

EU-only in Defence Procurement?

New developments hinder non-EU companies in defence sector

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After many years in the shadows, the European defence industry has returned to the political agenda since Russia's war of aggression in Ukraine. One of the ways to strengthen the domestic industry is to favour EU companies in defence procurement by EU Member States. A recent decision by the European Court of Justice has paved the way – with significant consequences for non-EU defence companies.

Political ambitions to boost EU defence industry

The recently re-elected European Commission is currently in the process of defining its political priorities for the coming years. A [report](#) on the future European competitiveness prepared by Mario Draghi, former President of the European Central Bank, shall serve as a basis to the Commission's new work plan. One of the main pillars identified in the high-profile report is to enhance Europe's security and reducing its dependence on foreign economic powers. As part of this, Mr Draghi recommends strengthening the EU defence industrial capacity, in particular by introducing European preference principles in defence procurement to ensure that a minimum share of the growing demand is concentrated in European companies rather than going overseas. It is therefore likely that boosting the EU's defence industry will be a priority in future EU politics.

Tailwind for EU defence industry due to latest case law

In addition to these political plans, which have not yet been translated into concrete measures, there are recent developments in case law that are of particular relevance to non-EU defence companies. The European Court of Justice has ruled that companies based outside the EU cannot rely on European public procurement law unless their country of origin has concluded a 'no less favourable treatment' agreement with the EU (the decision can be accessed [here](#)). The decision effectively bars companies from outside the EU from participating in public procurement procedures in the EU, unless the relevant contracting authority of the EU Member State allows them to participate. But even if non-EU companies are admitted, contracting authorities may decide to apply less favourable treatment in the bid evaluation. This could, for example, involve reducing the points awarded to non-EU companies due to their origin.

Although the decision was made in the context of an infrastructure procurement, the reasoning suggests that it can also be applied to procurement under the Defence and Security Directive (Directive 2009/81/EC). Whether non-EU defence companies continue to have equal access to defence contracts awarded by EU Member States therefore

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depends on whether their country of origin has concluded a respective international agreement with the EU. Many countries are linked to the EU by the Government Procurement Agreement (*GPA*), which in principle guarantees their companies the same access to procurement markets as EU companies. It should be noted, however, that the vast majority of defence and security procurements falls outside the scope of the GPA. Thus, equal access depends on the existence of a specific 'no less favourable treatment' agreement with the EU covering defence contracts.

If there is no such agreement, the decision as to whether and to what extent individual EU Member States open their defence procurement for non-EU companies is at their discretion. In light of the political objectives within the EU, it seems probable that the opportunity to prioritise the domestic defence industry will be made use of. Consequently, defence companies from outside the EU should proactively address the implications of the new ruling and, if applicable, investigate avenues for continued involvement in EU defence procurement (e.g. through collaboration with an EU company or the establishment of an EU entity).

Please note, however, that the decision of the European Court of Justice is not relevant where EU governments decide to purchase military equipment directly from the governments of other countries, i.e. either from other EU Member States or from third countries. In this case, the Defence and Security Directive and therefore the abovementioned judgment is not applicable. This results in very wide freedoms EU Member States in Government-to-government defence contracts. Stay tuned for our next Defence Briefing, that will shed further light on this complex.

BLOMSTEIN will continue to closely monitor the developments in the EU and EU Member States' defence procurement practice. If you have any questions, please do not hesitate to contact our [Defence Team](#).

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