency of public spending.
Does the Interpretative Communication deal with the transatlantic defence market?

No. The Interpretative Communication aims at better compliance with EU law and greater openness of defence markets between EU Member States. It does not deal with arms trade with third countries, which remains governed by World Trade Organisation rules and the Government Procurement Agreement in particular.

What is the relationship between the Interpretative Communication and the Code of Conduct of the European Defence Agency?

The Interpretative Communication specifies the conditions and the field of application of the exemption provided by Article 296. Thus, it helps to distinguish between defence procurement contracts to which the Public Procurement Directive applies and those which can be exempted from Community rules on the basis of Article 296.

The Code of Conduct on defence procurement administered by the European Defence Agency is a non-binding arrangement between 23 Member States (all 25 except for Denmark and Spain) which aims to enhance transparency for the award of defence contracts which are exempted from Community rules on the basis of Article 296. The two instruments differ therefore in nature and purpose. At the same time, they are complementary, since the Communication indicates which contracts fall into the scope of the Code.

What is the relationship between the Interpretative Communication and a possible new defence Directive?

The Interpretative Communication clarifies, rather than modifies, existing law. A new defence Directive would coordinate national procedures for the procurement of defence equipment. It would be adapted to the specificities of defence contracts and provide more flexible rules than the existing Public Procurement Directive (which was developed for public procurement of civil goods, services and works). Such a Directive could be applied to many defence contracts. This, in turn, would make it easier for Member States to use Article 296 in accordance with the Treaty and the Court's case law, i.e. by applying the exemption only in exceptional cases.

Does the Commission want to abolish Article 296 TEC?

No. Even if there were a defence Directive, Article 296 would still remain in place. The Commission's activities aim at creating conditions which make it possible for Member States to use Article 296 in a restrictive way. This would be in conformity with the Treaty and would enhance both transparency and openness of defence markets between EU Member States.