

German MoD's problematic EUR 25 million procedure

3. April 2024

As announced in January, BLOMSTEIN is publishing a series of briefings introducing into European and German legal defence matters. In our last briefing, we discussed when and how to challenge unlawful single source contracts in the EU.

Today's topic concerns the relationship between public procurement, constitutional law and the division of powers in the German Government:

In 1981, the Bundestag's (the German Parliament) Budget Committee decided that any defence project costing more than DM 50 million would have to be approved separately by it after (!) the underlying contract with the industry has been negotiated. This procedure became established and was maintained after the currency change (then set at EUR 25 million), without any change in the threshold at that time or since. There was no written legal basis for this procedure, but all parties accepted it.

In practice, this proceeding has caused three problems. First and foremost, it has facilitated a substantial informal influence of the Bundestag over defence acquisitions that not only entails the identity of the OEM but also subcontractors. Second, it leads to a delay of the procurement as each submission has to be drafted and submitted via the Federal Ministry of Finance. In a worse case scenario, the Bundestag can also require the renegotiation of an already finalised contract, delaying not only its conclusion but also bringing with it contractual risks for the industry.

The Act that created the EUR 100 billion additional budget for the German armed forces (the so called Sondervermögen) now enshrined this "shackle". And the law made the requirement even stricter: procurement contracts over EUR 25 million are now invalid without the approval of the budget committee. In our view, it is at least questionable whether this procedure is legal; it may well violate Germany's constitutional budget law.

How it is usually done

Under Germany's constitutional budget law, the Federal Government has the right to prepare the draft Budget Act, which it submits to the Bundestag for discussion (normally once a year). The Bundestag then discusses the draft and adopts the Budget Act. It can of course also amend the draft. The Budget Act and the budget contained therein are precisely defined for individual budget titles and authorises the executive to spend the amounts provided for in the titles.

The implementation of the budget, on the other hand, is the (sole) responsibility of the executive. The legislature creates the executive's room for manoeuvre within the Budget Act. The budget is therefore a classic example of the separation of powers: on the one hand, the Bundestag's inviolable budgetary right, which it may not dispense with and with which it solidifies key political decisions through budget allocation. On the other hand, the space thus created for the executive to decide on individual expenditure within the sums and intended purposes. This is how it is done for any other German federal ministry – other than the Ministry of Defence (**MoD**).

Enter the cumbersome EUR 25 million procedure

The requirement to (re-submit) any of the MoD's procurements above EUR 25 million deviates from this constitutionally stipulated separation of powers. There is no express constitutional basis for this as there is no provision for the legislature to have a say in the specific implementation of the budget beyond the content of the Budget Act.

In our opinion, there is no compelling reason for the deviation from the regular distribution of budgetary powers, which results in a serious violation of the corresponding rights of the Ministry of Defence. It might be considered a sign of the Bundestag's mistrust of the MoD. There is no convincing legal reasons for this procedure.

The only argument that might have merit is that the budget sovereignty of the Bundestag requires that the budget titles in the budget law be sufficiently specific. If the titles in the Budget Act are too vague (e.g. because this was not possible at the time the budget was passed), the subsequent approval of expenditure under the budget title can secure budget sovereignty. However, this is not convincing for the usual budget titles of the MoD. For example, title 1405 554-68 032 of the 2023 budget specifies "P8A-POSEIDON" as the purpose of procurement. The executive does not have much room for manoeuvre as it can only act within the framework of the title. In practical terms, this means that the administration can only purchase the aforementioned aircraft model on the basis of the title within the budget. This title has already been granted by the Bundestag. There is no need for feedback to the Budget Committee.

Who to turn to

BLOMSTEIN is constantly advising its clients in the defence industry in all aspects of defence procurement. We will be happy to answer and share their insights regarding any general questions or in connection with a specific procurement process.

Stay tuned: In our next defence briefing - to be published around 17 April - we will provide some insight into the regulatory framework for the defence industry to produce and sell from the EU.