

Industrial Participation and Defence/Security Procurement: Time for a Rethink

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Outline

- ❑ Background
- ❑ The EU Legal Architecture
- ❑ The two 'Elephants in the Room'
- ❑ DSPD a preliminary assessment: Ambition v Reality
- ❑ State of Play
- ❑ New Realities/Game Changers
- ❑ Final Thoughts/Proposals

Background

The “original” arguments for “more Europe” in the defence market(s):

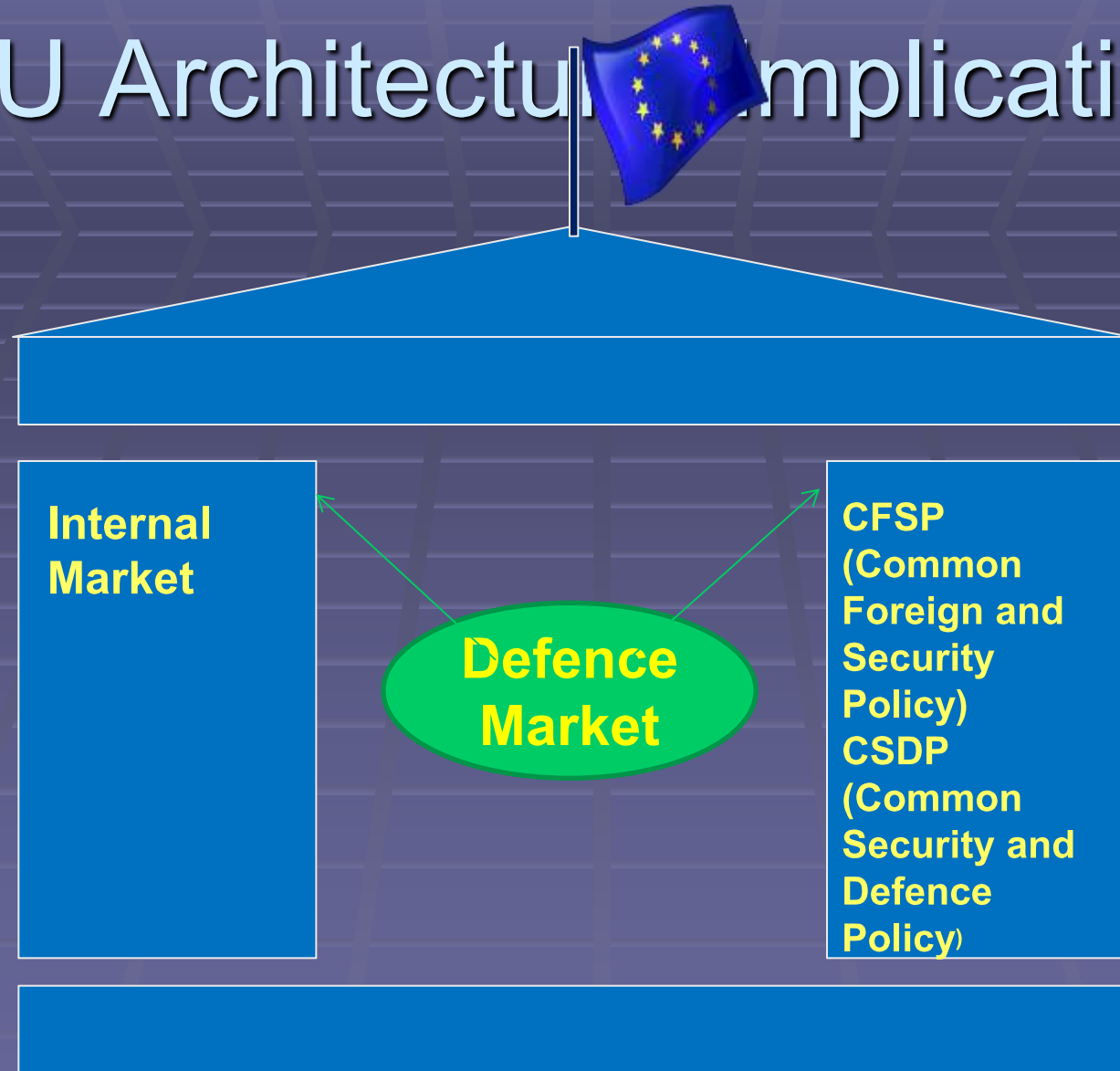
❑ Economic imperatives :

- Need for increasing the competitiveness of European Defence Industrial Base (EDTIB)
- Need to create a European Defence Equipment Market (EDEM) - ‘home ground’ that would increase the competitive position EU Defence contractors
- Need for rational use **of the limited resources** allocated to defence and avoidance of duplication

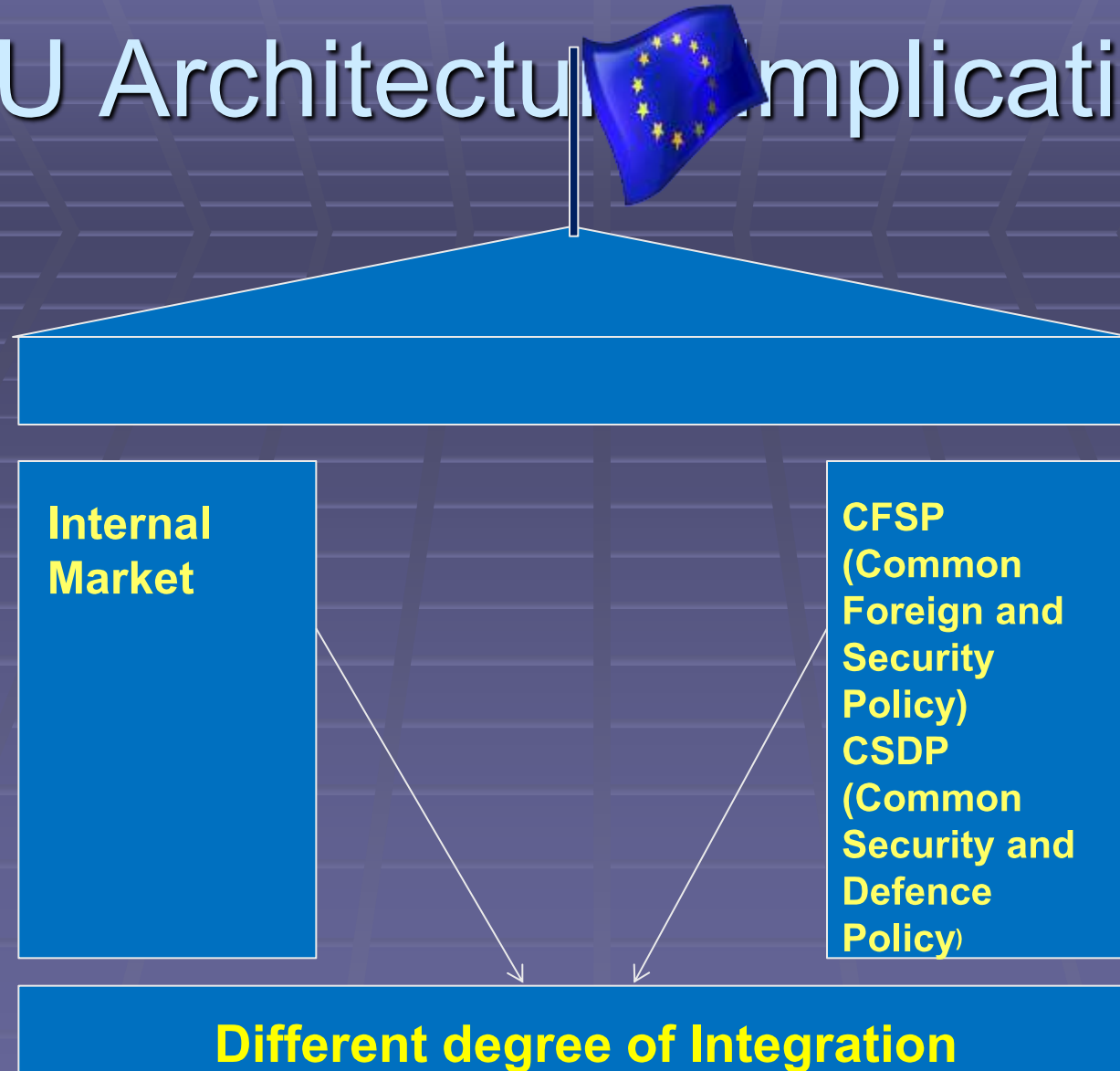
❑ Political/strategic imperatives:

- Support of the *credibility* of the CSDP by a healthy European defence industrial base

EU Architecture Implications



EU Architecture Implications



Main Legal Instruments Dealing with Industrial Participation Arrangements

- ❑ **Interpretative Communication** on Article 346 TFEU (ex Article 296 EC) (December 2006)
- ❑ **Defence and Security Procurement Directive** (December 2007) - Entry into force 2009 (Directive 2009/81/EC) (e.g. Subcontracting Provisions)
- ❑ **Commission's Guidance Notes** (Offsets, Security of Supply, Security of information, Research & Development etc.)

The Big Elephant in the Room (1):

□ Article 346 (1b) TFEU:

‘Any Member State may take such measures as it considers necessary for the protection of the essential interests of its security the production of or trade in arms, munitions and war material: such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes’

The Big Elephant in the Room (1): Article 346 TFEU

□ CJEU's Interpretation of Article 346 TFEU

e.g.:

- *Case C- 414/97 Commission v. Spain*
- *Case C-252/01 Commission v. Belgium*
- *Case C-337/05 Commission v. Italy*
- *Case C-409/05 Commission v. Greece*
- *Case C-239/06 Commission v. Italy*

....

- *Case C-601/21 Commission v. Poland*

Another Elephant in the Room (2)?

DSPD Exclusions

- Exclusions:
 - International rules (Art.12)
 - Disclosure of information (Art. 13(a))
 - Intelligence activities (Art.13(b))
 - Cooperative programmes (Art. 13(c))
 - Contract awards in third countries (Art. 13(d))
 - Government to Government sales (Art. 13(f))

Defence Procurement Directive (DSPD) – The Ambition...

Before the DSPD (Reality):

**EU Public Procurement
Rules**

Article 346 TFEU

After the DSPD (Ambition):

DSPD 2009/81/EC

**Art 346
TFEU**

Defence Procurement Directive (DSPD) – The Reality...

Before the DSPD (Reality):

**EU Public Procurement
Rules**

Article 346 TFEU

After the DSPD (Ambition):

DSPD 2009/81/EC

**Art 346
TFEU**

10 years on (Reality):

DPSD 2009/81/EC

Article 346 TFEU + Exemptions

Use of DSPD 2011-2018



Combined Sources: EPRS/IRIS/IAI Study, Oct. 2020, EU Commission Report, SWD(2016) 407 Final

Initial Assessments

- ❑ The Commission has completed the first evaluation of the DSPD implementation (2016). The EU Parliament (IMCO) (2021) carried a similar evaluation. Some of the (common) conclusions:
 - No Need to amend the DSPD at that point.
 - Focus on the enforcement of the instrument
 - Lack of SMEs access to contract opportunities

- ❑ Infringement proceedings against Denmark, Netherlands, Italy, Poland and Portugal

New Realities/Game Changers

- ❑ Russian Invasion of Ukraine
- ❑ Trump Administration
- ❑ Germany's Decision to increase military Spending/ Amendment of "Debt Brake"
- ❑ General increase of National Defence spending among EU MSs circa 12% (2021-2022)
- ❑ Strengthening of the incentives for Defence R&D Collaborative projects/ Defence Fund/ Defence Finance

New Realities/Game Changers

- ❑ Creation of DG Defence Industry and Space (DEFIS)
- ❑ European Defence Industrial Strategy (EDIS)
- ❑ European Defence Industry Plan (EDIP)
- ❑ “Draghi” Report – Niinistö Report-“ReArm Europe”
Plan/Readiness 2030 White Paper

Some Final Thoughts on Future Trends

- ❑ The two alternative/complementary regulatory paradigms (market-legal-competition v policy-cooperation) have been functioning as the *wheels* for moving the process of re-negotiation of *incomplete contracts* amongst the stakeholders (policy dimension of integration) forward
- ❑ MSs remain veto players. Increase Funding opportunities at EU Level provide incentives for MSs to “buy in”. Enough for loosening of their “grip” on defence?

Some Final Thoughts on Future Trends

- ❑ Suggestion/proposed next steps: A realistic and productive approach regarding industrial participation regulation in the EU aimed at enhancing transparency and coordination.
- ❑ There are various options/formats that could be followed:
E.g. A. Georgopoulos *European Defence Procurement Integration: Proposals for Action within the European Union (PhD Thesis)* p. 344 and after
- ❑ Review of the DSPD and of the accompanying soft law framework (Guidance notes):
 - Revisit the “subcontracting provisions of the DSDP (the formalistic approach they introduce is counterproductive for the interests of the Union and its defence industrial base)
 - Expansion of the DSDP coverage to include Critical Infrastructure (e.g. Cyber Security Infrastructure)

The underappreciated



Gottlieb Schick (1776-1812) Achilles with Agamemnon's Ambassadors,
Galerie Michel Descours

©Georgopoulos, Copenhagen University, 23 April, 2025

Relevant Papers - Submissions

- "Ammunition Support for Ukraine 'ASAP'?: The EU Regulation Proposal for Fast-Track Joint Procurement of Ammunition" (2023)

<https://arisoflawxley.com/scholarship/ammunition-support-to-ukraine-asap-the-eu-regulation-proposal-for-fast-track-joint-procurement-of-ammunition/>

- 'EDA and Defence Procurement Integration', 2015

(<http://ssrn.com/abstract=2618357>)

- 'Revisiting Offset Practices in European Defence Procurement: The European Defence Agency's Code of Conduct on Offsets', 2011

(<http://ssrn.com/abstract=2757378>)

Thank You

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Are the procurement rules fit for purpose in a time of crisis

Danish Defence Acquisition and Logistics Organisation - DALO



Who are we and what is DALO?

Danish Defence Acquisition and Logistics Organisation

- Underlying entity of the Danish Ministry of Defence.
 - The organisation in charge of procurement of material and IT
- Yearly administration of approximately 20 billion DKK.
- More than 2.500 employees.

A military helicopter is shown in flight over a rugged, rocky coastline. The helicopter is positioned in the upper left quadrant of the frame. The background features steep cliffs and the ocean under a cloudy sky. A large, semi-transparent grey shape is overlaid on the right side of the image, containing a list of political demands.

Political demands

1. Significant increase in fighting readiness and capability
2. Faster implementation of defence political agreements and new political decisions
3. Direct awards
4. Joint procurement



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Financial frame

- Broad national political Agreement 2024-2033
 - 2023: DKK 155 billion
 - 2024: increased to DKK 190 billion
- Acceleration fund
 - 2025+2026: DKK 50 billion
 - 2027 – 2033: DKK 10 billion each year



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Touchdowns

- The scope of the Directives
- Procurement procedures
- During the contract



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Scope of the Directives

- The common procurement Directive 2014/24 EC or the Defence procurement Directive 2009/81/EC
- Military material or military activity
- Security considerations



A military helicopter is shown in flight over a rugged, rocky coastline. The helicopter is positioned in the upper left quadrant of the frame. The coastline features steep cliffs and a body of water in the lower left. The sky is overcast. A large, semi-transparent grey shape, resembling a map of Denmark, is overlaid on the right side of the image.

Procurement methods

- Procurement procedures
 - Open procedure
 - Dynamic Purchasing Systems
- Urgent procurements
 - Urgency
 - Extreme urgency
- Joint procurement



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A high-angle, low-altitude photograph of an F-35 fighter jet in flight. The jet is dark grey and stealthy, with its canopy and sensor pod visible. It is flying over a city with a grid-like street pattern. The sky is filled with white, fluffy clouds. The image has a semi-transparent dark blue overlay on the right side.

During the contract

- Changes or modifications to the contract
 - Innovation
- Breach of contract
 - Delay
 - Termination of contract
 - New procurement



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Questions?



Find us at LinkedIn

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SAFEGUARDING SENSITIVE INFORMATION IN PROCUREMENT PROCEDURES

EU PUBLIC PROCUREMENT CONFERENCE - 23 APRIL 2025

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Niels Rytter specialises in commercial contracts and tenders, and he advises authorities, public undertakings, and businesses in several sectors and lines of business, including defence & security, infrastructure, and IT, technology & telecommunications.

He provides advice on all procurement aspects under the public procurement rules, and he has extensive experience in complex tender proceedings aimed for the international market, including negotiated procedures and competitive dialogue, and in procurement proceedings falling outside the scope of the procurement directives.

He also advises on EU law and international law and in other regulatory areas such as investment screening. Niels Karl represents public authorities and private parties before the ordinary Danish courts and before administrative complaints bodies, including the Danish Complaints Board for Public Procurement.

Niels Karl has created several digital tools for procurement law, including Fristberegneren that can calculate deadlines in tenders.



KEY QUESTIONS

Do the EU rules provide adequate mechanisms for ensuring the security of information throughout the procurement procedure within the area of defense and security?

Do the rules strike an appropriate balance between the principles of equal treatment and transparency, and the imperative to prevent unauthorized disclosure of sensitive information?





BACKGROUND

- Before the Defence and Security Procurement Directive (Directive 2009/81/EC):
 - Procurements within the fields of DS were largely exempted from the EU procurement rules.
 - Reliance on Art. 346 TFEU.
 - Fragmented market – low degree of competition.
- Adoption of the DSD
 - Introduced rules tailored to the particularities of the DS sector, including provisions on **security of information (SOI)**.
 - Attempt to establish more coherent and balanced legal framework and thereby reducing the (over)use of Art. 346 TFEU.



REGULATION IN EU LAW (1)

- Definition of Security of Information ("SOI")
 - No definition in the public procurement directives
 - Commission's Guidance note on SOI:
 - *"The ability and the reliability of economic operators to protect **classified information**"*
- Classified information:
 - Information that has formally designated as requiring protection due to its importance to national security .
 - Categorized into levels depending on the potential harm caused by unauthorized disclosure.
 - Access is restricted to individuals/operators with proper clearance.

REGULATION IN EU LAW (2)

- No EU-wide regime on SOI, see also Recitals 7, 43 and 68 of DSD.
- Each member state may:
 - Determine which information is to be **classified** at which level of confidentiality.
 - Grant its own national security **clearances**.
- Security clearances are not automatically **recognised** by other member states through EU law.
 - Some member states have bilateral agreements on the **mutual protection** of classified information.
 - Member states shall recognise security clearances which they **consider equivalent** to those issued in accordance with their national law, see Art. 22 DSD (and Art. 42(1)(j) DSD).





REGULATION IN EU LAW (3)

DSD, Recital 9:

“... the absence of Union-wide regimes hampers the openness of defence and security markets between Member States. This situation requires rapid improvement. An Union-wide regime on security of information, including the mutual recognition of national security clearances and allowing the exchange of classified information between contracting authorities/entities and European companies, would be particularly useful...”



APPLICABLE RULES?

- Three main procurement **directives**:
 1. Classic Directive, 2014/24/EU (“CD”)
 2. Utilities Directive, 2014/25/EU (“UD”)
 3. Defense and Security Directive, 2009/81/EC (“DSD”)
- When there are specific requirements regarding Sol, **DSD** will often apply.
 - See Art. 2: DSD applies for i.a. “sensitive contracts” (= contracts for security purposes, involving, requiring and/or containing classified information).
- If DSD applies, it takes **precedence** for CD and UD
 - See Art. 15(1)(a) CD and Art. 24(1)(a) UD
- **Exemptions** (regarding SOI)
 - Directive-based, e.g. Art. 13(a) and 13(b) DSD
 - Treaty-based, e.g. Art. 346(1)(a) TFEU
- Commission’s Guidance Note on SOI:
 - *“The [DSD] provides for various safeguards concerning Security of Information, which should make it possible for contracting authorities/entities to limit both exclusions and Treaty-based exemptions on the grounds of confidentiality to really exceptional cases.”*



PROCUREMENT DOCUMENTS

- Contract notice?
- Procurement documents
 - Acces to the procurement documents can be given **after prequalification** under DSD
 - No requiemnts regarding unrestricted acces by **electronic means** under DSD
 - The contracting authority may impose **requirements aimed at protecting classified information** (Art. 7 DSD):
 - NDA
 - Security clearance (possibly as a minimum requirement regarding technical ability (Art. 42(1)(j) DSD))
 - Potential practical solutions:
 - Data rooms?
 - Release only to the successful bidder?

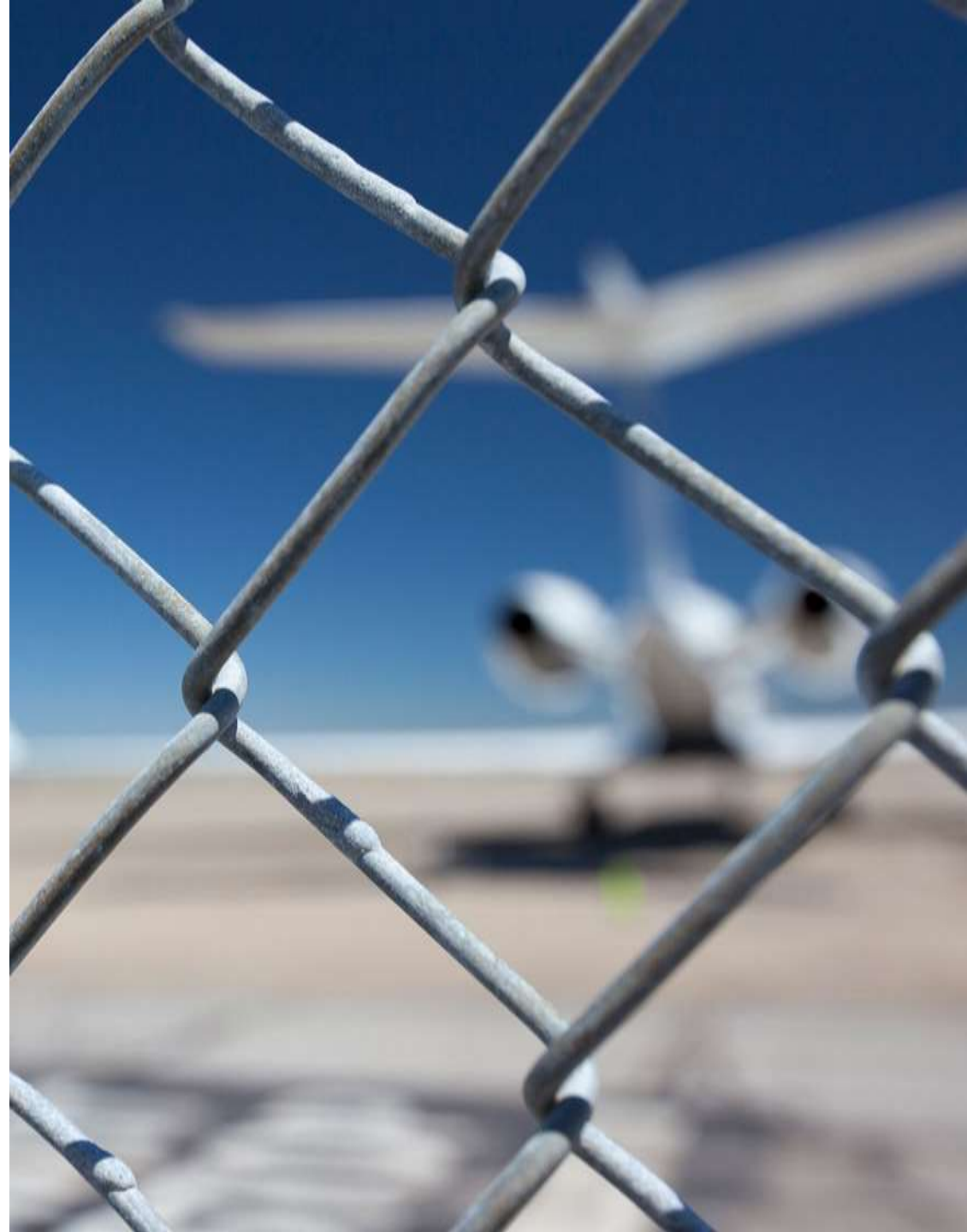


COMMUNITATION IN THE PROCES

- Communication may be made by "post", "fax", and "electronic means". It shall shall be carried out in such a way as to **ensure that the integrity of data** (Art. 36(1 and 3) DSD).
- Q/A
- Offers

GROUNDS FOR EXCLUSION

- Tailor-made grounds for exclusion regarding SOI (Art. 39(2) DSD):
 - (d) has been guilty of **grave professional misconduct** proven by any means which the contracting authority/entity can supply, such as a breach of obligations **regarding security of information** or security of supply during a previous contract;
 - (e) has been found, on the basis of any means of evidence, including protected data sources, **not to possess the reliability** necessary to exclude risks to the security of the Member State
- Recitals 67 and 65:
 - “... *the reliability of economic operators ... is vital. This reliability depends, in particular, on their ability to respond to requirements ... with respect to ... security of information*”
 - Economic operators must be “*sufficiently reliable so as to exclude risks to the security of the Member State. Such risks could derive from certain features of the **products supplied** or from the **shareholding structure** of the candidate*”



CONCLUSION AND **QUESTIONS?**

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