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WORKING DOCUMENT

From:	Presidency
To:	Ad hoc working party on defence industry
Subject:	European defence industry reinforcement through common procurement act (EDIRPA) - Proposal for Art. 8 by Germany, Croatia, Hungary, Lithuania and the Netherlands

Delegations will find enclosed a proposal by Germany, Croatia, Hungary, Lithuania and the Netherlands for Article 8 of the EDIRPA Regulation.

Article 8 Additional eligibility conditions

Input by DE, HR, HU, LT, NL

1. Member States or associated third countries shall appoint a procurement agent to act on their behalf for the purpose of the common procurement. The procurement agent shall carry out the procurement procedures and conclude the resulting contracts with contractors on behalf of the Member States and associated countries participating in the common procurement.
2. The procurement procedures referred to in paragraph 1 shall be based on an agreement to be signed by the participating Member States with the procurement agent under the conditions set out in the work programme referred to in Article 11.
3. Common procurement procedures and contracts shall include participation requirements for contractors involved in the common procurement as referred to in paragraphs 4 to 10.
4. ~~The Contractors and subcontractors involved in~~of the common procurement shall be established and have ~~their his~~ executive management structures in the Union or in an associated country. ~~They-It~~ shall not be subject to ~~control~~ by a non-associated third country or by a non-associated third country entity.
5. By way of derogation from paragraph 4, a legal entity established in the Union or in an associated country, and controlled by a non-associated third country or a non-associated third country entity may participate as contractor ~~or subcontractor involved in~~of the common procurement only if it provides ~~guarantees~~ approved by the Member State or associated country in which the contractor is established. The guarantees shall provide assurances that the involvement of the contractor ~~or subcontractor involved~~ in the common procurement does not contravene the security and defence interests of the Union and its Member States as established in the framework of the CFSP pursuant to Title V of the TEU, or the objectives set out in Article 3.
6. The guarantees shall in particular substantiate that, for the purposes of the common procurement, measures are in place to ensure that:
 - (a) control over the contractor ~~or subcontractor~~ involved in the common procurement is not exercised in a manner that restrains or restricts its ability to carry out the order and to deliver results and
 - (b) access by a non-associated third country or by a non-associated third-country entity to sensitive information relating to the common procurement is prevented and, where relevant, the employees or other persons involved in the common procurement have a

Commented [A1]: The inclusion of subcontractors is in the light of the imaginable vast amount of subcontractors and the missing ability of industry and the EU MS to adapt on short notice not acceptable. To apply all the Article 8 4 to 10 on subcontractors is not consistent with the short-term character of this instrument and gets in direct conflict with the urgent needs of the EU MS. Nevertheless, we support the approach to ensure generally that the majority of the investment originates from the EU or associated countries. (see comment on para 8, at the end).

Commented [A2]: We would like to propose to link the definition of control with EU regulation 2019/452: "... control by ... within the meaning of Regulation 2019/452..."

Commented [A3]: DE, NL comment:
With regard to the guarantees we would still propose the application of a standardized template for the guarantees to ensure the unified application among the EU MS.

national security clearance issued by a Member State, in accordance with national laws and regulations.

7. The Member States or associated countries participating in the common procurement shall provide to the Commission a notification from the procurement agent on the guarantees provided by ~~the~~ contractor ~~or subcontractor involved in~~ of the common procurement that is established in the Union or an associated country and controlled by a non-associated third country or a non-associated third country entity. The guarantees and related provisions in the procurement contract shall be made available to the Commission upon request.

8. The infrastructure, facilities, assets and resources of the contractors ~~and subcontractors involved in~~ of the common procurement which are used for the purposes of the common procurement shall be located on the territory of a Member State or of an associated country. ~~Where no competitive substitutes are readily available in the Union or in an associated country~~ Notwithstanding the above, contractors ~~and subcontractors~~ involved in the common procurement may use their assets, infrastructure, facilities and resources located or held outside the territory of the Member States or of the associated third countries provided that such use does not contravene the security and defence interests of the Union and its Member States and is consistent with the objectives set out in Article 3.

8-9. ~~To effectively incentivize cooperation in the defence procurement process, Member States can derogate from Directive 2009/81/EC ... and Directive 2014/24/EC ... until XX.XX.202X, in so far as this is strictly necessary to fulfil the eligibility conditions for a common procurement funded under this Instrument, in particular to ensure high added value in the European Union and associated third countries.~~

10. Common procurement procedures and contracts shall also include a requirement for the defence product to not be subject to a restriction by a non-associated third country or a non-associated third country entity directly, or indirectly through one or more intermediary legal entities, that limits Member States' ability to use it. ~~These requirements do not apply to products that are already in use or in national inventory of among at least X member states prior to XX of XXX2022.~~

9. ~~For the purposes of this Article, 'subcontractors involved in the common procurement' means all of the following:~~

- ~~(a) subcontractors with a direct contractual relationship to a contractor;~~
- ~~(b) other subcontractors to which at least 10 % of the value of the contract is allocated;~~
- ~~(c) subcontractors which may require access to classified information in order to carry out the common procurement.~~

Commented [A4]: Unapplicable as the replacement of products or their sub-components is in EDIRPA not imaginable due to existing contracts, legal obligations and supply chains. Otherwise we would start to tear products apart?

EDIRPA aims at existing products and is not creating new ones. Here it becomes again obvious that EDF rules do not fit the EDIRPA realities.

Therefore, we propose the change of wording.

Commented [A5]: We agree to introduce a provision that ensures that the majority of investment originates from the EU or associated MS.

Commented [A6]: NL comment:
Insertion of a threshold to ensure that the majority of the investment originates from the EU or associated MS.

Commented [A7]: HU comment – A suggestion to replace the deleted sentence: „*The Consortium shall define the critical part of the contract to be performed directly by the contractor or its subcontractors established and have his executive management structures in the Union or in an associated country*”.

Commented [A8]: HU comment – As communicated, to create legal certainty an exhaustive list of possible derogations would be appropriate.

Commented [A9]: Article 8 is not in line with the existing procurement directives as these EDIRPA restrictions are not covered by the EU procurement directives. There is a need for an exclusion. We would like to underline that otherwise this instrument will need to be dealt with in the further process as probably not in line with binding EU law, provoking litigation actions from third countries and thereby causing direct liability issues for the member states and inflicting deeper conflicts with non-EU competitors.

Commented [A10]: General comment:
Several MS prefer the deletion of this para.