

A Critical Assessment of the Bundeswehr Procurement Acceleration Act

30 June 2022

On 21 of June 2022, the German Federal Cabinet submitted to the Bundestag a draft for a Bundeswehr Procurement Acceleration Act (*BwBBG-E*). The scope of the proposed act covers all procurement initiatives for the supply of military equipment that serve to "*directly strengthen the operational capability of the Bundeswehr*" within the meaning of Section 104 (2) of the Competition Act (*GWB*) with a contract value reaching the applicable threshold. It is to be limited in time until 31 of December 2025 and will also apply to procurement procedures that have already begun at the time of entry into force.

The BwBBG-E has two main parts: the introduction of supplementary provisions in connection with multinational procurement projects (see **1**) and a change of the legal remedies under procurement law compared to the otherwise applicable rules (see **2**).

In addition, the draft contains further amendments, of which only section 4 (1) and section 7 (5) are highlighted here. From a procurement law perspective, it is interesting that both provisions allow the exclusion from procurement procedures of a company which is based in a country which is not a member of the [GPA](#). The Düsseldorf Higher Regional Court (VII-Verg 54/20) recently decided in a similar context that such an exclusion is not permissible under EU law.

1) The amendments pertaining to multinational procurement projects

In various provisions, the BwBBG-E seemingly clarifies the German procurement law framework for multinational procurement projects. In fact, however, it will be necessary to establish whether these provisions violate underlying EU law:

- Section 3 (6) of the draft BwBBG contains an addition to the regulations on the participation in procurement procedures carried out on behalf of several countries by international organizations, such as NATO. However, the draft wording likely violates underlying EU. According to the directive provision, international organizations may procure for "*its purposes*" without having to adhere to Procurement law. By establishing that "*statutory purposes*" are a part of "*its purposes*", the draft intends to enable international organizations to procure for the purposes of their member states thereby circumventing otherwise applicable Procurement law. However, the broad interpretation of the phrase "*its purposes*" to also cover "*statutory purposes*" is not acknowledged for the directive.

- Section 4 (1) no. 3 BwBBG-E is also critical from the perspective of EU Law. According to this, essential security interests of the Federal Republic of Germany in a procurement initiative are also affected if essential security interests of another EU member state or of the EU itself are affected by it. This turns the genesis of the underlying Article 346 TFEU on its head and is incompatible with its meaning and purpose. Art. 346 TFEU is intended to exempt from the applicability of EU law only if the security interests of the respective Member State itself are affected.
- Finally, section 4 (2) No. 5 BwBBG-E provides that technical reasons or reasons connected with the protection of exclusive rights entitling to direct award (also) exist if the equipment in question is already used by another state and it is *"the only one that enables the joint performance of the public order"*. It is likely that *"public order"* here actually means a joint military mission and not a public contract. In any case, the regulation is only in conformity with EU law if the contracting authority continues to examine the conditions of the exemption provision on a case-by-case basis. A Member State cannot waive this requirement with an enactment of a legal provision.

It remains to be seen whether the respective provision will become subject of review by the review bodies and how the ECJ, to which such a case probably would have to be referred to, will position itself on these issues.

2) Weakened legal protection

The most significant block of amendments relates to legal remedies available under procurement law. While the amendments made in 2020 in the *"law on accelerated procurement in the defense and security sector"* were moderate supplements to the *"normal"* legal remedies, the changes proposed now are clear restrictions of the legal protection available:

- Section 3 (4) of the BwBBG-E allows considerable restrictions on the legal protection against unlawful de facto awards. According to this provision, the review bodies, upon application and under certain conditions, do not have to declare a contract concluded in violation of procurement law to be invalid – as was previously mandatory – but may impose alternative measures, in particular, a monetary penalty. This raises the question of whether this provision is compatible with EU law. Union law permits *"effective, proportionate and dissuasive"* sanctions other than finding the contract invalid. However, the BwBBG-E does not specify where such a monetary sanction would go to. If it remains in the federal budget, it can hardly be said to be an effective or dissuasive sanction.
- Section 6 (5) BwBBG-E also provides a significant change to the existing legal procedure. The new provision obligates the higher regional courts responsible for the second instance to conclude the proceedings on the appeal within six months.

At present, a legal proceeding before the second instance tends to take approximately nine to twelve months due to the overloading of the courts.

- Furthermore, the draft expands the groups of cases in which the review bodies can lift the provisional prohibition on awarding a contract or not even declare it in the first place. Accordingly, special defense and security interests generally prevail if the contract directly serves to strengthen the operational capability of the Bundeswehr (see section 5 (3) and section 6 (3) of the BwBBG-E). In the case of a joint procurement procedure with another state, the defense and security interests also generally prevail if the procedure would otherwise be terminated by the partner state.
- Finally, the draft provides that review proceedings can also be concluded without oral hearings *"to speed up"* the process and that oral hearings can also be conducted digitally (section 5 (1) and section 6 (2) BwBBG-E).

3) Implications

As discussed above, the proposed legal act aims to accelerate procurement predominantly by a combination of direct awards and the shortening of legal protection under public procurement law. In the case of individual provisions, it is questionable whether the draft BwBBG exceeds the scope of what is permissible under EU law. In any case, the BwBBG-E offers (even) less transparency and affords (even) less competition. The risk remains that the proposal will hinder the public's ability to monitor and control dubious award practices, for example, the [new generation of replenishment tankers](#) for the navy.

Meanwhile, the actual causes of the problems in German defense procurement are not addressed. The fact that the budget committee of the Bundestag must approve separately every procurement project above 25 million Euros was codified in law for the first time in section 5 (3) of the Act on the Establishment of a *"Special Fund of the German Armed Forces"*. Prior to this legislation, the Budget Committee had established this condition only in a protocol note in each legislative period. As far as can be seen, the Ministry of Defense's procedure for determining and meeting procurement needs (so called CPM) on the creation of performance specifications is not subject to revision.

One thing is clear: the Bundestag probably will vote to pass the BwBBG-E in the current form. Political opposition to the draft language is not apparent, with a few exceptions of a few expert groups, such as the [BDSV](#) and the [DVNW](#). BLOMSTEIN will continue to monitor developments in the field of contract awards in the security and defense sector and will be happy to answer any questions or to discuss any issues.