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WORKING DOCUMENT

From:	General Secretariat of the Council
To:	Ad hoc working party on defence industry
Subject:	Proposal for a Regulation on establishing the European Defence Industry Programme (EDIP) - AT comments on Art. 34

Delegations will find attached comments by the Austrian delegation with regard to Article 34 of the EDIP proposal.

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Proposal by AT on Article 34

Article 34 in its current version contains a large number of unclear and/or incomplete provisions, while also leaving a very small window of applicability. As a short overview:

- There is no practical incentive to use this – more complicated – procedure in cases of extreme urgency, when the negotiated procedure without prior publication is available (Art. 29[1][d] of Dir. 2009/81/EC);
- The concept of a “substantial modification” lacks clarity (see ECJ jurisprudence);
- It is unclear what rights (remedy, necessity of ex ante agreement?) the initial contractors have, and how the framework agreement would be structured when new contractors are added (esp. in the case of a cascade, but also e.g. when adding new parties to a single-party FA);
- It is unclear which parts of the FA remain the same and which may be changed (e.g. selection criteria) and in which way/to what extent they may be changed.

From AT perspective this leads to Article 34 being unworkable in its current form. AT suggest to draw inspiration from the recast of the Financial Regulation, which allows Union bodies/institutions to add contracting authorities to as well as expand the volume of existing framework agreements wherever a crisis declaration (see definition of security crisis in Art. 2) has been made according to that body's/institution's internal rules (see Art. 163[6] FR). It does not presuppose the existence of an emergency state declared by an implementing act, as the Internal Market Emergency and Resilience Act (IMERA) does (see Art. 38[2], allowing for modifications of any existing contract). Most importantly, the Financial Regulation does not require a reopening of competition as required by Art. 34 of EDIP in its current form.

Therefore, AT proposes the following outlines for a solution:

- A Member State notifies the Commission of a crisis state requiring a substantial modification to an existing contract or framework agreement [in the scope of Directive 2009/81] **OR** the Member State in a crisis situation wants to join an existing framework agreement (in this case, all involved MS should submit a request together, even if only one MS is in a crisis state);
- The general criteria for what is a crisis state are set out in EDIP (drawing from IMERA and the Commission's internal rules, for example);
- There is a very (!) short procedure for the Commission to confirm/deny application of new Art. 34 [or request more information];
- If the Commission confirms the crisis state, a contracting authority may modify a contract/FA as inspired by Art. 175 (5) FR. This implies: modification of volume up to 100% [could be more in EDIP], modification of terms (new contracting authorities, new contractors ...).

This solution would avoid in particular the procedural and review issues tied to a reopening of competition. If this solution is broadly acceptable for MS and CLS, AT can work on supplying a text.

Additionally, other “crisis” tools as foreseen in Art. 163 (6) of the FR could be established in EDIP as well.