



Council of the
European Union

Brussels, 22 November 2023
(OR. en)

15854/23

MAP 55
MI 1025
COMPET 1161
DELECT 186

COVER NOTE

From: Secretary-General of the European Commission, signed by Ms Martine
DEPREZ, Director

date of receipt: 15 November 2023

To: Ms Thérèse BLANCHET, Secretary-General of the Council of the
European Union

No. Cion doc.: C(2023) 7652 final

Subject: COMMISSION DELEGATED REGULATION (EU) .../... of 15.11.2023
amending Directive 2009/81/EC of the European Parliament and of the
Council in respect of the thresholds for supply, service and works
contracts

Delegations will find attached document C(2023) 7652 final.

Encl.: C(2023) 7652 final



Brussels, 15.11.2023
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COMMISSION DELEGATED REGULATION (EU) .../...

of 15.11.2023

**amending Directive 2009/81/EC of the European Parliament and of the Council in
respect of the thresholds for supply, service and works contracts**

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 68 of Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC empowers the Commission to adopt delegated acts, in accordance with Article 290 TFEU, for the revision of the thresholds. That Article also provides, in case of time constraints, for the use of the urgency procedure, in accordance with Article 66b of that Directive.

Article 68 of Directive 2009/81/EC further provides that the thresholds laid down in Article 8 of that Directive shall be revised at the same time as the thresholds applicable to the Directive on procurement by entities operating in the water, energy, transport and postal services sectors (Directive 2014/25/EU of the European Parliament and of the Council).

For reasons of coherence, the thresholds laid down in Directive 2009/81/EC should be aligned to the revised thresholds laid down in Directive 2014/25/EU.

The calculation of the thresholds is made on the basis of the average daily value of the euro in terms of the Special Drawing Rights (SDR), over a period of 24 months terminating on 31 August preceding the revision, with effect from 1 January.

Consequently, the calculation of the thresholds cannot start earlier than 1 September, due to data availability. Furthermore, According to Article 68(3) of the Directive 2009/81/EC, the revised thresholds (in euro) and their corresponding values in the other national currencies of EU Member States must be published by the Commission in the Official Journal of the EU at the beginning of November.

In view of the above, and to meet the above-mentioned deadline, the Commission is using the urgency procedure to adopt this regulation.

2. CONSULTATIONS PRIOR TO ADOPTING THE ACT

The Expert Group on Defence and Security Procurement was consulted on this Regulation and the accompanying Communication.

3. LEGAL ASPECTS OF THE DELEGATED ACT

The calculation of the thresholds for the public procurement Directives is a purely mathematical operation and therefore the revision of the threshold as such is merely a technical exercise.

It must be carried out every two years in accordance with the terms of the World Trade Organisation Agreement on Government Procurement (GPA). The purpose of the adjustments is to correct for any currency movements between the signatories which would affect the extent of their procurement markets that are open to competition from companies in other signatory countries.

The GPA has a mechanism for recalculating the equivalent value of its thresholds, which are fixed in SDRs, in the currencies of its parties every two years. This mechanism is given legal effect through Article 6 of Directive 2014/24/EU.

Commission Delegated Regulation (EU) .../... of 15.11.2023 amending Directive 2009/81/EC of the European Parliament and of the Council in respect of the thresholds for supply, service and works contracts

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC¹, and in particular Article 68(1), second subparagraph, thereof,

Whereas:

- (1) By Decision 2014/115/EU², the Council approved the Protocol amending the Agreement on Government Procurement³ concluded in the framework of the World Trade Organization. The amended Agreement on Government Procurement ('the Agreement') is a plurilateral instrument and its purpose is to mutually open government procurement markets among its parties. The Agreement applies to any procurement contract with a value that reaches or exceeds the amounts set therein ('thresholds') expressed as special drawing rights.
- (2) One of the objectives of Directive 2014/25/EU of the European Parliament and of the Council⁴ is to allow the contracting entities and the contracting authorities which apply that Directive to comply at the same time with the obligations laid down in the Agreement. In accordance with Article 17 of Directive 2014/25/EU, every 2 years the Commission is to verify that the thresholds set out in Article 15, points (a) and (b), of that Directive correspond to the thresholds established in the Agreement and is to, where necessary, revise them.
- (3) The thresholds laid down in Directive 2014/25/EU have been revised. In accordance with Article 68(1) of Directive 2009/81/EC, the thresholds laid down in that Directive are to be aligned to the revised thresholds laid down in Directive 2014/25/EU.
- (4) Pursuant to Article 68(1) of Directive 2009/81/EC, the Commission is also to revise the thresholds laid down in Article 8 of that Directive at the same time as thresholds laid down in Directive 2004/17/EC⁵ are revised. Article 17(1) of Directive 2014/25/EU, which repealed Directive 2004/17/EC, requires that every two years the

¹ OJ L 216, 20.8.2009, p. 76.

² Council Decision 2014/115/EU of 2 December 2013 on the conclusion of the Protocol Amending the Agreement on Government Procurement (OJ L 68, 7.3.2014, p. 1).

³ OJ L 68, 7.3.2014, p. 2.

⁴ Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).

⁵ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004, p. 1).

Commission revise the thresholds, with effect from 1 January. Hence, the thresholds for the years 2024-2025 should apply as of 1 January 2024.

- (5) The calculation of the thresholds cannot start earlier than 1 September, due to data availability. According to Article 68(3) of the Directive 2009/81/EC, the revised thresholds in euro and their corresponding values in other national currencies of EU Member States must be published by the Commission in the Official Journal of the EU at the beginning of November. In view of the above, and in order to meet the above-mentioned deadline, the Commission makes recourse to the urgency procedure for adopting this regulation.
- (6) Directive 2009/81/EC should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Article 8 of Directive 2009/81/EC is amended as follows:

- (1) in point (a), ‘EUR 431 000’ is replaced by ‘EUR 443 000’;
- (2) in point (b), ‘EUR 5 382 000’ is replaced by ‘EUR 5 538 000’.

Article 2

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 1 January 2024.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 15.11.2023

For the Commission
The President
Ursula VON DER LEYEN