



Ministry
of Defence

DEFENCE AND SECURITY PUBLIC CONTRACTS
REGULATIONS 2011
FIVE YEAR STATUTORY REVIEW





Ministry
of Defence

Defence and Security Public Contracts Regulations 2011 Five Year Statutory Review

Presented to Parliament
pursuant to Regulation 2 of the Defence and Security Public
Contracts Regulations 2011.

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DEFENCE AND SECURITY PUBLIC CONTRACTS REGULATIONS 2011 FIVE YEAR STATUTORY REVIEW

Executive Summary

Introduction

1. The Ministry of Defence (MOD) successfully transposed the Defence and Security Directive¹ (DSD) into national law as the Defence and Security Public Contracts Regulations (DSPCR) 2011 on 21 August 2011. Regulation 2 of the DSPCR requires the MOD to review the extent to which the objectives of the DSPCR have been achieved by 21 August 2016. The views expressed in this report are informed by our engagement with key stakeholders.

2. MOD's policy objectives for the DSPCR stemmed from realising the general objectives of the DSD in the UK. The first main objective for the DSD was to establish an open and competitive market for suppliers in the defence and security sectors, allowing them to bid for business opportunities in all EU member States on an equal footing. The second main objective was to limit EU member States use of the exemptions, which EU member States often used to avoid having to procure defence materiel under the old public procurement Directive 2004/18/EC.

Achievement of Objectives in the UK

3. The first main objective of the DSD is to create an open defence and security market. MOD has successfully created the regulatory framework for this market in the UK by introducing the DSPCR. The DSPCR has reinforced the culture of meeting requirements through open competition. A clear majority of MOD procurement fall under the DSPCR and the Public Contracts Regulations (PCR) 2015, which allows all suppliers in the EU an equal opportunity to bid for work. However, this has not resulted in significant increase in cross border procurement, as most suppliers seem reluctant or unable to bid across national borders².

4. MOD believes the limited extent of cross border procurement in the United Kingdom (UK) is not due to any failings in the regulatory framework or its application of the regulations. The problem seems to be the inherent difficulties of international business (such as the language barrier, different cultures and business practices), which the European Commission identified in its report on "Cross-Border Procurement above EU Thresholds"³ (March 2011). This problem is not unique to the defence and security sector.

5. The second main objective of the DSD was to limit use of exemptions, which has been achieved in the UK. The specific defence procurement rules in the DSPCR are well suited to deliver effective procurement of defence materiel. The DSPCR provides, for example, measures to protect the security of information and security of supply. Such provisions have *inter alia* reduced the number of exempt MOD procurements above the financial thresholds from 55% to 25%.⁴ MOD cannot compare this reduction with the situation in other EU member States, as there are no figures on their use of exemption in the public domain.

6. MOD also had national objectives to "transpose the new Directive and thereby adhere to the UK's EU Treaty obligations" and "implement procurement rules specifically adapted to the defence and security sectors" that were met in full without creating any additional burdens for Government or industry.

¹ [Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC](#)

² See Cross Border Procurement on page 29 of this report

³ http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/cross-border-procurement_en.pdf

⁴ See Reduce inappropriate use of Article 346 TFEU and other exemptions on page 37

Application of the DSD in the EU

7. A report by Fondation pour la Recherche Stratégique⁵ (the “FRS study”) on behalf of the European Parliament found that the UK accounted for 38% of contract awards, by value, under the DSD from 2011 to 2014, which was the largest value of any national contribution to the European Defence Equipment Market (EDEM). Of the other member States, the next greatest contributors to the EDEM by value were France (26%), Germany (9%), Italy (8%) and Poland (8%). In terms of the number of contract awards under the DSD from 2011 to 2014, Germany (23%) and France (22%) were the largest users of the DSD. Of the other EU member States, the next most prominent users by number of awards were Italy (14%), Poland (9%) and the UK (7%).

8. The FRS study concluded that EU member States use of the DSD from 2011 to 2014 “is not as significant as expected, and above all it is due to a small number of member States - France, Germany and the United Kingdom”. Moreover, the FRS study found that an “incomplete and incorrect application” of the DSD across the EU has resulted in little or no impact on the defence industrial base although it felt it was “premature to draw conclusions from such a short period”.

Appropriateness of the Objectives

9. MOD considers the main objective of the regulatory framework - to create an open defence market in the EU - remains appropriate for EU member States and Norway. A properly functioning defence market would provide better value for money for the taxpayer and provide opportunities for defence industry to win export orders. However, a regulatory framework is a necessary but not sufficient measure to create the defence and security market. The non-legal factors inhibiting cross border trade also needs to be addressed

Reducing the Regulatory Burden

10. MOD cannot change the DSPCR to reduce the regulatory burden without changes to the DSD at EU level, as its mandatory provisions of the DSD must be reflected in our national regulations whilst the UK remains an EU member State.

11. The DSD represents good but not the best commercial practice. Best practice in public procurement has evolved since the DSD was agreed. The DSD does not allow the full range of procurement techniques such as the open procedure and is not as efficient and streamlined as the Public Procurement Directive (PPD)⁶. There is also considerable scope to simplify the DSD to improve access to business opportunities and reduce the burden of pre-qualification for Small and Medium-sized Enterprises (SMEs).

12. The DSD and PPD set out two distinct sets of implementing regulations for procurers. These regulations do not vary in their principles - transparency, non-discrimination, equality of treatment - although a lot of the detail in the rules is unique or different. Our procurers were obliged to follow the different rules for procurement procedures in the DSD and PPD that often bear the same name. One set of rules could have made the regulatory framework less complicated and much easier for procurers to understand and operate.

⁵ http://www.frstrategie.org/publications/recherches-documents/web/documents/2015/RD_201503.pdf

⁶ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC

Abbreviations	
DIA	Defence Internal Audit
DSD	Defence and Security Directive
DSPCR	Defence and Security Public Contract Regulations 2011
EDA	European Defence Agency
EDEM	European Defence Equipment Market
EDTIB	European Defence Technological and Industrial Base
EU	European Union
FCO	Foreign and Commonwealth Office
FR	France
FRS	Fondation pour la Recherche Stratégique
LCS(T)	Logistics Commodities and Services (Transformation) Programme
OCCAR	Organisation Conjointe de Coopération en matière d'Armement (Organisation for Joint Armament Cooperation)
OGD	Other Government Departments
OJEU	Official Journal of the European Union
PCR 2006	Public Contracts Regulations 2006
PCR 2015	Public Contracts Regulations 2015
PPD	Public Procurement Directive 2014/24/EU
PQQ	Pre-Qualification Questionnaire
SME	Small and Medium-sized Enterprises
TED	Tender Electronic Daily
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
VEAT	Voluntary Ex Ante Transparency (known as a Voluntary Transparency Notice within the MOD)

Chapter One – The Defence and Security Directive

1.1. The DSD introduced new procurement rules designed to take account of the special features of the defence and security market such as security of information and security of supply. For the first time, defence and sensitive procurement was subject to its own set of legal rules designed to foster transparency and competition.

1.2. Previously, all public sector procurements unless they were exempt or below threshold, were governed by the rules set out in the Directive 2004/18/EC. There were also rules for procurements by utilities in the water, energy, transport, telecommunications and postal services sectors governed by Directive 2004/17/EC.

1.3. The standard rules in the old Directives did not always permit the effective acquisition of military or security capability or deal explicitly with key requirements for acquisitions such as protecting classified information. The consequence of these inadequate rules was that Ministries of Defence in the EU regularly exempted procurements from the Directive.

1.4. The DSD was largely based on the public procurement rules in Directive 2004/18/EC. However, it also covers utilities procurement by contracting entities if they procure goods, works or services which are for security purposes and involve, require or contain classified information. The DSD also introduced a number of provisions which were either new, or were adaptations of the provisions in Directive 2004/18/EC, in particular:

- a) the competitive negotiated procedure⁷ could be used without restriction, which gives procurers the flexibility to negotiate with suppliers in detail all or any features of complex procurements;
- b) specific provisions on security of information were included which ensure that sensitive information remains protected against unauthorised access;
- c) special clauses on security of supply will provide contracting authorities/entities with greater certainty that equipment, works or services can be delivered, in particular in times of crisis or armed conflict;
- d) special rules on subcontracting made it possible for contracting authorities/entities to introduce regulation into the supply chain for the award of subcontracts on an EU-wide basis.

1.5. The DSD had higher financial thresholds⁸ for goods and services than Directive 2004/18/EC. The current financial thresholds for the DSD are, in Euros (and current value in £ sterling):

- a) €412,000 (or £328,352)⁹ for goods and services; and
- b) €5,150,000 (or £4,104,394) for works.

1.6. The MOD transposed the DSD into national law as the DSPCR on the 21 August 2011. The DSPCR applies to defence and sensitive security procurements throughout England, Scotland, Wales and Northern Ireland where the procurement procedures began on or after 21 August 2011. The Government of Gibraltar also introduced their Procurement (Defence and Security Public Contracts) Regulations 2012 (LN. 2012/088) on 21 June 2012. The Government of Gibraltar's regulations are not covered by this review.

⁷ The full name of the competitive negotiated procedure is "the negotiated procedure with prior publication of a contract notice".

⁸ If the requirement falls within the scope of DSD, the financial threshold is the point when the estimated value of the procurement is at a level that requires a contracting authority to apply the DSD.

⁹ This compares to £106,047 in the PCR 2015.

Chapter Two - The Review of the DSPCR

2.1. Regulation 2 of the DSPCR requires the Secretary of State to carry out a review of its provisions and set out the conclusions of the review in a report that must be laid before Parliament on or before 21 August 2016. This review must, so far as reasonable, compare the UK implementation of obligations in the DSD with the implementations of those obligations in other EU member States. The report must:

- a) set out the objectives intended to be achieved by the regulatory system established by those provisions;
- b) assess the extent to which those objectives have been achieved;
- c) include the assessment of the comparison between implementations; and
- d) assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.

2.2. The MOD has prepared this report by gathering quantitative and qualitative information on how we have used the DSPCR. In doing so MOD has:

- a) gathered statistics on the number and value of contract awards under the DSPCR in the last five years;
- b) carried out a perception survey of procurement staff in Government and industry¹⁰ that have used or supplied under the DSPCR in its first four years to assess their views on and the scope for improving the regulatory framework; and
- c) drawn on other sources such as reports produced by MOD's Defence Internal Audit (DIA), the European Defence Agency (EDA), the FRS study and the European Commission.

¹⁰ 66 procurement staff in MOD and 5 procurement staff in OGDs responded to the survey. MOD also issued 230 questionnaires to suppliers who had won contracts under the DSPCR and received 53 replies. 58% of the industry respondents were SMEs. In terms of the nationality, 62% of the suppliers were based in the UK, 4% of the suppliers were located outside the UK, and 34% of the suppliers described themselves as multinationals.

Chapter Three - The Objectives of the DSPCR

3.1. The European Commission's main objective for the DSD was to establish an open and competitive EDEM in support of the EU's Security and Defence Policy. The EDEM would allow defence and security suppliers established in one EU member State to bid for business opportunities in all EU member States on an equal footing.

3.2. Suppliers would therefore obtain access to a much larger defence and security market, and could restructure across national boundaries to reduce duplication, create centres of excellence and take advantage of longer production runs. Open competition would encourage restructuring and help to lower defence procurement costs.

3.3. The European Commission also had another objective - to limit to exceptional cases EU member States' use of the exemptions provided for in Article 346 of the Treaty on the Functioning of the European Union (TFEU) and Article 14 of Directive 2004/18/EC for secret contracts and contracts requiring special security measures. These exemptions were often used by EU member States to avoid having to procure defence materiel under the Directive 2004/18/EC.

3.4. The European Commission designed the DSD to allow EU member States to adopt security measures under new regulatory framework and decided not to include Article 14 as part of the DSD. EU member States now rely on Article 346(1)(a) and the general exclusion at Article 13(a) of the DSD instead of the old Article 14. Whether they can rely on this in all circumstances has never been tested legally. The Commission hoped these measures would mean the majority of defence and security contracts would be awarded as part of the EDEM.

3.5. MOD was required to implement the DSD. The national objectives of the DSPCR therefore stemmed from our obligations as an EU member State and the general objectives of the DSD. In the Impact Assessment¹¹ for the DSPCR, the MOD set this out as policy objectives to:

- a) transpose the New Directive and thereby adhere to the UK's EU Treaty obligations;
- b) implement procurement rules specifically adapted to the defence and security sectors;
- c) open the majority of defence and security procurements to open competition in Europe;
- d) encourage some member States away from inappropriate use of Article 346 Treaty of the Functioning of the European Union (TFEU) and the other derogations of the Treaty; and reduce reliance on exemptions.

¹¹ [Impact Assessment No: MOD0001 dated 29 July 2011](#)

Supply of Enhanced Drivers Night Vision System

The contract for the supply of enhanced Drivers Night Vision System (DNVS) was the first contract awarded under the DSPCR. The contract worth £0.9M was awarded to DRS Technologies under the negotiated procedure in September 2011.

The procurement enhanced the DNVS already on the Combat Vehicle Reconnaissance (Tracked) to free up considerable space around the driver, allowing easier ingress and egress to improve safety and enable the operator to view the thermal image in a more relaxed and natural manner, whilst working in the harsh Afghan environment.



Chapter Four - Procurement under the DSPCR

Contract Award Procedures

4.1. Procurers in the MOD awarded 838 defence and sensitive security contracts worth £17,284M under the DSPCR from 2011 to 2015. MOD procurers also awarded 1,598 contracts for dual-use or civil equipment or services required to fulfil a military or security need worth £10,349M under the PCR.

4.2. In the first five years of the DSPCR, only 2 contracts were awarded by a contracting authority other than the MOD¹². MOD found no evidence of utilities¹³ using the DSPCR for their sensitive security procurement. It is therefore questionable whether utilities actually need to use the specific security provisions in the DSPCR.

4.3. Table 1 shows the number of MOD contracts and other procurements¹⁴ since 2011 subject to the DSPCR and PCR or exempt from or below the financial thresholds of the DSPCR or PCR. It shows the number of contracts awarded under the DSPCR has been steadily growing against a background of a declining number of contracts being awarded by MOD.

	DSPCR	PCR	Exempt	Below Threshold	Total
2011	4	525	518	3,537	4,584
2012	122	348	276	2,533	3,279
2013	195	265	169	1,626	2,255
2014	258	268	135	1,200	1,861
2015	259	192	153	1,035	1,639

Table 1: Number of MOD Contracts Awards and Other Procurements

4.4. This period of MOD procurement was under the 2010 Spending Review from 2011/12 to 2014/15. Defence expenditure reduced by 12% in real terms during this period.¹⁵ Whilst it is not possible to prove a direct cause and effect, there have been some intervening factors that may have reduced the number of contracts awarded by the MOD, e.g.:

- a) reductions in the defence procurement budget;
- b) modern purchasing methods, in particular the widespread use of Government and MOD framework agreements¹⁶;

¹² 2 works contracts were awarded by the Foreign and Commonwealth Office. Figures taken from the statistical report by the MOD to the European Commission required by Article 65 of Directive 2009/81/EC.

¹³ "Utilities" is defined by Regulation 3 of the Utilities Contracts Regulations 2006 and Regulation 3 of the Utilities Contracts (Scotland) Regulations 2006.

¹⁴ "Other procurements" are procurements that are not based on an MOD contract, including procurement under Memoranda of Understandings (MOU), US Foreign Military Sales and contracts awarded by international organisations.

¹⁵ MOD Official Statistics show a decline of 12% in real terms over this period from £39,085m in 2011/12 to £34,365m in 2014/15 (at 2014/15 constant prices), see Table 1 in Excel file at www.gov.uk/government/statistics/defence-departmental-resources-2015

¹⁶ The number and values of the contract awards for framework agreements awarded by MOD are included in the figures in Tables 1 and 2 but to avoid double counting - not the individual call offs contracts under those frameworks. The value of contract awards also includes payments to foreign government and international organisations that are not directly attributable to an individual contract award.

c) draw down of operations in Afghanistan.

4.5. The trend of the MOD increasing its use of the DSPCR is also reflected in value of contract awards and other procurements in £M from 2011 to 2015 in Table 2 below. The value of contracts awarded under the DSPCR was 75% of the value of all contracts awarded by the MOD in 2015, although this is largely due to the contract award for the Logistics Commodities and Services Transformation (LCS(T)) Programme worth £6.331 Billion.

	DSPCR (£M)	PCR (£M)	Exempt (£M)	Below Threshold (£M)	Total (£M)
2011	2	1,757	6,138	110	8,008
2012	422	2,661	3,457	128	6,666
2013	2,161	1,795	1,821	116	5,893
2014	4,101	3,191	1,873	101	9,266
2015	10,598	946	2,511	94	14,150

Table 2: Value of MOD Contract Awards and Other Procurements (£M)

4.6. The slow build-up of contracts awarded under the DSPCR from 2011 to 2013 was largely due to the transitional provisions at Regulation 67, which meant the DSPCR did not apply to contract award procedures started before 21 August 2011. This meant in the early years of the DSPCR there were still many “legacy” procurements that fell within the scope of the DSPCR but were exempt or awarded under the PCR 2006 as the award procedure started before 21 August 2011.

4.7. An example of such legacy procurement is the Tide-class tanker program for the Royal Fleet Auxiliary that will maintain our capability to refuel Royal Navy ships at sea for the next 25 years. The ships were designed by BMT Defence Services in the UK but are being constructed in South Korea. Daewoo Shipbuilding and Marine Engineering were awarded the Contract worth £452M in February 2012 after a competitive dialogue procedure under the PCR 2006.

4.8. The fall in the use of the PCR in 2015 is probably due to the Central Government Reform Programme. The Crown Commercial Service (CCS) was established to aggregate demand and procures common goods & services across Government. Over the last 18 months, the MOD has transferred a number of categories of spend to CCS, including:

- a) energy and fuels (excluding operational fuels);
- b) fleet management and leasing of administrative transport vehicles;
- c) office solutions;
- d) print and print management;
- e) consultancy;
- f) contingent labour;
- g) elements of professional services;
- h) travel; and
- i) elements of information and communications technology.

4.9. Table 1 however shows there remains a substantial number of MOD contract awards for dual-use or civil equipment and services. This means that MOD had to use regularly two different regulatory systems that complicated our procurement processes.

Competitive Procurement under the DSPCR

4.10. Tables 3 and 4 below show the number and value respectively of competitive and non-competitive¹⁷ DSPCR contracts awarded by the MOD since the DSPCR came in force.

	DSPCR Contract Awards	Competitive Contract Awards	Non-Competitive Contract Awards	% Competitive
2011	4	2	2	50%
2012	122	35	87	29%
2013	195	102	93	52%
2014	258	161	97	62%
2015	259	173	86	67%

Table 3: Number of Competitive Contract Awards

	DSPCR Contract Awards (£M)	Competitive Contract Awards (£M)	Non-Competitive Contract Awards (£M)	% Competitive
2011	2	1	1	50%
2012	422	121	301	29%
2013	2,161	720	1,441	33%
2014	4,101	2,981	1,120	73%
2015	10,598	9,023	1,575	85%

Table 4: Value of Competitive Contract Awards (£M)

4.11. The figures in the early years show a high volume of non-competitive procurement under the DSPCR. This would have been a period when the MOD was implementing the Strategic Defence and Security Review (October 2010) that brought defence plans, commitments and resources into balance to produce a sustainable defence programme for the future. Whilst it is not possible to prove a direct cause and effect, there have been some intervening factors that would have caused a significant amount of non-competitive procurement from 2011 to 2015, e.g.:

- a) MOD spending a higher proportion of resources on repairing, maintaining and upgrading existing systems rather than purchasing new systems due to:
 - (1) reductions in the defence procurement budget; and
 - (2) the alignment of defence plans, commitments and resources to produce a sustainable defence materiel budget.

¹⁷ By non-competitive contracts, we mean contracts awarded under Regulation 16 (Negotiated without prior publication of a contact notice) of the DSPCR

- b) repeat procurements with Original Equipment Manufacturers, justified on exclusive rights and technical grounds.

4.12. This high volume of non-competitive procurement represented a legal risk to the MOD. The most serious breach of the DSPCR would be a failure to justify non-competitive procurement on the grounds permitted by Regulation 16. MOD procurers are therefore required to publish a Voluntary Ex-Ante Transparency (VEAT) notice in OJEU that explains the justification for awarding a contract under Regulation 16 to the market to mitigate the legal risk. MOD lawyers review the justification before the publication of the VEAT. The VEAT mitigates the risk for MOD from a legal challenge, and the follow-on application of the remedy of ineffectiveness from the Court.

Learning to use the DSPCR

4.13. MOD produced a comprehensive suite of guidance, training and communications material to prepare Government procurement staff and industry to use the DSPCR. The guidance was well received, e.g. the Foreign and Commonwealth Office (FCO) kindly commented “the online guidance for DSPCR¹⁸ is the single best piece of public sector procurement guidance I have ever seen” describing it as “definitive and comprehensive, but readable and concise”.

4.14. MOD still had to learn how to use the new DSPCR. A Defence Internal Audit (DIA) audit in June 2013 only provided a “limited assurance” opinion on MOD’s tendering process under the DSPCR in 2013. The “limited assurance” opinion was primarily due to the finding that the key differences between PCR and DSPCR¹⁹ were not well understood by procurement staff, and contracts that had been reported as being let under DSPCR continued to follow the principles of PCR. The DIA audit also found instances where procurements had been initiated by project staff before the involvement of commercial staff.

4.15. MOD produced an action plan of reviewing the guidance, training and communications to help address these issues. MOD also addressed some of the problems through MOD’s e-procurement tools (e.g. automatic reminders about missing contract award notices). The DIA audit in September 2014 concluded that across MOD there was a noticeable improvement and provided a “satisfactory” marking in their assessment.

4.16. MOD continues to review the use of DSPCR annually through a targeted sample of contract award procedures to test that the knowledge of MOD’s procurement staff and their use of the DSPCR remains satisfactory.

Legal Challenges

4.17. Table 5 shows the number of challenges to MOD’s contract awards since 2012 that acquisition teams referred to the MOD legal team. Most challenges relate to our use of award criteria and the tendering process. Whilst it does show a yearly increase in the number of challenges, in relative terms against the number of contracts awarded it remains very low.

4.18. The increase in challenges to MOD procurement is likely to stem from the increased regulation of the defence and security sector by the introduction of the DSPCR with its remedies provisions.

4.19. Table 5 shows that there have been no Court rulings against the MOD, although this needs to be tempered by the fact that some of the challenges resulting in Court action were either withdrawn or subject to agreement being reached in an out of Court settlement.

¹⁸ www.gov.uk/government/publications/the-european-union-defence-and-security-public-contracts-regulations-dsPCR-2011

¹⁹ The key areas of difference between PCR and DSPCR are the different choices of procurement procedures and the need to consider security of supply and security of information during the procurement process.

	Contract Awards	Number of Challenges	% of Awards Challenged	Challenges Resulting in Court Action	Rulings Against the MOD
2012	3,279	14	0.4%	3	0
2013	2,255	17	0.8%	6	0
2014	1,861	24	1.3%	7	0
2015	1,639	13	0.8%	7	0

Table 5: Number of Legal Challenges to MOD Contract Awards

Logistics Commodities and Services (Transformation) Programme

In May 2015 the MOD awarded a 13 year £6.331 Billion contract, under Regulation 18, the competitive negotiated procedure of the DSPCR, with Leidos Supply Europe Limited, to deliver the Logistics Commodities and Services (Transformation) Programme (LCS(T)).

LCS(T) will improve the efficiency of the MOD's warehousing, storage and distribution and procurement of a range of commodities including medical supplies, medical equipment, general stores, food, clothing and oils, lubricants and gas. Through efficiencies and modernisation of stock control, processes and infrastructure LCS(T) is expected to generate savings of around £500M over the life of the contract. The modernisation includes significant investment in infrastructure, with the construction of a new defence logistics centre at Donnington in Shropshire.



Chapter Five - Level Playing Field in the EU

5.1. Regulation 2 of the DSPCR requires the MOD, so far as reasonable, to compare the UK implementation of obligations in the DSD with the implementations of those obligations in other EU member States. MOD's main sources of information are the European Commission, the European Defence Agency (EDA) and the FRS study for the European Parliament.

5.2. MOD's approach was to consider the implementation in other EU member States in the context of creating a level playing field in the EU. The key indicators for a level playing field are:

- a) transposition of the DSD;
- b) application of the rules in the DSD;
 - (1) number and value of contract awards;
 - (2) open publication of competitive contract opportunities;
- c) transparency of procurement procedures.

Transposition of the DSD

5.3. Figure 1 shows when the DSD was transposed into law by the EU member States and Norway.

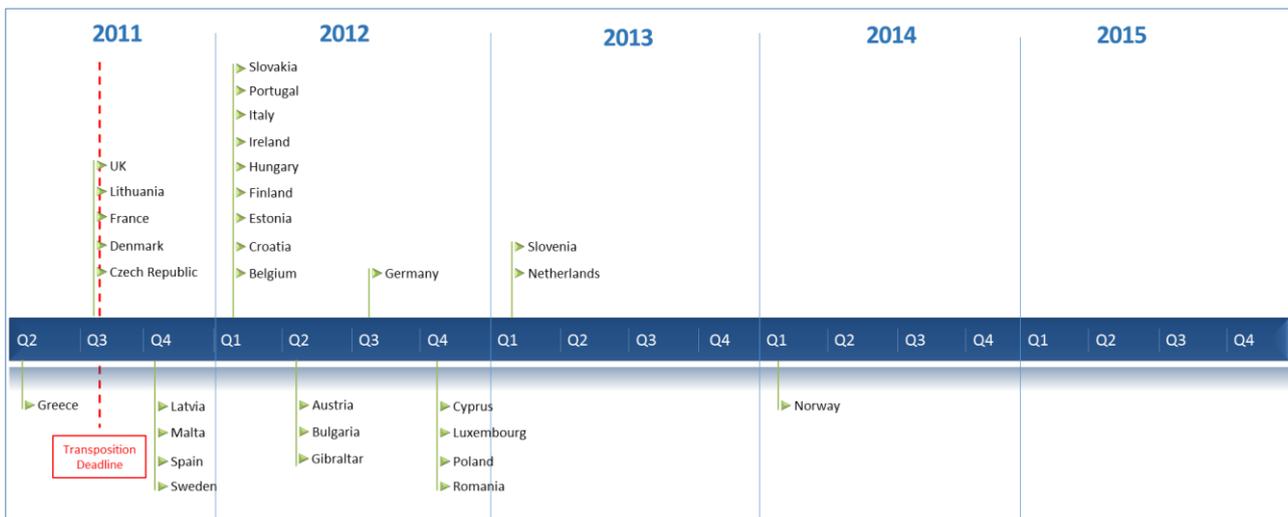


Figure 1: DSD Transposition Timeline across the EU member States and Norway

5.4. The European Commission²⁰ concluded that most of the 23 EU member States who have transposed the DSD by July 2012 have *prima facie* done so correctly.

5.5. The EDA has also reviewed the transposition of the DSD in EU member States who participate in the EDA and Norway. The MOD asked colleagues in the EDA and other EU member States to check and update results of the EDA review that are summarised at Annex A. This work supports the European Commission's conclusion that EU member States have correctly transposed the DSD with no practical differences in scope, exclusion or review procedures.

5.6. The majority of EU member States have transposed the non-mandatory provisions on sub-contracting. Only the UK and Estonia chose not to transpose the option under Article 21(4) that would have allowed their procurers to require prime contractors to break up the prime contract and

²⁰ Report from the European Commission to the European Parliament and the Council on transposition of directive 2009/81/EC on Defence and Security Procurement (COM(2012) 565 final) dated 2 October 2012

subcontract up to 30% of the requirement under the regulations. However, there is little evidence that the other EU member States are using Article 21(4), see paragraph 5.16.

Number and Value of Contract Awards under the DSD

5.7. The FRS study shows a significant disparity across EU member States in the application of the DSD from 2011 to 2014. The statistics on the number of contracts awarded and value in € million under the DSD from their analysis of the European Commission's procurement portal - Tenders Electronic Daily (TED) - is shown in Annex B. The FRS statistics are very different to MOD's own statistics, but worth considering for the international comparisons they provide.

5.8. The extract from Annex B in Table 6 below shows the top five users of the DSD - UK, France, Germany, Italy, and Poland - share of the market is 88.8% based on 74.5% of contract award notices published.

FRS STUDY STATISTICS				
Top 5 Users of DSD	Value of Contract Award Notices (€M)	% Share of Market by Value	Number of Contract Award Notices	% Share of Number of Awards
United Kingdom	3,997	37.9%	172	7.2%
France	2,768	26.3%	511	21.5%
Germany	949	9.0%	550	23.2%
Italy	831	7.9%	327	13.8%
Poland	816	7.7%	209	8.8%
Total	9,362	88.8%	1,769	74.5%

Table 6: FRS Analysis of Contract Award Notices from 2011 to 2014 (€M)

5.9. The FRS statistics in Table 6 and Annex B do not show the full picture of contract awards, as 562 out of 2,373 contract award notices, shown in Annex B, did not contain the value of the contract award. EU member States are obliged under Article 32.3 and Annex IV of the DSD to publish the value of contract awards.

5.10. The UK's relative small number of contract awards compared to the value of the contract awards reflects our practice of aggregating requirements under large framework agreements to obtain best value for money. The disparity in the market share amongst the top five EU member States is roughly proportionate to differences in defence procurement budgets.

5.11. Analysis of defence expenditure by NATO²¹ enables us to draw a comparison of defence procurement budgets amongst these EU member States in 2014. Table 7 below details expenditure as opposed to value of contract awards by categories using NATO definitions by financial year in US dollars. The procurement expenditure will therefore include commitments from contracts awarded in earlier years.

²¹ Financial and Economic Data Relating to NATO Defence http://www.nato.int/cps/en/natohq/news_120866.htm

NATO STATISTICS

Top 5 Users of DSD	2014 Defence Procurement Expenditure (\$M)			
	Equipment	Operations and Maintenance	Infrastructure	Total
UK	13,297	23,434	1,251	37,982
France	12,845	12,689	1,196	26,731
Germany	5,947	15,029	1,752	22,728
Italy	2,738	2,763	269	5,770
Poland	1,900	2,445	556	4,900

Table 7: NATO Statistics: Defence Procurement Expenditure of Top 5 Users of DSD \$M

5.12. Differences in defence equipment, operations and maintenance budgets cannot explain all the variations in the application of the DSD across the EU. It is clear that some EU member States have been economical in their use of the DSD from 2011 to 2014. For example, Spain, Cyprus, Greece, Ireland, Malta, Portugal and Luxembourg are not shown at Annex B, as they did not publish any Contract Award Notices under the DSD from 2011 to 2014.

5.13. Whilst it is not possible to prove a direct cause and effect, there have been some factors that could have caused other EU member States to be economical in their use of the DSD:

- a) late transposition of the DSD into national law resulting in an increased amount of legacy defence procurements under the PPD;
- b) difficulty in adopting effective administrative measures in terms of systems and people to apply correctly the DSD;
- c) high proportion of dual use and civil procurement in the defence budget that are procured under the PPD; and
- d) high use of exclusions for legitimate reasons, including the protection of national security.

Open publication of competitive contract opportunities

5.14. In an open and competitive defence market, EU member States would use competitive procurement procedures that allow at least all suppliers in the EU who are capable of meeting the requirement to bid for work in all but exceptional circumstances. However, the EU member States have traditionally used competitive procurement less in the defence sector compared to other parts of the market.

5.15. The FRS study highlighted there is an uneven use of competitive procurement amongst the top five users of the DSD drawing again from Contract Award Notices published on TED – see Table 8 below.

FRS STUDY STATISTICS		
Top 5 Users of DSD	% Split of Competitive and Non-Competitive Award by Value	
	Competitive	Non-Competitive
United Kingdom	90%	10%
France	63%	37%
Germany	40%	60%
Italy	18%	82%
Poland	55%	45%

Table 8: Competitive and Non-Competitive Contract Awards Derived from FRS Study (%)²²

Open publication of subcontract contract opportunities

5.16. The FRS study also shows the practical application of the subcontracting provisions was extremely limited. Their analysis of TED only identified five subcontracting notices pursuant to Article 21(3) and 21(4) between 2011 and 2014. The FRS study calls into question the complexity of the subcontracting provisions of the DSD stating “In actual fact, this equation relating to subcontracting seems to be poorly formulated, hence the introduction of a complex and hardly applicable mechanism in practice”

Transparency of procurement procedures

5.17. The transparency of procurement procedures is an important part of demonstrating confidence in the integrity of the process, and encouraging suppliers to request to participate in the procurements.

5.18. The FRS study found that the “United Kingdom and Denmark, and to a lesser extent, Finland and Poland, are distinguished by a large number of publications of Voluntary Ex-Ante Transparency (VEAT) Notices”. The VEAT notice is used to publicise the reasons for awarding a non-competitive contract, and allows the market to challenge the decision before the contract is awarded. This provides reassurance to other suppliers that they are not being unfairly excluded from a business opportunity.

5.19. The FRS study also found that 31% of Contract Award Notices from 2011 to 2014 did not include the contract award criteria used to choose the successful tender, which is an obligation under Article 32.3 and Annex IV of the DSD. This lack of transparency may create a suspicion amongst suppliers that inappropriate criteria were used to award the contract and discourage them from future bidding.

Conclusions

5.20. The MOD recognises that the FRS study is an incomplete picture of the implementation of the DSD due to the limitations of the data on TED. The European Commission’s report to the European Parliament in 2016 should provide the full picture, as they have full access to EU

²² The figures are taken from FRS analysis of the percentages of award notices without publication of a contract notice published on TED from 2011 to 2014. However, the FRS overstates the UK MOD's use of competition, i.e. Table 4 show 85% of our requirements (by value) were met by competition. MOD has nevertheless used the FRS figures as they are the best available insight on the openness of the defence market in the EU.

member States statistical returns under the DSD and PPD as well as the output from TED. That said, the FRS study has identified some important trends. The early indication is that from 2011 to 2014 the DSD was supported by a small group of EU member States - UK, France, Germany, Italy and Poland.

5.21. MOD found the regulatory system challenging²³ in the early years so it would not be surprising if some EU member States have struggled to apply the DSD. The MOD believes the EDA is best placed in terms of practical procurement expertise to provide help and assistance to any EU member States who are struggling to cope with the new rules.

²³ The Defence Internal Audit (DIA) report of February 2013 found that a lack of awareness of the full requirements of DSPCR amongst commercial and project staff was a high priority risk for the MOD. The follow-up DIA audit in September 2014 found awareness had improved.

Chapter Six - Objective 1 - Transposing the DSD in the UK

6.1. The first national objective was to “transpose the New Directive and thereby adhere to the UK’s EU Treaty obligations”. The DSD required implementing regulations to apply to defence and sensitive security procurements by contracting authorities and utilities throughout England, Scotland, Wales and Northern Ireland. MOD was responsible for transposing the DSD into UK law.

6.2. The MOD could not change the mandatory provisions adopted at EU level during the transposition. However, the MOD did have some flexibility about the optional provisions, which were the focus of two public consultations. MOD’s approach was to minimise the burden on Government and industry. In general, MOD followed the style and approach taken in the PCR 2006 when transposing the DSD in order to minimise the differences between two regulatory systems that MOD procurement staff had to use.

6.3. MOD consulted stakeholders in two separate exercises on 11 December 2009²⁴ and 13 December 2010²⁵. The first public consultation sought feedback from stakeholders on MOD’s approach and on the optional provisions of the DSD. The second public consultation sought feedback on our draft regulation, which took account of the results of the first consultation exercise.

6.4. The European Commission²⁶ considers the key elements of the DSD for creating the EDEM are:

- a) the scope of the DSD;
- b) the exclusions from the application of the DSD;
- c) the provisions relating to subcontracting; and
- d) the review mechanism.

Scope

6.5. MOD had no flexibility about transposing the scope of the DSD into the DSPCR that is made subject to the Article 346 TFEU derogation from our EU Treaty obligations. MOD transposed the scope of the DSD into the DSPCR as procurement of:

- a) the supply of military equipment, including any parts, components or sub-assemblies of military equipment;
- b) the supply of sensitive equipment, including any parts, components or sub-assemblies of sensitive equipment;
- c) works, goods and services directly related to the above equipment;
- d) works and services for specifically military purposes or sensitive work or works and sensitive services.

Exclusions

6.6. MOD had no flexibility about transposing the mandatory provisions on the exclusions in the DSPCR. “Exclusions” are provisions in the DSPCR that provide grounds to allow contracting authorities not to apply the DSPCR for specific procurements because the requirement is:

- a) unsuited to the specific rules set out in the DSPCR; or

²⁴ <https://www.gov.uk/government/consultations/mod-consultation-on-the-approach-to-the-implementation-of-directive-200981ec2>

²⁵ <https://www.gov.uk/government/consultations/mod-second-consultation-on-the-approach-to-the-implementation-of-directive-200981ec>

²⁶ [Report from the Commission to the European Parliament and the Council on transposition of directive 2009/81/EC on Defence and Security Procurement \(COM\(2012\) 565 final\) dated 2 October 2012](#)

b) necessary to protect a specific defence or security interest.

6.7. MOD transposed the exclusions of the DSD into the DSPCR in full, which included:

a) contracts awarded in accordance with specific procedural rules of:

(1) international agreements or arrangements between EU member State(s) and one or more third countries;

(2) international agreements or arrangements on the stationing of troops between an EU member State and one or more third countries; or

(3) international organisations that have specific procurement rules;

b) contracts which would oblige EU member States to supply information, the disclosure of which is contrary to its essential security interests;

c) contracts for intelligence activities;

d) cooperative programmes between EU member States based on research and development for a new product;

e) contracts awarded in a third country during military or security operations if operational needs require them to be awarded to local suppliers.

Subcontracting

6.8. MOD had some flexibility about how to transpose the new subcontracting provisions, which was one of the main issues in the public consultations. These subcontracting provisions in the DSD allow EU member States to introduce regulation into the supply chain that:

a) obliges successful tenderers to compete on an EU-wide basis all or a certain portion of its proposed sub-contracts (Article 21(3)); and/or

b) mandate a level of sub-contracting to third parties, up to a maximum of 30% of the contract value (Article 21(4)).

6.9. MOD had to implement Article 21(3) in the DSPCR either as a mandatory or optional requirement for contracting authorities. We chose to transpose Article 21(3) as an option to allow each contracting authority to decide on a case by case basis whether such a measure would deliver value for money.

6.10. The MOD opted not to transpose Article 21(4) that requires mandatory subcontracting to third parties for up to 30% of the contract due to the difficulty in ensuring equal treatment for all tenderers during the competition for the main contract as this provision is likely to have a different impact on the supply chain of each tenderer. The public consultations suggested that SMEs were likely to struggle to cope with the regulatory burden if they were required under Article 21(4) to split up contracts they had won in open competition. Even larger suppliers might find it difficult to sub-contract 30% of contracts if they did not have significant procurement departments.

6.11. MOD was concerned about the regulatory burden that Article 21(4) would create for industry, as the subcontracting regulations for industry to use in the DSD were alien to their normal business practice and inconsistent with the Government's commitment to reducing regulations. We therefore introduced a policy that MOD staff can only consider using this provision if the prime contract is valued over £10M so that SMEs are not discouraged from bidding for contract opportunities.

Review Mechanism

6.12. The DSD also required the DSPCR to contain review procedures which will enable suppliers to challenge procurement decisions and provide effective remedies to protect their rights. These procedures are very similar to those introduced into the PCR 2006 by amendment in December 2009 but were slightly amended to tailor them to the defence and security market.

6.13. The review procedures permit the Courts to set aside defence and security contracts in certain circumstances where contracting authorities have breached their obligations under the DSD. MOD decided to transpose the derogation at Article 60 (3) of the DSD that allows an independent review body not to set aside a contract if it finds the contract has been awarded illegally but there are overriding defence or security interests for not doing so.

Extent of Achievement of the Objective

6.14. The MOD fully achieved the objective to transpose the DSD in the UK. The MOD's engagement with a wide range of stakeholders helped us to minimise the burden of the regulations when shaping and drafting the DSPCR. During the preparation of this report a UK defence company kindly commented that "the MOD transposition process was extremely effective, with excellent engagement with industry". MOD would like to thank defence industry for their participation and remains very grateful for their support during the transposition.

Puma MK2 Interim Support Arrangement

MOD awarded a £87.6M contract to Eurocopter in April 2013 for the interim support of PUMA under the non-competitive negotiated procedure in line with Regulation 16(1)(a)(ii) of the DSPCR.

The Puma Mk2 is capable of carrying up to 16 fully equipped troops and can fit into a C-17 which means that it can be transported anywhere in the world and, crucially, can be ready to deploy in support of both combat and humanitarian missions in just 4 hours.



Chapter Seven - Objective 2 - Implementing Defence and Security Procurement Rules

Specific Rules for Defence and Security Sectors

7.1. The second national objective was to “implement procurement rules specifically adapted to the defence and security sectors”. The provisions in the DSPCR replicate many of the procedures found in the PCR 2006 but were adapted to reflect defence and security issues.

7.2. Some of the specific procurement rules in the DSPCR adapted for the defence and security sectors are:

- a) new exemptions for intelligence activities, local purchases for operations outside the EU and co-operative armaments projects;
- b) restricted and competitive negotiated procedures²⁷ – procurers have a free choice of using these procedures; this provides more flexibility for acquisition teams to negotiate with contractors where they choose to use the negotiated procedure;
- c) non-competitive negotiated procedure²⁸ available for:
 - (1) operational urgency;
 - (2) air and maritime transport services for deployment of the armed forces.
- d) new selection criteria available for:
 - (1) grave professional misconduct related to security breaches;
 - (2) industry’s capacity to provide security of supply and ensure security of information.
- e) provisions to protect classified information and ensure security of supply.

7.3. The DIA audit²⁹ highlighted the difficulties from 2011 to 2013 for commercial staff having to adjust to the differences between the DSPCR and PCR. The key differences between PCR and DSPCR were not well understood by those involved in the procurement. The risk was a lack of awareness of the full requirements of DSPCR could mean that:

- a) contracts are procured incorrectly, increasing the risk of legal challenge and reputational damage; and
- b) inefficiencies in procurement where the correct route is identified late, delaying the procurement of essential supplies or services and increasing cost.

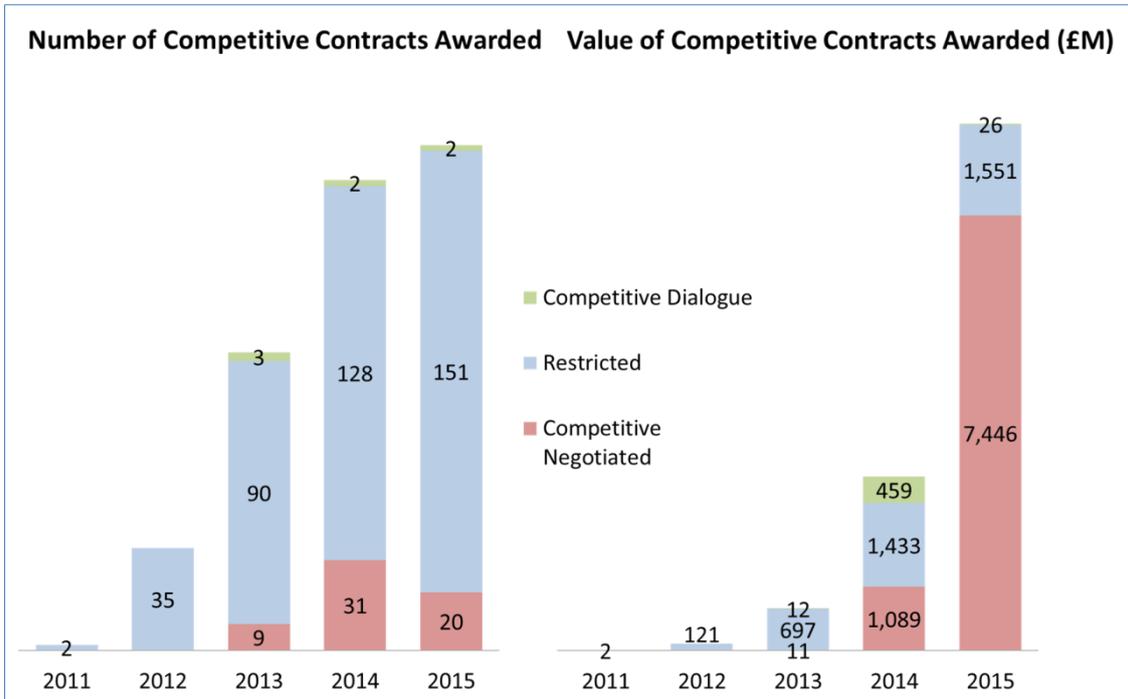
7.4. Graph 1 shows the types of competitive procurement procedures used by the MOD. Initially, acquisition teams chose to tread carefully and, where possible, only made minimal changes to how they conducted their procurement, e.g. they mostly chose the restricted procedure for their competitive procurement that is very similar to the restricted procedure in the PCR 2006. Graph 1 shows the MOD’s current use of the restricted procedure remains very high but that acquisition teams are increasingly confident to depart from past practice to use the competitive negotiated and competitive dialogue procedures for high value, complex procurements in order to deliver better value for money.

²⁷ The full name of the competitive negotiated procedure is “the negotiated procedure with prior publication of a contract notice”.

²⁸ The full name of the non-competitive negotiated procedure is “the negotiated procedure without prior publication of a contract notice”.

²⁹ DIA Internal Audit - “DSPCR Tender Bid Evaluation/Award”, reference: 3015/16/12 of February 2013

7.5. The reason for the large peak in the use of competitive negotiated procedure in 2015 is the value of the LCS(T) Project contract award worth £6.331 Billion, which was awarded under the competitive negotiated procedure.

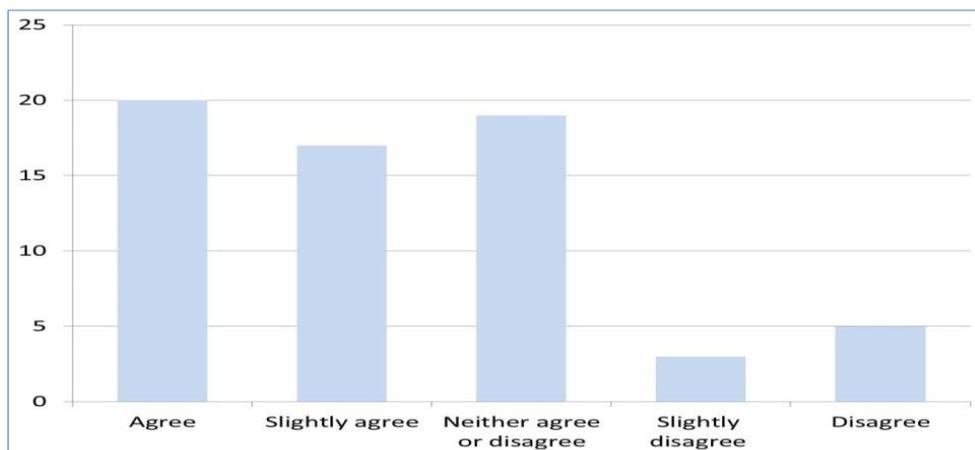


Graph 1: Competitive Contract Award Procedures under the DSPCR

Benefits and Burdens

7.6. The MOD carried out an online survey of Government procurement staff³⁰ that uses the DSPCR, to gauge their perceptions on the benefits and drawbacks of the DSPCR. We asked them how closely they agreed with the following statement –

“The DSPCR has introduced regulations that are more suited to the conduct of defence and security procurements?”



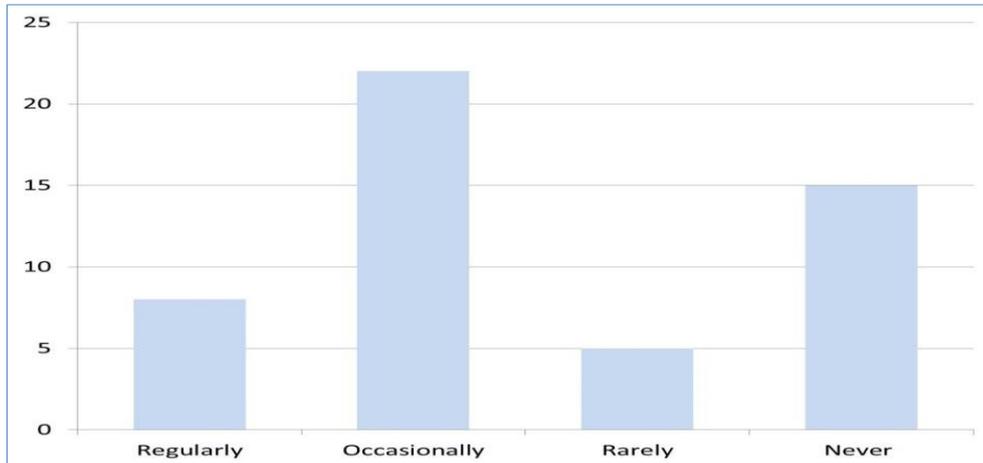
Graph 2: Suitability of Procedures for Defence and Security

³⁰ 66 procurement staff in MOD and 5 procurement staff in OGDs responded to the survey.

7.7. The response was generally positive about the suitability of the rules in the defence and security business. 57% of respondents agreed or slightly agreed that the DSPCR introduced rules that are more suitable for defence and security procurement than the previous rules. Only 13% of respondents disagreed or slightly disagreed whilst 30% neither agreed nor disagreed.

7.8. We asked procurement staff in their experience—

“Has the use of DSPCR resulted in better value for money for defence and security procurements?”

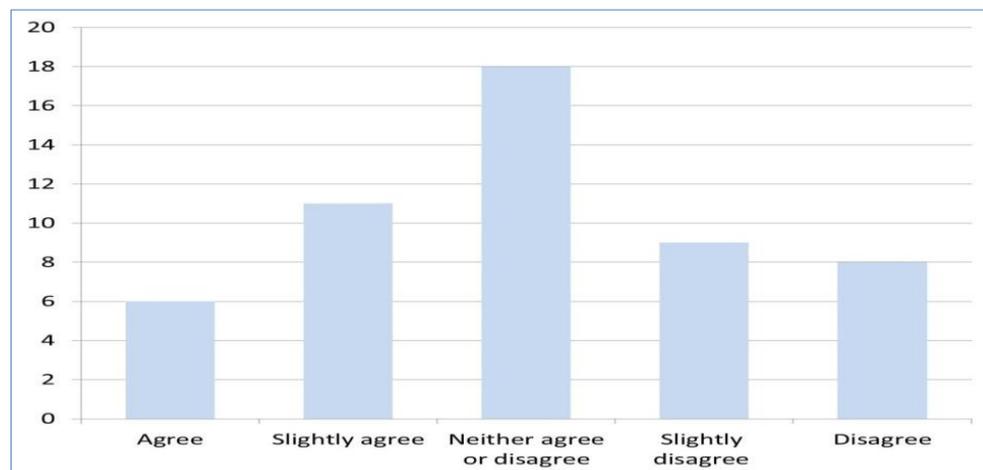


Graph 3: Does the DSPCR Deliver Value for Money?

7.9. The response was marginally positive bearing in mind that a lot of defence procurement would have previously been awarded under the PCR 2006. Only 30% of respondents who answered this question never saw an improvement in value for money when using the DSPCR.

7.10. We asked how closely procurement staff agreed with the following statement –

“The introduction of the DSPCR has resulted in clearer, easier to follow procurement procedures?”

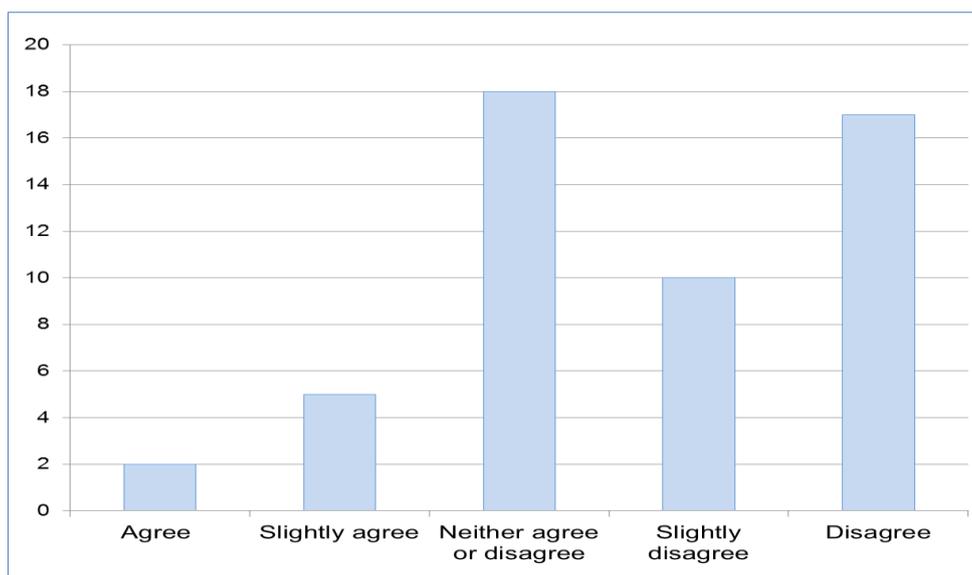


Graph 4: Does the DSPCR Have Clearer, Easier Procedures?

7.11. The response was mixed. 34% of respondents agreed or slightly agreed that the DSPCR introduced clearer rules, and easier to follow procurement procedures. However, 34% of respondents disagreed or slightly disagreed and 35% neither agreed nor disagreed.

7.12. We asked how closely procurement staff agreed with the following statement –

“The DSPCR reduces the burden on procurement staff placing contracts?”



Graph 5: Does the DSPCR Reduce the Burden on Procurement Staff?

7.13. The response indicated that few staff thought there was a reduction in the regulatory burden. Only 14% of respondents agreed or slightly agreed that the DSPCR reduced the burden on procurement staff. However, 52% of respondents disagreed or slightly disagreed whilst 34% neither agreed nor disagreed.

7.14. The opinion of procurement staff was also split on whether the DSPCR resulted in more benefits or burdens to procurement staff. 51% of respondents thought on balance the DSPCR benefits procurement staff whilst 49% thought on balance that the DSPCR burdens procurement staff.

7.15. Procurement staff mostly felt that the DSPCR had instilled good practice to improve value for money for the taxpayer but was a burden to project staff. One respondent commented:

“The parameters it sets are really beneficial, I believe it has increased the workload as a process as it is prescriptive and - arguably - demanding and, does demand more assurance checks and in producing more documentation in support of the procurement (so that a wider range of suppliers can bid) BUT the benefit is that these practices should've been happening regardless of DSPCR and the DSPCR does provide commercial staff structure/support to make sure the whole project/procurement team produce what is necessary.”

7.16. Other respondents commented that the DSPCR allowed commercial staff to challenge the historical use of Article 346 TFEU – the “warlike stores” exemption, and the DSPCR “provided, or perhaps the materials that have been produced around it provide, clarity which helps with the task of explaining the process to non-commercial staff.”

7.17. Not all the comments were so positive about the DSPCR. Procurement staff from the FCO missed the ability to use the open procedure, which is not included in the DSD. Other procurement staff felt the regulatory framework was difficult to understand and was “driving a risk adverse culture due to the likelihood of challenges being made at contract award”. One respondent commented the DSPCR is:

“...over complicated and ambiguous in many respects, the result in which is an increasing prevalence for challenges to be made by unsuccessful bidders. This, in turn drives the procurement process to a much more risk adverse position adding delay and uncertainty to the outcome of any procurement action”.

7.18. There was also a concern from a respondent about the length of time taken to complete procurement procedures under the DSPCR. A capability manager in the MOD lamented that it

seemed it was impossible to award a contract within a year. Even a sympathetic respondent noted that:

“There are benefits from use of the DSPCR but on the whole the balance is tipped slightly towards burdens, but only slightly, because of the inflexibility with regards to timeframes would have given the department better value for money in the long run.”

Scope for Quicker, Better Procurement

7.19. We also asked procurement staff if the rules represent best commercial practice and, if not, how they could be improved. A typical comment from respondents was that the “rules do represent good commercial practice but perhaps not best commercial practice”. This was not surprising as the survey was conducted just after the implementation of more modern, streamlined procedures in the PCR 2015. MOD procurement staff also did suggest a number of practical ways to improve the provisions in the DSPCR. However, MOD cannot make material changes to improve the DSPCR without changes to the DSD at EU level, as its mandatory provisions must be reflected in national law whilst the UK remains a part of the EU.

7.20. The main call from procurement staff was for the DSPCR to be brought in line with the PCR 2015. The MOD can decide how it conducts its exempt and below threshold procurement. However, we are obliged to follow the different rules for procurement procedures in the DSPCR or PCR 2015 that often bear the same name. This not only complicates our procurement processes but multiplies the amount of guidance and training needed by procurement staff, and increases the risk of error.

7.21. Some of our procurement staff also believed that they would achieve better commercial outcomes if they had more flexible contract award procedures. There was also a call to raise the financial thresholds in the DSPCR, as the rules were labour intensive for low value requirements. If the thresholds were raised, MOD would still have to follow the TFEU principles of non-discrimination, equality of treatment and transparency.

7.22. Some procurement staff questioned whether the DSPCR adopts the right approach to repeat purchases of in-service items and wanted more flexible rules on contract amendments. An option to enable this would be to introduce rules for contract amendments in a revised DSD similar to those of Directive 2014/24/EU for general public procurement.

7.23. Another respondent commented that the DSPCR is predicated on the basis that additional competition will drive down price and result in best value for the procurer. Competition is an important tool in defence procurement but for repeat or additional purchases so too is systems integration, accreditation, security of supply, track record, and encouraging continuous improvement from the supply chain.

Extent of Achievement of the Objective

7.24. The MOD believes that the DSPCR has met its objective of implementing procurement rules specifically adapted to the defence and security sectors. The DSPCR is still better suited to defence and security procurements than the PCR 2006 or PCR 2015. Rules for selection and award criteria and special contract conditions are drawn more widely to reflect defence and security issues.

7.25. MOD agrees that the general procurement rules in the DSPCR are not as effective and efficient as the rules in the PCR 2015. The DSPCR does not allow the full range of procurement techniques, and the new rules in the PCR 2015 are more flexible and reduce the workload on concluding a deal with industry.

7.26. The DSPCR is more often than not viewed by procurement staff as an extra burden. This may in large part be due to staff having to understand and follow two sets of regulations - the DSPCR and PCR - so no matter how clear and easy to follow either set of regulations are, they will still represent an “extra burden”.

Repair and Maintenance of Warrior Traverse Gearbox and Motor

MOD awarded a £0.865M contract to Davall Gears Ltd under the competitive restricted procedure of the DSPCR in December 2014 to repair and maintain essential mechanical parts of the Warrior Infantry fighting vehicle.

The Warrior is designed to provide firepower and armour to support infantry in the assault in difficult terrain. Since entering service in 1988 it has provided excellent mobility, lethality and survivability for the infantry and has enabled key elements from the Royal Artillery and Royal Electrical and Mechanical Engineers to operate effectively within a Battle Group. The vehicle is expected to stay in service until 2040.



Chapter Eight - Objective 3 - Open the majority of defence and security procurements to open competition in Europe

Cross Border Procurement

8.1. The third and most important objective was to “open the majority of defence and security procurements to open competition in Europe”. This objective flowed down from the DSD but must be interpreted in the context of the DSPCR that applies only to the UK.

8.2. MOD advertises its competitive procurements under the DSPCR in the Official Journal of the EU, which allows all suppliers in the EU to request to participate in the procurement procedure. The creation of a level playing field for competition in the EU should benefit UK industry, as the EU represents a much bigger defence market so in theory should offer more business opportunities.

8.3. Table 9 shows the number of requests to participate in MOD competitive procurement from national and cross border suppliers located outside the UK.

	Competitive Awards	Number of Requests to Participate	National Requests to Participate	Cross Border Requests to Participate	% Cross Border
2011	2	24	18	6	25
2012	35	255	235	20	8
2013	102	654	601	53	8
2014	161	543	495	48	9
2015	173	533	460	73	14

Table 9: Number of Request to Participate in UK MOD Competitive Contract Awards

8.4. Table 10 shows MOD's competitive contract awards to national and overseas suppliers.

	Competitive Awards	Number of National Awards	Number of Cross Border Awards	% Cross Border
2011	2	1	1	50
2012	35	31	4	11
2013	102 ³¹	89	12	13
2014	161	136	25	16
2015	173 ³²	151	21	12

Table 10: Number of UK MOD Cross Border Competitive Contract Awards

³¹ The 102 contracts in 2013 include a multi-supplier framework contract which was awarded to both UK and overseas suppliers

³² The 173 contracts in 2015 include a multi-supplier framework contract which was awarded to both UK and overseas suppliers

8.5. Table 11 shows a breakdown of cross border contract awards for competitive contracts under the DSPCR by a range of values from 2011 to 2015.

Contract Value Range	EU Suppliers	USA Suppliers	Other Non-EU Suppliers
Greater than £5M	18	2	14
£1M to £5M	13	3	3
Less than £1M	4	4	2
Total	35	9	19

Table 11: Cross Border Contract Awards by Contract Value Range

8.6. The difficulties of creating a more open market are not unique to the defence sector. The European Commission’s report on “Cross-Border Procurement above EU Thresholds³³” (March 2011) calculated that direct cross border procurement by number of contracts was limited to 1.6% of contract awards from 2007 to 2009. The report also found that the majority of cross-border trade by number of contracts occurred indirectly through affiliates (11.4%), subcontractors (1.0%), consortia (0.3%) and wholesalers/distributors (11.9%).

8.7. The European Commission’s report identified many of the obstacles to cross-border procurement, including:

- a) lack of experience of doing business abroad;
- b) language barriers;
- c) strong competition from national bidders; and
- d) legal requirements leading to market entry barriers in the awarding country.

8.8. The percentage of non-competitive contract awards under Regulation 16 of the DSPCR directly to national and or cross border suppliers is shown in Table 12 below.

	Non-Competitive Awards	Number of National Awards	Number of Cross Border Awards	% Cross Border
2011	2	2	0	0
2012	87	79	8	9
2013	93	79	14	15
2014	97	82	15	15
2015	86	73	13	15

Table 12: Number of UK MOD Cross Border Non-Competitive Contract Awards

8.9. The FRS study shows a similar trend across the EU noting “when the contracting authorities/entities provide the name and address of the successful economic operators, in 84% of

³³ http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/cross-border-procurement_en.pdf

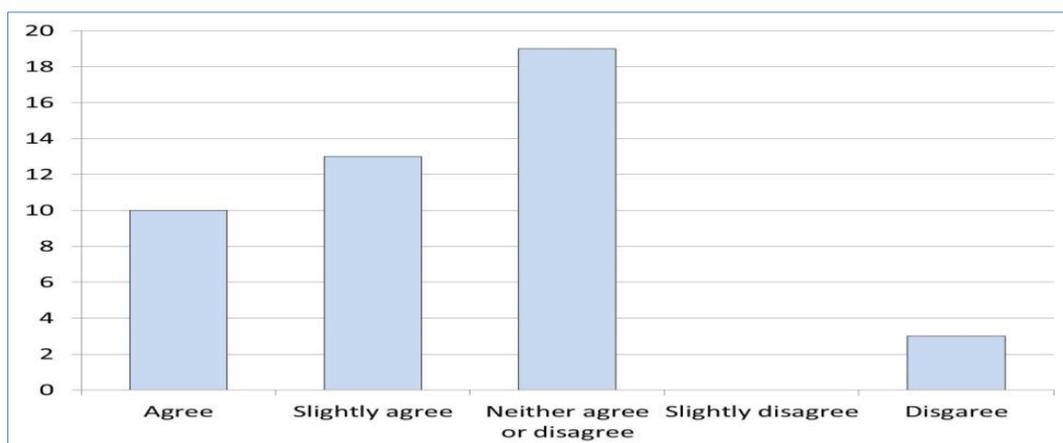
cases, the selected supplier is based on national territory. In terms of value, this share reached 92% in 2013 and 94% in 2014 (the high point during the period in question).”

Suppliers’ View of the EDEM

8.10. The MOD also conducted a survey amongst the suppliers³⁴ who had won contracts under the DSPCR and ADS Group Limited³⁵ to gauge their perceptions of the impact of the DSPCR. We issued 230 questionnaires and received 53 replies. 58% of respondents were SMEs. In terms of the nationality, 62% of the suppliers were based in the UK, 4% of the suppliers were located outside the UK, and 34% of the suppliers described themselves as multinationals.

8.11. We asked industry how closely they agreed with the statement –

“UK industry benefits from a more open and competitive defence market in the UK as a result of the DSPCR?”

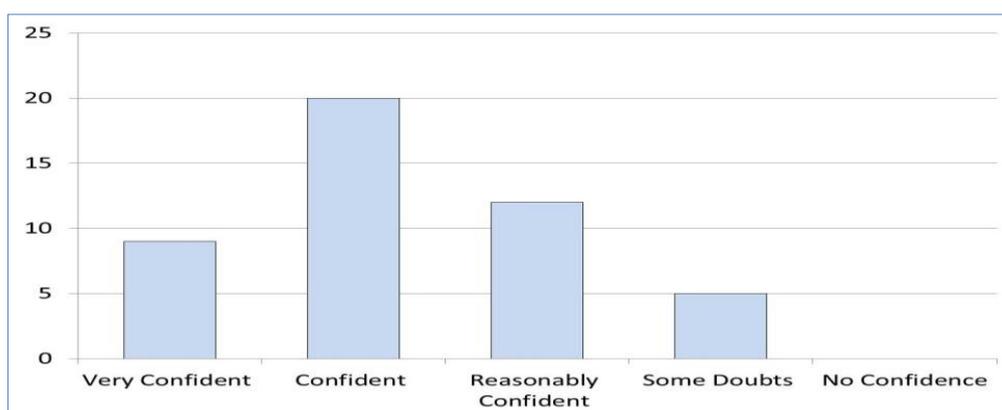


Graph 6: Does the UK Industry Benefit from the Open Market under the DSPCR?

8.12. The response was generally positive. 51% of respondents agreed or slightly agreed that UK industry benefited from the competitive market created by the DSPCR. 42% neither agreed nor disagreed. Only 7% disagreed or slightly disagreed.

8.13. We asked industry –

“How confident are you that the UK MOD would give fair and equal consideration under the DSPCR to a bid for a defence procurement contract from your company?”



³⁴ MOD issued 230 questionnaires to suppliers who had won contracts under the DSPCR and received 53 replies. 58% of the industry respondents were SMEs. In terms of the nationality, 62% of the suppliers were based in the UK, 4% of the suppliers were located outside the UK, and 34% of the suppliers described themselves as multinationals.

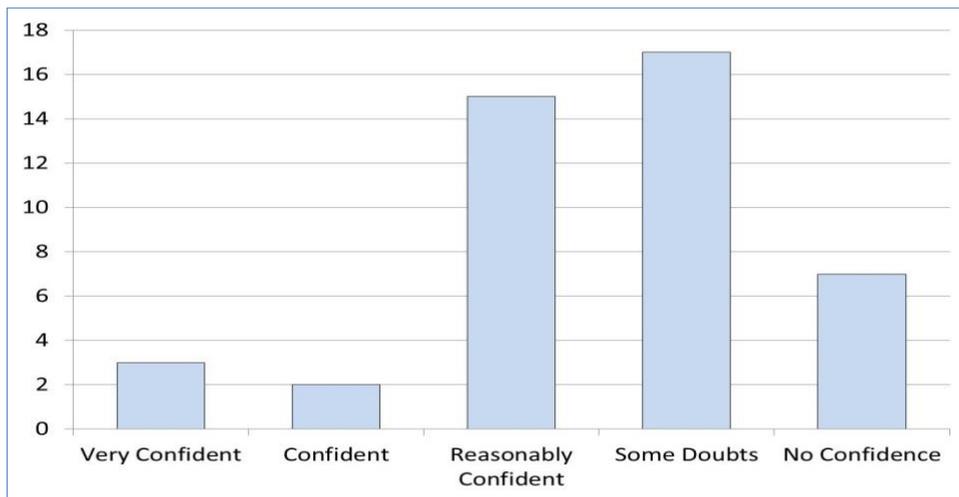
³⁵ ADS Group Limited is the trade organisation for any companies operating in the UK Aerospace, Defence, Security and Space sectors

Graph 7: Does the UK MOD Treat Your Bids Fairly under the DSPCR?

8.14. The response was generally positive. 89% of respondents were very confident, confident or reasonably confident that MOD would give fair and equal consideration to their bids for work. Only 11% had some doubts. No supplier expressed “no confidence” in MOD.

8.15. We also asked the same question in the context of whether UK defence industry thought they would receive fair and equal consideration under the DSD from other MODs in the EU:

“How confident are you that other MODs in the EU would give fair and equal consideration under the DSD to a bid for a defence procurement contract from your company?”



Graph 8: Do other MODs in the EU Treat Your Bids Fairly under the DSD?

8.16. The responses show a drop in confidence (compared to the responses in Graph 7) that those respondents would receive equal treatment from the other MODs in the EU. This does not establish unequal treatment as a fact. However, only 45% of respondents were very confident, confident or reasonably confident that other MODs would give fair and equal consideration to their bids for work. 55% had some doubts or no confidence at all about receiving equal treatment from the other MODs in the EU.

8.17. This drop in confidence was also reflected in some of the comments by respondents, e.g. “UK implementation is sound - pity not all member States implemented as well”. One supplier commented that whilst the “UK implements the rules in accordance with the spirit as well as the letter of the regulation; other EU member States appear to provide a less even handed approach.”

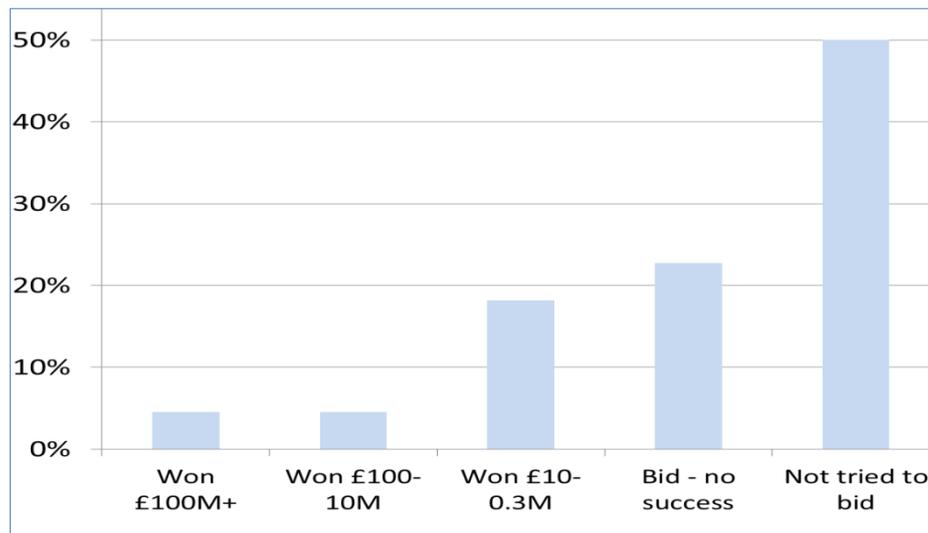
8.18. MOD believes part of this lack of confidence may stem from a lack of transparency about how other MODs implement the DSD and use Article 346 TFEU. The UK Government openly published a White Paper³⁶ that sets out how the UK will procure technology, equipment, and support to meet defence and security requirements including the UK’s approach to Article 346 TFEU. The MOD’s publication of its DSPCR guidance on the internet is the exception rather than the rule in the EU.

8.19. ADS Group Ltd developed this point commenting that whilst the DSD “is a common requirement for all EU member States, implementation and application varies. Going forward it would be helpful if differences in the way countries apply the rules could be recognised and a coherent approach adopted.”

8.20. MOD also asked the suppliers if they had tried to win contracts under the DSD outside the UK, and if they could provide an indication of how much business they had won under the DSD.

³⁶ White Paper (Cm8278) entitled “National Security Through Technology: Technology, Equipment, and Support for UK Defence and Security” dated February 2012

“Have you tried to win contract under the DSD outside the UK? If so, please provide an indication of how much business they had won under the DSD.”



Graph 9: Supplier success in winning orders under the DSD

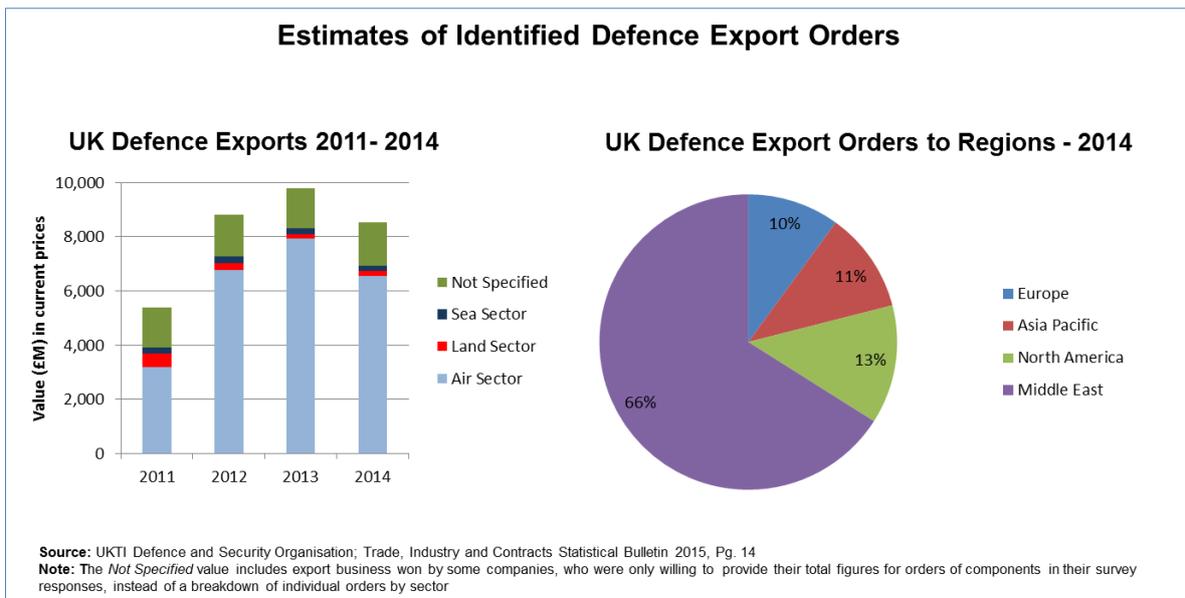
8.21. Only 27% of respondents had won contracts outside the UK under the DSD. A slight majority of suppliers who had tried to win contracts outside the UK under the DSD were successful. In summary,

- a) 5% of successful suppliers had won more than £100M worth of orders;
- b) 5% of successful suppliers had won between £100M and £10M worth of orders;
- c) 18% successful suppliers had won less than £10M worth of order;
- d) 23% of suppliers had tried to bid across national borders without success; and
- e) 50% of suppliers had not tried to win work outside the UK.

8.22. We also asked suppliers if there were any concerns that prevented or hindered them winning contract opportunities outside the UK. The main points identified by the respondents were:

- a) bidding across national borders requires a detailed level of foreign language - which if not organic to the organisation has to be procured, making tendering unrealistic;
- b) a belief that many EU member States still prefer to use their national suppliers;
- c) different criteria for using Article 346 TFEU – the warlike stores exemption - by several EU member States renders the playing field far from level.

8.23. The low confidence of suppliers being able to win orders in the rest of the EU is reflected in information on UK defence exports from the UK Trade and Investment Defence and Security Organisation, which is set out in Graph 10 below.



Graph 10: Estimates of Identified Defence Export Orders

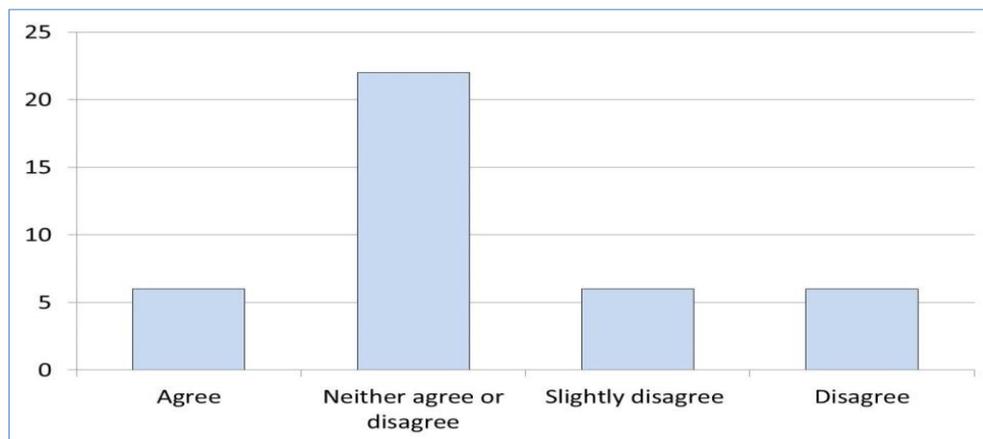
8.24. Although UK defence industry has seen an increase in exports since 2011, by far the biggest export market for the UK's defence sector is the Middle East, with Europe accounting for just 10% of UK defence exports.

Benefits and Burdens of the EDEM

8.25. The European Commission's study³⁷ on the cost effectiveness of public procurement estimated the total cost of public procurement in Europe is roughly 1.4% of purchasing volume and that businesses account for 75% of these as bid costs. The MOD recognises that not all bid costs under the DSPCR are fully attributable to the DSPCR. Bid costs are an inevitable feature of competitive procurement

8.26. We asked Industry, bearing in mind that bid costs will occur whether the procurement is regulated or not, and that much of defence procurement was previously regulated by the PCR 2006, how closely suppliers agreed with the statement –

“The DSPCR reduces the burden on suppliers bidding for defence contracts?”



Graph 11: Does the DSPCR Reduce the Burden on Suppliers?

³⁷ Public procurement in Europe - Cost and effectiveness. A study on procurement regulation. Prepared for the European Commission, March 2011

8.27. 55% of respondents neither agreed nor disagreed. Only 15% agreed with the statement that DSPCR reduced their bid costs. 30 disagreed or slightly disagreed. The responses show that Industry generally do not perceive the DSPCR has significantly reduced their regulatory burden.

8.28. We also asked “On balance, would you say that the benefits of DSPCR and DSD outweigh the burdens to UK industry?”

- a) 62% of respondents thought there had been more benefits than burdens.
- b) 38% thought the burden of the DSPCR did not outweigh the benefits.

8.29. The 62% of respondents who felt on balance that the DSPCR and DSD delivered more benefits than burdens focussed on the positive effects of competition - opening up the defence market, driving efficiency in the supplier bases and creating new business opportunities. A typical comment came from James Troop & Company Ltd who said “It has benefited our company (an SME) as we have been able to win defence contracts in competition with major companies”

8.30. Not all suppliers were convinced that the DSPCR and DSD had made a significant impact on opening up the defence market in the EU, which is supported by the early statistics on the extent of cross border procurement. For example, BAE Systems Ltd commented:

“The perception is that the regulations have not created more business opportunities for UK Industry and have increased the costs to bid. They have also resulted in significant overheads in understanding the legal aspects, even when looking to launch collaborative European programmes, since it remains unclear whether such programmes can be exempt from competition rules. This was the case for putative Anglo-French the MALE UAV Programme, which caused endless debates on whether it would require a competitive procurement process for the development phase.”

8.31. The 38% of respondents who felt on balance that the DSPCR and DSD delivered more burdens than benefits focussed on the costs on the regulations; in particular bid costs. A supplier who asked to remain anonymous said “Bid cost is up, the chances of success down due to increased competition. Competition is great if you are a buyer, not so great if you are a seller.”

Extent of Achievement of the Objective

8.32. MOD has successfully created the regulatory framework for the EDEM in the UK by introducing the DSPCR. However, the main problem in creating an open defence market appears to be reluctance of the majority of suppliers in the EU to engage in cross-border trade due to inherent difficulties in international business. These difficulties are not unique to the defence and security sectors.

8.33. The low level of confidence from UK suppliers bidding for business opportunities in the rest of the EU, shown in Graph 8, is supported by the FRS Study that highlighted that with a few exceptions that a very high majority of contract awards are within national borders in the EU.

Provision of Large Aircraft Infrared Countermeasures In-Service Support 2

MOD awarded a £80.5M contract to Northrop Gunman in April 2013 for the continued support of Large Aircraft Infra-Red countermeasures (LAIRM) system under the non-competitive negotiated procedure in line with Regulation 16(1) (a) (ii) of the DSPCR.

The LAIRM is a directed infrared (IR) countermeasures system designed to protect large transport and rotary-wing aircraft from IR-guided missile threats by confusing its guidance system without requiring input from the aircrew.



Chapter Nine Objective 4 - Reduce inappropriate use of Article 346 TFEU and other exemptions

9.1. The fourth policy objectives for the DSPCR were to support the European Commission's operational objective to "encourage some member States away from inappropriate use of Article 346 TFEU and the other derogations of the Treaty" and "reduce reliance on exemptions".

9.2. The MOD's [Second Consultation Document on the implementation of Directive 2009/81/EC](#) dated 13 December 2010 said that the likely impacts of the regulations were:

"Roughly 55% of MOD contracts are exempt from the Classic Directive. The New Directive will reduce the number of exempt contract in two ways. First, its provisions on security of supply and security of information may provide adequate protection for requirements, meaning that there will be less reliance on Article 346 TFEU. Second, the general exclusions in the New Directive at regulation 6 are more tightly drawn. This means it will be harder to justify using these exemptions. Although it is difficult to quantify the effect but there is likely to be a significant reduction in the number of exempt contracts."

9.3. From a baseline of MOD using an exemption for roughly 55% of contracts that were from the old PCR 2006, the decline in the MOD's use of Article 346 TFEU and other exemptions, for above threshold procurements, since the introduction of the DSPCR can be seen in the Table 13 below.

	Contract Awards	DSPCR & PCR	Exempt	% Exempt
2011	1,047	529	518	49%
2012	746	470	276	37%
2013	629	460	169	27%
2014	661	526	135	20%
2015	604	451	153	25%

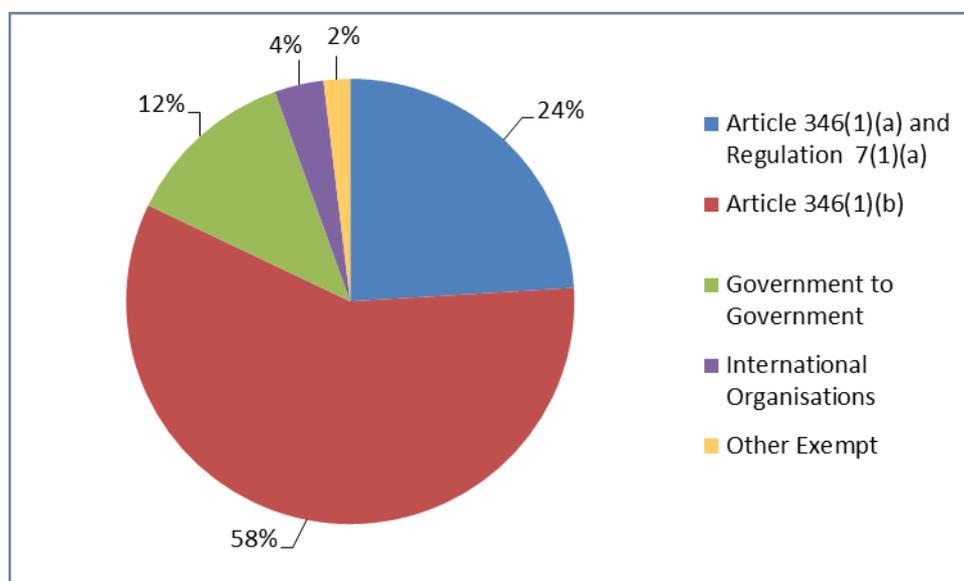
Table 13: Percentage of MOD Exempt Contracts above Threshold

9.4. MOD's statistics for the value of MOD exempt contracts are more variable, as the value of contract awards for a few major projects can distort the figures. However, the decline in the MOD's use of Article 346 TFEU and other exemptions since the introduction of the DSPCR can also be seen in the value of the award procedures in Table 14 below.

	Contract Awards £M	DSPCR & PCR £M	Exempt £M	% Exempt
2011	7,897	1,759	6,138	78%
2012	6,540	3,083	3,457	53%
2013	5,777	3,956	1,821	32%
2014	9,165	7,292	1,873	20%
2015	14,381	11,544	2,511	17%

Table 14: Percentage Value of MOD Exempt Contracts above Threshold (£M)

9.5. Analysis of the exemptions used in MOD procurement for 2015 shows that, by value, Article 346(1)(b) accounted for the biggest share, followed by Article 346(1)(a) and Regulation 7(1)(a), with other exemptions representing just 2% of the overall exempt procurement as can be seen in Graph 12 below.



Graph 12: Type of Exemptions used in 2015 by Value

9.6. Whilst it is not possible to prove a direct cause and effect, the two factors likely to reduce the MOD's reliance on exemptions are the introduction of the DSPCR itself and greater legal awareness amongst procurement staff of the rules for using Article 346 TFEU from the MOD guidance that drew on the European Commission's Interpretative Communication³⁸. This conclusion is supported by the online survey of procurement staff on the impact of the DSPCR, 64% of staff who responded believed that the special defence and security rules in the DSPCR had reduced their need to use the Article 346 TFEU to exempt requirements.

9.7. Whilst Article 346 TFEU is applied exceptionally to exempt procurement of equipment and services in certain circumstances (e.g. to withhold classified information bearing a national caveat, such as UK/FR Eyes Only), the general exclusions in the DSPCR protect a wider range of interests, including two general exclusions that lie at the heart of any future equipment co-operation amongst EU member States:

- a) co-operative programmes between EU member States based on joint research and development;
- b) procurement from international organisations. International organisations such as the Organisation for Joint Armaments Co-operation (known by its French acronym, OCCAR) are key players in managing co-operative programmes.

9.8. MOD believes the European Commission's advocacy of a strict interpretation of general exclusions may have been counterproductive to the aims of the DSD. We believe a flexible interpretation of these exemptions would be fully consistent with the DSD which highlights the "need to foster, develop and strengthen the European Defence Technological and Industrial Base (EDTIB)".

³⁸ [Interpretative communication on the application of Article 296 of the Treaty in the field of defence procurement \(SEC \(2006\) 1554\) \(SEC \(2006\) 1555\).](#)

9.9. The European Commission has already adopted a flexible approach for the Research and Development (R&D) services exemption at Article 13 (j) of the DSD to encourage investment in the EU defence industry. Their Guidance Note on [Research and Development](#) advocates a flexible approach to contract award that allows EU member States the choice “for instance, to organise a limited competition, conduct negotiations with several potential service providers, or even decide to conclude the contract directly with a specific service provider.” Such flexibility in the use of other exclusions would help foster equipment co-operation in the EU.

Extent of Achievement of the Objective

9.10. MOD believes that these objectives have been achieved in the UK. However, MOD has no figures on the use of Treaty exemptions and exclusions by other EU member States so cannot comment on whether the trend in the UK has been replicated in the rest of the EU. We hope the Commission’s report on the impact of the DSD to the European Parliament and the Council due by 21 August 2016 will answer that question.

Sustainment (Refurbishment and replacement) of Enhanced Combat Body Armour Plates

MOD awarded a £1.4M contract to Seyntex based in Belgium under the competitive restricted procedure of the DSPCR in February 2015 to refurbish Enhanced Combat Body Armour Plates after use by British troops in Afghanistan.

Combat Body Armour can be further reinforced with ceramic armour plates. The amount of protection employed can be scaled up or down to match the type of threat. It helps provide excellent ballistic protection. It can mean the difference between life and serious injury or death.



Chapter Ten - Suitability of the Objectives and Scope for Lessening the Regulatory Burden

Do the objectives remain appropriate?

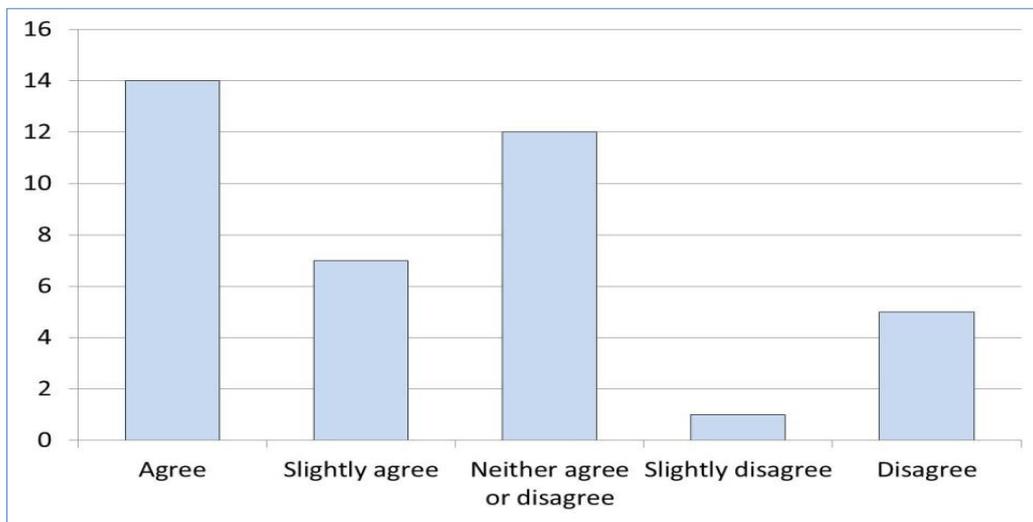
10.1. The main objective of the DSPCR was to create the UK part of an open and competitive EDEM in order that MOD can get better value for money in acquiring military capability. The DSD obliges all EU member States to open the majority of their defence procurements to open competition in Europe, providing industry with the opportunity to compete for programmes that may have previously been limited to domestic companies. Open competition has the potential to increase innovation and drive out inefficiencies in the defence and security equipment market.

10.2. MOD believes the main objective to open up defence and security procurement across the EU is still appropriate for EU member States and Norway. European defence industry operates in a difficult environment of reducing defence budgets and significant over-capacity. Europe needs a defence industry that is innovative, competitive and able to meet the requirements of EU member States. The DSD creates the legal framework for such a market where we would expect defence and security companies to prosper.

Does achieving the objectives require regulation?

10.3. MOD asked industry how closely they agreed with the statement –

“Regulation of defence procurement within the EU is the best way to open up cross-national border trade thereby creating new business opportunities for Industry?”



Graph 13: Is EU Regulation the Best Way to Open Up Cross Border Trade?

10.4. The response was generally positive. 54% of respondents agreed or slightly agreed that a properly functioning regulatory framework was necessary to create an open defence market. Some typical comments were “believe there should be a high level of regulation” or “I struggle to see how they could without regulation”. 31% neither agreed nor disagreed with the statement. Only 15% disagreed or slightly disagreed with the statement.

10.5. The European Commission argued that a regulatory system was necessary to create the EDEM in its Impact Assessment³⁹ for the DSD. MOD agrees with this position that a regulatory framework is necessary for creating the EDEM although MOD does not consider the legal

³⁹ [European Commission Impact Assessment for Directive 2009/81/EC](#)

framework is sufficient in itself to create a cross border market. The regulatory framework cannot overcome the reluctance of suppliers to bid across national borders.

Can the objectives be achieved with a system that imposes less regulation?

National Constraints

10.6. The current regulatory framework for the MOD is the DSPCR and PCR 2015. The experience of procurers and suppliers suggests there are areas in the DSD that set the rules for the DSPCR where the regulatory burden can be reduced by making the procurement procedures simpler, quicker and more flexible and efficient for procurers and suppliers; all of which would require changes to the DSD whilst the UK remains an EU member State.

One Set of Rules

10.7. Procurers in the MOD believed that just using one set of rules would have made the regulatory framework much easier to understand and operate for procurers and suppliers. This would have removed any confusion for the procurer over the differences between the detailed rules of the different implementing regulations, e.g. the restricted procedure in the DSPCR requires only a minimum of three economic operators whilst the PCR 2015 requires five economic operators.

10.8. Arguably many of the different features of the DSPCR and PCR 2015 just confirm what is possible under but not written down in the other regulation, e.g. it is possible to award contracts under the PCR 2015 with conditions that protect the security of classified information despite the absence of specific rules. It should, therefore, have been possible to draw up at the EU level a single set of rules for contracting authorities in the defence and security sectors that covers the full range of defence, security and civil procurement.

10.9. In retrospect, it would have been better if the regulatory framework allowed each contracting authority whose principal activity is in the field of defence or security, the option to use just one set of procurement rules. Defence and security procurement is organised in a variety of different ways in the EU. An option rather than a mandatory rule in the DSD would have allowed each contracting authority to decide whether one set of rules was more beneficial for them than two sets of rules.

Utilities Procurement

10.10. The low volume of contract awards in the utilities sector in the UK may suggest that a special defence and security regulations for this sector was unnecessary.

Industry's Views

10.11. We also asked suppliers "how suppliers in the EU could be given equal access to an open and competitive European Defence Equipment Market with a system that imposes less regulation?" The responses are summarised below:

- a) The ADS trade organisation commented that "an open and competitive European Defence Market requires greater focus on the barriers which inhibit cross border trade, e.g. use of common specifications, procurement procedures (including language and pricing methodologies) etc."
- b) Other respondents called for contract authorities to publish documents in English and other common EU languages, and make them available online.
- c) Minetech Ltd commented "Although designed to be fair for all suppliers, it is overly complex for simple products and the time and effort in bidding seems to be ever increasing. We feel that the extreme attention given to procurement procedures should be replaced by a little more common sense, and the system should rely more on individuals rather than procedure to get the forces what they require in a reasonable time and at reasonable cost, too much time and money is wasted during the procurement process."
- d) Other respondents raised concerns about the burden placed on suppliers during the pre-qualification stage of procurement procedures, including Sun Test Systems that

commented “often, a lot of effort goes into arranging documents about the company (financial, legal etc.) in the first stage. It would be better if these documents are only required in a later stage, before ordering.”

e) BAE Systems Ltd said “The best way to increase cross-border trade will be to align national requirements and launch more new multinational development programmes. There is very limited scope for opening up existing supply chains for existing products. New programmes will both sustain the European industry and provide opportunities for suppliers from around the EU (and globally) to bid into the supply chain opportunities.”

f) Navistar Defense UK Ltd commented “irrespective of the ease of accessing an opportunity, the ability still exists for countries to require certain amounts of local participation. This can be misused to give an excessive bias to certain companies.

g) Rockwell Collins UK Ltd also expressed similar concerns saying that the European Commission and European Parliament “should pass legislation to drive out offset / work share / polarisation and the like”.

Procurement Procedures

10.12. Procurers found that the DSPCR did not allow the full range of procurement techniques, e.g. there is no open procedure, which is useful in some cases to extract the maximum response from market to obtain best value for money. An open procedure would also encourage more participation from Small and Medium Enterprises (SMEs) in tendering exercises.

10.13. Procurers were also aware that the PPD contains a number of improvements to procurement procedures such as the new Innovation Partnerships procedure, and the simplification and reduction of time periods for conducting other procurement procedures that may have some utility to the DSD.

PQQs and Qualification Systems.

10.14. MOD also agrees with industry that much could have been done to lighten the burden of the procurement procedures in the DSPCR. Our current approach to PQQs is constrained by the rules in the DSPCR. The PCR 2015 allows contracting authorities to accept an updated self-declaration confirming that the supplier meets the relevant selection criteria. Only the winning tenderer has to submit documents to the self-declaration. The DSPCR requires that we must ask for documents to verify the information in the PQQ for all bidders before we issue the invitation to tender.

Offsets and Industrial Participation

10.15. MOD is concerned that suppliers still faced demands for offset or industrial participation from EU member States using the DSD. The European Commission said in their Guidance Note on Offsets⁴⁰ “since they violate basic rules and principles of primary EU law, the DSD cannot allow, tolerate or regulate them.” The current legal position is very clear.

Protecting National Security Interests

10.16. MOD considers that the pursuit of the objective to create the EDEM must however be balanced by the need to protect the national security interests of each EU member State. The UK remains committed to retaining the ability to protect those national security interests when procuring defence and security equipment. We will not allow the UK’s freedom of action or operational advantage of our Armed Forces to be compromised.

⁴⁰ http://ec.europa.eu/internal_market/publicprocurement/docs/defence/guide-offsets_en.pdf

Chapter Eleven - The Next Steps for the DSD

11.1. Article 73(2) of the DSD obliges the European Commission to report on the impact of the DSD to the European Parliament and the Council as provided under by 21 August 2016.

11.2. The European Commission will base its analysis of the impact of the DSD not just on a statistical analyse of award procedures public in the Official Journal of the EU but also by gathering figures on procurement outside of DSD from EU member States. The European Commission's approach will be to examine the:

- a) relevance, efficiency, consistency and effectiveness of the DSD;
- b) effects of the DSD on the EDTIB; and
- c) impact of the DSD on SMEs.

11.3. The report to the European Parliament and the Council may be accompanied by a legislative proposal from the European Commission.

Annex A - Transposition of the Defence and Security Directive in EU member States and Norway

State	Form of Transposition: Title(s) (Date of entry into force)	Art 2 - Scope	Art 8 - Thresholds & Rules for Below Threshold	Art 12 & 13 - Exclusions	Art 21 & Title III - Subcontracting	Art 22 -Security of Information	Art 23- Security of Supply	Title IV Art 54 -64 Review Procedures
Austria	Law, entry into force 01/04/2012	Information not available	Thresholds as set out in the DSD, no special provisions	Transposed as set out in the DSD	Transposed as set out in the DSD as an option for procurers	Transposed as set out in the DSD	Transposed as set out in the DSD	Information not available
Belgium	Implemented by the Act of 13 August 2011 on public contracts and certain contracts for works, supplies and services in the field of defence and security	Transposed as set out in the DSD.	Transposed as set out in the DSD.	Transposed as set out in the DSD.	Transposed as set out in the DSD.	Transposed as set out in the DSD.	Transposed as set out in the DSD.	Transposed as set out in the DSD.
Bulgaria	Law, entry into force 30/04/2012	Information not available	Information not available	Information not available	Transposed as set out in the DSD as an option for procurers	Information not available	Information not available	Information not available
Croatia	National Regulations pursuant to the Public Procurement Act (Official Gazette 90/2011)	Information not available	Thresholds as set out in the DSD, no special provisions	Information not available	Transposed as set out in the DSD as an option for procurers	Transposed as set out in the DSD	Transposed as set out in the DSD	Information not available
Cyprus	Law, entry into force 23/12/2011	Information not available	Information not available	Information not available	Transposed as set out in the DSD as an option for procurers	Information not available	Information not available	Information not available
Czech Republic	Law, entry into force 12/9/2011 The Directive 81/2009/EC was transposed into the Czech law based on the	Transposed as out in the DSD. Article 2 was transposed into Act 137/2006 Coll., as amended, to § 10a of	Thresholds as set out in the DSD, and simplified procedures for below-the- threshold contacts, only small contact are excluded. The update of Government	Transposed as set out in the DSD. The articles 12 & 13 were transposed	Transposed as set out in the DSD as an option for procurers. The articles 21 & Title III were	Transposed as set out in the DSD. The article 22 was transposed into the Czech law based on the Act No.	Transposed as set out in the DSD. The article 23 was transposed into the Czech law based on the Act No.	Transposed as set out in the DSD. The articles 54 - 64 were transposed into the Czech law based on the Act

	Act No. 258/2011 Coll. that amended the Act No. 137 /2006 Coll., on Public Procurement, as subsequently amended. Note: the Act No. 137/2006 Coll., on Public Procurement, as subsequently amended, is a piece of legislation both for the domain of public procurements and for defence and security purposes.	the Act. List of Military Equipment within the meaning of the Common Military List of the EU and 1958 List of warlike stores was transposed by decree 274/2006 List of Military equipment. Now is the complete new version - Military equipment for the purpose of procurement, which will be part of the law – as annex (valid from 1. April 2016).	Regulation 77/2008 sets new limits for the purpose of procurement (valid from 1 April 2016). Note: update of limits is in accordance with EU directives and currency rates.	into the Czech law based on the Act No. 258/2011 Coll. that amended the Act No. 137 /2006 Coll., on Public Procurement, as subsequently amended.	transposed into the Czech law based on the Act No. 258/2011 Coll. that amended the Act No. 137 /2006 Coll., on Public Procurement, as subsequently amended.	258/2011 Coll. that amended the Act No. 137 /2006 Coll., on Public Procurement, as subsequently amended.	258/2011 Coll. that amended the Act No. 137 /2006 Coll., on Public Procurement, as subsequently amended.	No. 258/2011 Coll. that amended the Act No. 137 /2006 Coll., on Public Procurement, as subsequently amended. Note: There is an on-going process of review of law on procurement (update should be valid in 1. April. 2016).
Denmark	DSD was implemented in Denmark by an implementing law, which transposed the DSD to Danish law in its entirety. The implementation law entered into force on 19th August 2011.	Transposed as set out in the DSD.	Thresholds as set out in the DSD and amended by Commission's Regulation No. 1336/2013/EU of 13. December 2013. Procurements below thresholds of the DSD are not regulated in national legislation.	Transposed as set out in the DSD.	Articles 21 (3) and 21 (4) are transposed as an option for procuring authorities.	Transposed as set out in the DSD.	Transposed as set out in the DSD.	Articles 55 – 64 are transposed as set out in the DSD, including the derogation in Article 60 (3).
Estonia	Law, entry into force 24/02/2012	Information not available	Information not available	Information not available	Transposed Art 21.3 as an option for procurers Article 21.4 not transposed	Information not available	Information not available	Information not available

Finland	Act on Public Procurement in the Fields of Defence and Security (1531/2011). Entry into force 01/01/2012).	Covering procurement 1) in the fields of defence 2) in the fields of security. Defence equipment refers to products which are specifically designed or adjusted for military purposes and meant to be used as a weapon, ammunition or defence materiel.	In addition to the thresholds set out in the DSD, the following national below thresholds apply: 1) Goods & services - €100K; 2) Works €500K. Also specific provisions for Article 3461(b) provisions stipulating the simplified contracting procedures to be followed and remedies.	Transposed as set out in the DSD.	Transposed as set out in the DSD as an option for procurers.	Transposed as set out in the DSD.	Transposed as set out in the DSD.	Transposed as set out in the DSD. Judicial body responsible of handling the complaints: First instance: Market Court. Second instance: High Administrative Court.
France	Law no 2011-702 dated 22 June 2011 (chapter I is related to ICT and chapter II is related to contracts), and Decree n° 2011-1104 dated 14 September 2011. The law and the decree are implemented in the Part III of the Public Procurement Contract Code (PPCC)	Transposed as set out in the DSD	Thresholds as set out in the DSD, with simplified procedures for low value contracts	Transposed as set out in the DSD (see art 180 in the PPCC)	Transposed as set out in the DSD as an option for procurers (see art 275 to 288 in the PPCC)	Transposed as set out in the DSD (see art 227 in the PPCC)	Transposed as set out in the DSD (see art. 228 in the PPCC)	Transposed as set out in the DSD.
Germany	National Regulations: "Gesetz gegen Wettbewerbsbeschränkungen" (07/12/2011) "Vergabeverordnung für die Bereiche Verteidigung und Sicherheit" (19/07/2012)	Transposed as set out in the DSD	Thresholds as set out in the DSD, no special provisions	Transposed as set out in the DSD	Transposed as set out in the DSD as an option for procurers	Transposed as set out in the DSD	Transposed as set out in the DSD	Transposed as set out in the DSD, The optional derogation at Art. 60 (3) was not transposed

Greece	Law entry into force 16 June 2011. Law N° 3978/2011	Transposed as set out in the DSD	Thresholds as set out in the DSD, specific provisions apply as follows: 0 to 20K Direct Award, Accelerated Procedure; Open Procedure and Directive Procedures; 20K -60K Accelerated Procedure, Open Procedure and Directive Procedure; 60K up to Directive Threshold – Open Procedure and Directive Procedure	Transposed as set out in the DSD	Transposed as set out in the DSD as an option for procurers	Transposed as set out in the DSD	Transposed as set out in the DSD	Transposed as set out in the DSD
Hungary	Law, entry into force 01/01/2012	Information not available	Information not available	Information not available	Transposed as set out in the DSD as an option for procurers	Transposed as set out in the DSD	Transposed as set out in the DSD	Information not available
Ireland	Statutory instrument, entry into force 30/03/2012	Information not available	Thresholds as set out in the DSD, and open procedure for procurement below EU thresholds	Transposed as set out in the DSD	Transposed as set out in the DSD as an option for procurers	Transposed as set out in the DSD	Transposed as set out in the DSD	Information not available
Italy	National Law on public procurement contracts in the fields of defence and security (d.lgs. n. 208/2011), entry into force 15/01/2012. A Second level implementation law (Presidential Decree n.49/2013) entered into force mid-2013.	Transposed as set out in the DSD.	Thresholds as set out in the DSD: National Law provides for implementation of procurement principles of the Directive to below thresholds procurement.	Transposed as set out in the DSD: National Law transposes all exclusion of the Directive by using similar wording.	Transposed as set out in the DSD as an option for procurers: National Law provides for set up of a transparent and non-discriminatory instrument to be used for selection of subcontractor.	Transposed as set out in the DSD: National Law in accordance with the Directive provides a list of requirements the contracting authority may require to be satisfied by tenderers.	Transposed as set out in the DSD: National Law in accordance with the Directive provides a list of requirements the contracting authority may require to be satisfied by tenderers.	National system for Administrative Review is in line with the DSD. Optional derogation at art 60(3) not transposed.
Latvia	Law, entry into force 16/11/2011	Information not available	Information not available	Information not available	Transposed as set out in the DSD as an option for procurers	Information not available	Information not available	Information not available

Lithuania	Law, entry into force 21/08/2011	<ul style="list-style-type: none"> • Common Military List of the EU; • 1958 List of Products • Classified goods, works, services • Works, services, goods related to goods above • Services and works for military purpose 	Thresholds as set out in the DSD: Simplified procedures apply. Principles of DSD applied	Transposed as set out in the DSD as an option for procurers	Transposed as set out in the DSD as an option for procurers	Transposed as set out in the DSD as an option for procurers. National security measures applied also	Transposed as set out in the DSD as an option for procurers	Transposed as set out in the DSD
Luxembourg	Law, entry into force 26/12/2012	Information not available	Information not available	Information not available	Information not available	Information not available	Information not available	Information not available
Malta	Regulation, entry into force 21/10/2011	Transposed as set out in the DSD	Thresholds as set out in the DSD Below threshold procurement covered by national regulations	Transposed as set out in the DSD as an option for procurers	Transposed as set out in the DSD as an option for procurers	Transposed as set out in the DSD	Transposed as set out in the DSD	Transposed as set out in the DSD
Netherlands	Law, entry into force 05/02/2013	Information not available	Information not available	Information not available	Information not available	Information not available	Information not available	Information not available
Norway	Law, entry into force January 2014	Information not available	Information not available	Information not available	Information not available	Information not available	Information not available	Information not available
Poland	Law, entry into force 04/12/2012	Information not available	Information not available	Information not available	Information not available	Information not available	Information not available	Information not available
Portugal	Law, entry into force 01/01/2012	Information not available	Thresholds as set out in the DSD, no special provisions	Transposed as set out in the DSD	Transposed as set out in the DSD as an option for procurers	Transposed as set out in the DSD	Transposed as set out in the DSD	Information not available

Romania	Law, entry into force 01/10/2012	Information not available	Information not available	Information not available	Transposed as set out in the DSD as an option for procurers	Information not available	Information not available	Information not available
Slovakia	Law, entry into force 09/03/2012	Information not available	Thresholds as set out in the DSD: separate decree	Transposed as set out in the DSD	Transposed as set out in the DSD as an option for procurers	Transposed as set out in the DSD	Transposed as set out in the DSD	Information not available
Slovenia	<p>1. Legal Protection in Public Procurement Procedures Act, which also include Title IV. of DSD, entry into force 03/07/2011;</p> <p>2. Public Procurement for Defence and Security Act entry into force 30/12/2012;</p> <p>3. Decree entry into force 19/01/2013.</p>	Transposed as set out in the DSD.	<p>Public Procurement for Defence and Security Act applies to the contract award of supplies, services or works in the field of defence and security, when the values are above 40.000 EUR (supply and service contracts) or €80 (works contracts).</p> <p>Procurements whose values do not exceed €40K EUR (supply and service contracts) or €80K (works contracts) are governed by internal act of MoD and are published on the website of the Ministry of Defence of the Republic of Slovenia.</p>	Transposed as set out in the DSD.	Transposed as set out in the DSD.	Transposed as set out in the DSD.	Transposed as set out in the DSD.	Title IV Art 54 -64 (Review Procedures) are transposed as set out in the DSD in our Legal Protection in Public Procurement Procedures Act.
Spain	Law, entry into force 03/11/2011	Information not available	Thresholds as set out in the DSD, no special provisions	Transposed as set out in the DSD	Transposed as set out in the DSD as an option for procurers	Transposed as set out in the DSD	Transposed as set out in the DSD	Information not available

Sweden	Law, (source EUR-lex 11 June 2012) Act on Procurement in the field of Defence & Security into force on 1 November 2011	Information not available	Thresholds as set out in the DSD Specific chapter in the law governing procurements below thresholds Chapter 15	Transposed as set out in the DSD. The new Swedish Act includes 12 & 13 in chapter 1 Para 8 & 10	Transposed as set out in the DSD as an option for procurers: New Swedish Act chapter 14 Para 1-14.	Transposed as set out in the DSD Articles 7 & 22 included in New Swedish Act in chapter 7 Para 13-15, in practice earlier procedures followed	Transposed as set out in the DSD, Chapter 7 Para 16-18 Included provisions stipulated in Article 23 of Directive with some editorial changes.	Information not available
UK	National Regulations: The “Defence & Security Public Contracts Regulations” in England, Scotland, Wales and Northern Ireland (21/08/2011). The “Public Procurement (Defence and Internal Security) Regulation 2012” in Gibraltar (21/06/2012).	Transposed as set out in the DSD, except definition of military equipment includes equipment listed in: • Common Military List of the EU: and • 1958 List of warlike stores	Thresholds as set out in the DSD Below threshold procurement not covered by national regulations	Transposed as set out in the DSD	Transposed as set out in the DSD, except for: • the optional art 21(4) which is not transposed: and • art 52(3) where we have listed the justifications for non-competitive procurement:	Transposed as set out in the DSD	Transposed as set out in the DSD	Transposed as set out in the DSD, including the optional derogation at art 60(3)

Annex B - Contract Award Notices from 2011 to 2014 (€M)

FRS STUDY STATISTICS				
EU member State	Value of Contract Award Notices (€M)	% Share of Market by Value	Number of Contract Award Notices	% Share of Number of Awards
United Kingdom	3,997	37.9%	172	7.2%
France	2,768	26.3%	511	21.5%
Germany	949	9.0%	550	23.2%
Italy	831	7.9%	327	13.8%
Poland	816	7.7%	209	8.8%
Romania	235	2.2%	80	3.4%
Finland	205	1.9%	107	4.5%
Slovakia	119	1.1%	12	0.5%
Czech Republic	99	0.9%	65	2.7%
Bulgaria	98	0.9%	72	1.8%
Hungary	97	0.9%	43	1.8%
Denmark	91	0.9%	72	3.0%
Lithuania	65	0.6%	30	1.3%
Belgium	53	0.5%	30	1.3%
Croatia	36	0.3%	16	0.7%
Slovenia	20	0.2%	15	0.6%
Estonia	18	0.2%	21	0.9%
Latvia	12	0.1%	9	0.4%
Sweden	9	0.1%	25	1.1%
Netherlands	7	0.1%	31	1.3%
Austria	6	0.1%	6	0.3%
Total	10,534	100%	2373	100%



Ministry
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