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## PUBLIC LAW

### FEDERAL ARMED FORCES PROCUREMENT ACCELERATION ACT

The Federal Armed Forces Procurement Acceleration Act (*Bundeswehrbeschaffungsbeschleunigungsgesetz*, “BwBBG”), which was passed on 7 July 2022, is intended to accelerate the expansion of what section 1 BwBBG calls the “Armed Forces’ range of capabilities” by amending procurement legislation for a limited period of time. The aim is specifically to speed up the process for awarding public contracts for the procurement of military equipment.

#### *Bundestag* passes law to accelerate procurement measures for the Federal Armed Forces

The war of aggression in Ukraine, which violates international law, marks a turning point in Germany’s security and defence policy. It also raises the question of whether the Federal Armed Forces can adequately maintain their alliance and defence capabilities on the basis of their current equipment. The watershed referred to in this context by the Chancellor in his [policy statement of 27 February 2022](#) initially prompted the creation of a special EUR 100 billion fund for the Federal Armed Forces on the basis of the new Article 87a(1a) German Basic Law (*Grundgesetz*, “GG”) that came into force on 1 July 2022.

The *Bundestag* then went one step further and passed the BwBBG on 7 July 2022. The amendments to procurement legislation laid down by the BwBBG are intended as a further step towards rapidly strengthening the operational capability of the Federal Armed Forces. In what follows we will look at some of the new provisions introduced by the BwBBG:

#### Scope and term

Pursuant to section 9 BwBBG, the Act will initially apply until 31 December 2026 and, pursuant to section 8 BwBBG, will also cover all award procedures already commenced but not yet completed prior to its entry into force on 19 July 2022.

Section 2 BwBBG stipulates that the Act governs public contracts with a value exceeding the EU threshold and which cover the supply of military equipment to directly strengthen the operational capability of the Federal Armed Forces or construction and maintenance services directly related thereto.

By adopting the [Economic Committee’s recommendation for a decision](#), the *Bundestag* also made it clear that the term “military equipment” must be broadly defined to include e.g. software, rights and energy.

#### Exceptions to the requirement to award contracts by lots

Over and above the exceptions laid down in section 97(4), sentence 3 German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, “GWB”), section 3(1), sentence 1 BwBBG stipulates that several partial or trade-specific lots may be awarded collectively

*“if this is **justified** on economic, technical or **time-related** grounds.”*

In this way, the legislator has created an additional exception by also recognising, unlike section 97(4), sentence 3 GWB, “time-related grounds” as justification for awarding lots collectively without the requirement of “urgency” as defined in procurement law having to be met. It has also relaxed the general prerequisites for awarding lots collectively by stating that the specified grounds merely have to “justify” this rather than “requiring” it as stipulated in section 97(4), sentence 3 GWB.

This provision considerably restricts the requirement to award contracts by lots, the primary purpose of which is to protect the interests of small and medium-sized enterprises. It does not abolish the requirement altogether, however, even though [Directive 2009/81/EC 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](#) does not require the use of lots at all. This should probably be seen in light of the objective laid down in the [Coalition Agreement](#) of getting SMEs to compete in the defence sector.

### **Prioritising solutions already available on the market**

Section 3(7) BwBBG stipulates that, in order to accelerate procurement projects, market research should generally be carried out to identify products and services already available on the market that would fulfil the specified requirements. If a service is procured that is not already available on the market, the economic feasibility study should indicate why such a service is to be procured and whether the added value provided by a service developed specifically for the Federal Armed Forces justifies the expected additional cost.

### **Acceleration of review proceedings**

The proceedings before the public procurement review chambers and procurement panel for the review of alleged breaches of public procurement law are to be accelerated (the new provisions in the German Liquid Natural Gas Acceleration Act (*LNG-Beschleunigungsgesetz*, “LNGG”) are along similar lines – also due to the crisis, but applicable to a different area). Hearings in review and appeal proceedings can be held by means of video and audio transmission (sections 5 and 6 BwBBG). Moreover, public procurement review chambers may take a decision based on the documents before them if this serves to accelerate the proceedings (section 5(1) BwBBG). Section 6(2) BwBBG provides that in exceptional cases this option is also available to the public procurement panel at the higher regional court, which is the first and final court of appeal.

Such appeal proceedings can have a clear impact on public procurement processes, an impact which will be reduced by the envisaged acceleration of the review proceedings. According to the [15th Defence Report of the Federal Ministry of Defence](#), there were, for example, only eleven applications for review proceedings out of a total of 1,038 procurement procedures (1.1%) carried out in 2021 by the Federal Office of Bundeswehr Equipment, Information Technology and In-Service Support (*Bundesamt für Ausrüstung, Informationstechnik und Nutzung der Bundeswehr*) for contracts whose value exceeds the EU threshold. From 2014 to 2020, there were only 82 such applications out of 8,926 procedures (0.9%). The [Defence Report](#) also explained, however, that the appeals predominantly related to very high-volume, important procurement procedures and in some cases led to the projects concerned being considerably delayed.

### **Simplification of cooperative procurement at EU level**

The aim of section 4 BwBBG is to make it simpler to carry out cooperative procurement with other EU Member States. According to section 4(1) BwBBG, contracting authorities may restrict participation in a procurement procedure to tenderers established in a Member State of the EU if the public contract is awarded under a cooperation programme conducted with at least one other EU Member State.

### **Greater focus on security interests**

Section 7 BwBBG makes it possible for contracting authorities to take greater account of security interests during

procurement procedures. Under section 7(2) BwBBG, for example, they may exclude applicants or tenderers from non-EU states.

Section 7 (1) BwBBG makes it clear that according to section 145, no. 1 GWB it is not only procurements for classic institutional intelligence services such as the German Military Counterintelligence Service (*Militärischer Abschirmdienst*) that are exempt from procurement law, but now – taking the functional concept of “intelligence activities” as a basis – explicitly also all contracts that are used for the purposes of military intelligence operations. It will be interesting to see how broadly this exception is interpreted in the future. If it were to be accepted for all the sub-tasks of the broadly diversified staff function of military intelligence, as defined for example in the currently applicable [Federal Armed Forces Concept](#), this would affect the areas of military intelligence gathering and reconnaissance, intelligence management and military security, which are in some cases closely intertwined with other military activities. This new provision may therefore have a considerable impact.

## **Conclusion and outlook**

Whether the said measures will lead to a significant acceleration of the procurement process remains to be seen. It is also unclear what the reform of public procurement law announced for this legislative period will bring ([Coalition Agreement](#) p. 33 et seq.) – this time in the form of changes applicable for an indefinite period. It will be interesting to see whether the new provisions introduced by the BwBBG will stand up to detailed scrutiny for conformity with EU law (compatibility with the TFEU, with Directive 2009/81/EC and with the EU Directives on legal remedies in public procurement law) – legal disputes on this are to be expected.

## EXPERTISE

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