

QUESTIONS AND ANSWERS ON EDA CODE OF CONDUCT ON PRIORITISATION

- **Question** : What are the main objectives of the EDA Code of Conduct on Prioritisation (CoC)?
- **Answer** : It establishes a system for prioritisation, allocation, acceleration or expansion of production of defence articles to meet the requirements of Member States by involving industry in the EDA Security of Supply (SoS) Framework.

- **Question** : Is there a relation between the CoC and the EDA Framework Arrangement for Security of Supply (FA)?
- **Answer** : Yes. The CoC is connected to the FA. The CoC provides an instrument for industry to support the implementation of the FA provisions, thus further ensuring Member States' Security of Supply.

- **Question** : Is the CoC legally-binding for Member States?
- **Answer** : No. The CoC is a legally non-binding instrument. Member States and countries having an administrative arrangement with the EDA can subscribe to the CoC on a voluntary basis (subscribing Member States (SMS)). The subscription period was concluded on 30 October 2014 and all 27 EDA Member States (EU MS, excluding DK) and NO, already participating in the implementation of the FA, decided to join the CoC.

- **Question** : Is the CoC legally-binding for industry?
- **Answer** : No. If industry decides to adhere/sign-up to the CoC for a specific given contract, it may refer to this in its tender, as a means to demonstrate its commitment to comply with the CoC principles and objectives. However, in such a case, the responsibilities deriving from the CoC will become binding in respect of that specific contract, provided that a relevant provision is incorporated into the contract in question.

- **Question** : How can industry sign up to the CoC?
- **Answer** : Industry can sign up to the CoC in a case-by-case basis. The possibility that companies adhere to the CoC for specific procurements and contracts, is envisaged in the CoC.

- **Question** : What would signing-up to the CoC mean for industry?
- **Answer** : The CoC provides a way for companies to demonstrate their commitment to meet the SoS requirements of governments in procurements. Whilst signing-up, industry will accept a set of principles to ensure SoS of defence equipment and services to the Member States.

- **Question** : What are the benefits to industry? Why to sign-up?
- **Answer** : The CoC being connected with the FA provides to the industry signing-up a framework to address SoS related questions also with the support of its Member State (i.e. the Member State where the company is located). This provides additional support mechanism both to the industry and Member States to tackle potential SoS related challenges.

- **Question** : Would a specific economic operator deciding not to sign-up to the CoC for a specific contract, mean that the economic operator rejects the CoC in principle?
- **Answer** : No. The decision of the economic operator not to sign-up to the CoC for a specific contract, does not preclude possible signing-up to the CoC by the economic operator for future contracts. Nor does signing up for a given contract presuppose or entail similar behaviour in respect of any potential future contracts.

- **Question** : Can the CoC be used as a means to discriminate against industry that decides not to sign-up?
- **Answer** : No. The CoC provides a non-discriminatory way to deliver Security of Supply as companies not adhering to the CoC will have the possibility to ensure potential SoS requirements by alternative means. No economic operator might be precluded from awards of defence contracts from the CoC SMS because of not subscribing to the CoC.

- **Question** : What would be the possible interaction between a Member State and industry, based on the CoC?
- **Answer** : The CoC allows a Member State to request industry to accelerate or expand the production of needed defence articles or services, under an existing contract. In this situation, the concerned parties will try to negotiate/agree on the additional costs based on fair and reasonable commercial solutions. The end result of the negotiations will have to be reflected in a contract amendment before proceeding to implementation. For a specific contract falling under the CoC, the economic operator can also engage in consultation with the SMS on which territory the economic operator is located, if so requested by such SMS, to ensure that

appropriate priority is given to the needs of the contracting SMS in matters of ordering, re-allocating supplies of defence goods or services or modifying existing defence goods.

- **Question** : How can a voluntary legally non-binding CoC improve SoS in Europe? Why would an CoC SMS actually use the provisions of the CoC in practice?
- **Answer** : Member States often face urgent and critical defence requirements over and above what has been stipulated in their contract. In order to meet such requirements, Member States many times need to turn for support to industry, for prioritising/expediting the delivery times of, or providing additional, assets/services under a pre-existing contract. By adhering to the principles of/signing-up to the CoC, the industry demonstrates its willingness to positively examine such a request, in view of reaching a prompt commonly agreed (contractual) solution, in order to support the contracting Member State's Security of Supply requirements.

- **Question** : How is national CoC implementation organised?
- **Answer** : It is up to the SMS to decide on the procedures that will be followed for national CoC implementation, based among others on their internal regulations and organisational structure. However, to support the implementation and application of the CoC (and associated FA), each FA/CoC SMS was requested by EDA to nominate national Point(s) of Contact (PoC(s)) to act as national focal points. The appropriate nomination of such national SoS PoC(s) will ensure the coherent national oversight, as well as the successful implementation of the FA and CoC provisions and can provide support to industry in the implementation of the CoC.

- **Question** : How in practice is the CoC implemented? What contracting authority of a SMS or industry needs to do?
- **Answer** : To implement the CoC in practice in relation to a future contract with industry, the SMS contracting authority needs to include in the tender/technical specifications of the contract, especially in relation to Security of Supply contractual clauses, appropriate references/requirements in line with the "Contractual Requirements" mentioned in the CoC. More specifically, the SMS contracting authority can require the economic operator/contractor to commit in the contract to :
 - *inform, in a timely manner, the contracting authority of any problems that the economic operator may encounter in maintaining an adequate continuity of supply to discharge its contractual and other legal commitments;*

- *respond in a timely manner to requests from the contracting authority, exercising best efforts to establish appropriate Security of Supply measures, based on fair and reasonable commercial solutions, in support of critical and urgent defence requirements or should any need for prioritisation of supplies arise;*
- *subject to relevant commercial laws, and in line with standard business rules and contractual provisions, negotiate in good faith with the contracting authority the contract amendment terms and conditions and any other measures to facilitate such additional, accelerated, re-allocated or modified supply;*
- *engage also in consultation with the Member State on which territory the economic operator is located, if so requested by such Member State, to ensure that appropriate priority is given to the needs of the contracting authority in matters of ordering, re-allocating supplies of defence goods or services or modifying existing defence goods;*
- *bring to the attention of and consult in a timely manner with the contracting authority (and if needed the Member State on which territory the economic operator is located) conflicts between the contract at hand and other contracts, especially in respect to a given additional, accelerated, re-allocated or modified supply request, posed by the contracting authority;*
- *use its best commercial efforts to insert into the subcontracts provisions designed to ensure due performance of all contractual responsibilities mentioned above (that will be eventually included in the main contract);*

Additionally, the contracting authority can also include in the tender specifications the following :

- *The payment arrangements for accommodating a prioritisation request by the contractor will be a matter of consultation and contract amendment negotiation between the contracting authority and the economic operator.*
- *If compliance with a prioritisation request from the contracting authority would seriously imperil future client-customer relations and/or endanger future business or would otherwise unfairly burden the economic operator, the economic operator will be entitled to inform the Member State that the economic operator is located in, through appropriate channels (for example the national PoC referred to in the Framework Arrangement for Security of Supply). Further consultation between the Member States of the contracting authority and the Member State that the contractor is located in, will be done in line with the provision of the EDA Framework Arrangement for Security of Supply.*
- *If an economic operator encounters difficulties in transshipment or transit arrangements, or in acquiring transfer licenses in order to comply with its*

responsibilities under the contract, the EDA Framework Arrangement for Security of Supply national PoC of the Member State he is located in will facilitate that the Member State will provide in consistence with national legislation any reasonable assistance to the economic operator.

The industry/economic operator/tenderer in this case will need to take into account the tender specifications/requirements posed by the contracting authority in his tender. This will result in a potential contract between the contracting authority and the economic operator/tenderer falling under the CoC. It has to be noted that such contract could incorporate not necessarily all, but part of the mentioned requirements, based potential follow up contract negotiations between the contracting authority and the tenderer, before contract award. In general, when applying the CoC to a contract, this contract will be treated as falling under the CoC.

- **Question** : Will the CoC answer to all SoS requirements potentially set by the contracting authority of a SMS? In other words, if a company just adheres to the CoC, will that mean that the company fulfils all potential SoS requirements set by contracting authority of a SMS?
- **Answer** : Not necessarily. The potential overall SoS requirements set by the contracting authority can be different from, or can include additional clauses to, the CoC related requirements described above. In such cases, if a company adheres to the CoC does not mean that the company fulfils all SoS requirements set by contracting authority. The SoS requirements that are over and above, or in general different from, the ones related to CoC will need to be covered independently.
- **Question** : What if a contracting authority of a SMS has not mentioned the CoC in its request for quotation? Can the company still refer to the CoC in its quotation?
Answer : Even if the CoC is not explicitly mentioned in the tender specifications by the contracting authority for Security of Supply, an economic operator may refer in his tender to the CoC in order to demonstrate its commitment to comply with such requirements. However it is noted that the responsibilities deriving from the CoC will become binding in respect of that specific contract, provided that a relevant provision is incorporated into the contract in question.
- **Question** : Can a contracting authority of a SMS demand within tender specifications that industry adheres to the CoC?
- **Answer** : No. Adhering to the CoC is voluntary. No economic operator will by reason of not complying with the CoC be precluded from awards of defence contracts from a contracting authority. The contracting authority will have to set its overall

Security of Supply requirements and it will up to economic operator to exhibit how it intends to fulfil such requirements.

- **Question** : If an economic operator does not adhere to the CoC in a contract, can still decide to do it for future contracts?
- **Answer** : Yes. Where an economic operator decides not to accept to apply the CoC for a new contract, or is party to a contract falling under the CoC and rejects a contracting CoC SMS request for change, that decision or rejection will be without prejudice to the economic operator's possible application of the CoC for future contracts.
- **Question** : Can a company from a country that has not subscribed still refer to/adhere to the CoC in a contract?
- **Answer** : No. The CoC is based on relations and actions, both between government (contracting authority) and industry (contractor), but also between government (Member States of contracting authority) and government (Member State that the contractor is located in). Since the company in question will be located in a country that has not subscribed the CoC, the government to government dimension cannot be implemented.
- **Question** : What is EDA's role after the adoption of the CoC?
- **Answer** : EDA is acting as a facilitator to support SMS in national implementation and application of the CoC. If requested, EDA can act as an interlocutor to facilitate better communication between Member States involved, including the use of the established network of SoS PoCs, as well as to clarify procedural aspects in relation to the CoC implementation.
- **Question** : How will the EDA monitor the national CoC implementation?
- **Answer** : The EDA is supporting the monitoring of national CoC implementation, by among others developing dedicated template(s) to facilitate the regular gathering of national CoC implementation from SMS (in an annual basis). In parallel, the EDA has previously established a network of working level participating Member States and Norway SoS experts, forming the EDA SoS Experts Working Group, which convene in regular meetings, together with the nominated SoS PoCs, to discuss all issues pertaining to national implementation of the CoC and monitoring procedures, in view of identifying the state of play and possible improvements for the future.