

30th March 2005**UNICE COMMENTS ON THE EUROPEAN COMMISSION'S
GREEN PAPER ON DEFENCE PROCUREMENT**

On 23rd September 2004, the European Commission adopted a Green Paper on Defence Procurement. The purpose of this Green Paper in the Commission's own words is "to develop the debate on these issues"¹.

UNICE is the leading independent organisation representing European business. We speak for more than 20 million companies, the vast majority of which are small and medium-sized. Altogether, these companies provide employment for more than 110 million people and have a total turnover of around €18,000 billion. UNICE's constituents are the major value drivers in the European economy. When commenting on this Green Paper UNICE is focusing its comments on what primarily and generally directly affects its constituents, and thus the European economy, the most.

UNICE welcomes this European Commission initiative. As the Green Paper states "Defence expenditure constitutes a large part of Member States' public spending, to the order of €160 billion for the 25 Member States, one fifth of which is used for the procurement of military equipment (acquisition plus research and development)"². It is our hope that this Commission initiative will contribute positively to the establishment of a more transparent and open European market that caters to this segment of Member States' public spending.

SPECIFIC COMMENTS ON THE DETAILS OF THE GREEN PAPER

UNICE has a number of comments regarding the Commission Green Paper. The first of these comments is that European business and industry acknowledges the extreme complexity of the issue. It is not for nothing that this significant area of Member States' public spending has remained distinct from other normal procurement. The special qualities and considerations which arise when this issue is discussed guarantee complexity, warrants caution and requires prudence in approach and clarity in purpose.

With regard to the two instruments outlined, UNICE would like to state the following.

Clarification of the legal framework by a "non-legislative instrument, such as an interpretative Communication"³ could be helpful in establishing the boundaries of *Article 296* (of the EC Treaty) exemption. Such clarification could seek to establish what constitutes 'provisions / materials / supplies' to which *Article 296* applies. It should seek to establish the boundaries of the exemption, explicitly where it was intended to apply and to close the loophole whereby 'provisions / materials / supplies' that cannot seriously be justified as "necessary for the protection of the essential interests of its security"⁴ are still exempted with reference to *Article 296* in some Member States. Such an interpretative communication must be prepared by the

¹ Green Paper on Defence Procurement, European Commission, Brussels, 23 September 2004, Page 3.

² *Ibid.* page 4.

³ *Ibid.* page 10.

⁴ EC Treaty, article 296, paragraph 1, section b.

Commission in close cooperation with EU Member States (and non-Member States to whom this would apply⁵). Without this, the goals of such an interpretative communication cannot be achieved and Europe will be no closer to achieving change in this important sector.

UNICE is not convinced that the second option put forward in the Green Paper (that the EU's legal framework "be supplemented by a new specific legal instrument for defence procurement, such as a directive"⁶) has been shown to be the right way to proceed. As far as European industry and business is concerned, legislation which applies to provisions that do not fall under the scope of *Article 296* already exists (i.e. the recently restructured Public Procurement rules that currently apply to the classical sector – 2004/18/EC – the "New Classical Directive").

The New Classical Directive simplifies the way procurement is conducted and introduces new elements (competitive dialogue, negotiation with or without a call for tender, frameworks, confidentiality) which help to make procurement more flexible and in tune with modern requirements. These are the rules to which non-*Article 296* defence related procurement should be subject.

It must fall on the Commission and Member States to ensure that the public authorities and the industries and sectors which are active in procuring and supplying military related 'provisions / materials / supplies' are made aware of the scope of current procurement legislation and how it can be applied to non-*Article 296* provisions. A good way of doing this would be to include clarification of the possibilities which the New Classical Directive provides in the proposed interpretative communication.

It is possible that at some future date cases (which have not as yet been identified) might arise relating to 'provisions / materials / supplies' that might no longer fall under *Article 296* but which may perhaps require some form of specific legal instrument to coordinate procedures for the award of contracts. To head off further difficulties from this possible development we believe that the European Commission, the defence sector and wider industry should enter into a dialogue to determine the as yet un-identified specificities in the defence markets which might fall outside the *Article 296* exemption and the extent to which these are already taken care of by the New Classical Directive.

This debate should test in detail how well the New Classical Directive can respond to defence-specific factors such as military security of supply, international trade restrictions, absence of defence from international trade restrictions, absence of defence from international trade agreements and NATO standards. UNICE would welcome involvement in any legislative adaptations of the New Classical Directive which may become necessary as a result of these discussions.

SPECIFIC COMMENTS ON *ARTICLE 296* AND RELATED ISSUES

The most problematic aspect of defence procurement is of course related to the procurement of weapon systems, materiel and services to which *Article 296* genuinely applies. Rules for procurement in this sphere do not exist due to the exemption which *Article 296* provides. We are aware that there is support in the European defence industry for dealing with this issue in the short term through a voluntary intergovernmental 'code of conduct' under the auspices of the European Defence Agency. We hope that approach proves fruitful, but we also

⁵ The EEA Member States' Norway, Iceland and Liechtenstein.

⁶ Green Paper on Defence Procurement, European Commission, Brussels, 23 September 2004, Page 11.

recognise that it will be a lengthy, difficult and time consuming process to achieve the desired results and see them properly implemented. This will however, in all likelihood, be true whatever option is chosen. A step by step approach to political and industrial cohesion in this field therefore seems most likely to succeed.

European industry believes that the ultimate goal of the current debate should be to see an internationally competitive European defence industry; for that, a competitive European market is a necessary prerequisite. To achieve this all Member States must be serious in wanting to reach a consensus and demonstrate a willingness to open up the areas potentially covered by *Article 296*. It is obvious that a genuine debate on *Article 296* cannot limit itself just to procurement related aspects. It will also have to deal with related issues that currently have a great impact on defence procurement such as:

- ❑ Differing national security and defence policies;
- ❑ The distortion of competition that exists between public and private defence industries;
- ❑ The dominant role of the state in this sector;
- ❑ The distortion of competition that exists in exports markets;
- ❑ Obstacles to the exchange of arms-related documents, components and products within the Community;
- ❑ Discriminatory state aid and subsidies, and;
- ❑ Lack of harmonisation of military requirements and procurement schedules.

It would be prudent that in the debate due consideration be also given to additional elements which could prove significant to the eventual outcome such as:

- ❑ How to ensure genuine consultation between the various stakeholders (i.e. the Commission, the European Parliament, Member States' and the defence industry);
- ❑ Support for the European Defence Agency;
- ❑ The establishment of a centralised publication system as already addressed in the Green Paper, for all defence contract awards planned by the Member States above a certain threshold value;
- ❑ European standards for defence equipment;
- ❑ Defence related R&D;
- ❑ How to ensure the continued existence of healthy defence industries in smaller Member States;
- ❑ How to improve the position of SMEs active in the defence equipment market, and;
- ❑ How to foster transparency in public procurement procedures.

These issues must be dealt with if a genuine defence procurement industry in Europe which can compete globally, is to be created.

Therefore, in the opinion of UNICE answering the list of questions does, at present, not help in achieving the aforementioned goals. As long as the basic conditions have not been established the questions posed by the Commission cannot be usefully discussed.