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From: General Secretariat of the Council
To: Delegations

Subject: Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND
OF THE COUNCIL on establishing the Act in Support of Ammunition
Production ('ASAP') - Mandate for negotiations with the European
Parliament

Delegations will find enclosed the negotiating mandate on the proposed 'ASAP' Regulation, as approved by the Permanent Representatives Committee on 23 June 2023.

2023/0140 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on ~~establishing the Act in S~~upporting of ~~A~~mmunition ~~P~~roduction (ASAP)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 114 and 173(3) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee¹,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The Russian war of aggression against Ukraine has put the European defence industry and equipment market to the test and exposed a number of flaws. Those undermine their ability to satisfy in the requisite secure and timely manner the Member States urgent needs for defence products and systems such as ammunition and missiles, considering the high consumption rate of those products or systems during a high intensity conflict.

¹ OJ C , , p. .

- (2) Since 24 February 2022 the Union and its Member States have been steadily stepping up their efforts to help meet Ukraine's pressing defence needs. Furthermore, in this context, confronted with growing instability, strategic competition and security threats, the Union Heads of State or Government, meeting in Versailles on 11 March 2022, decided to take more responsibility for the Union own security and take further decisive steps towards building European sovereignty. They committed to "bolster European defence capabilities", agreed to increase defence expenditures, step up cooperation through joint projects, and common procurement of defence capabilities, close shortfalls, boost innovation and strengthen and develop the Union defence industry. On 21 March 2022, the "Strategic Compass for a stronger Union security and defence in the next decade" was approved by the Council, and subsequently endorsed by the European Council on 24 March 2022. The Strategic Compass stresses the need to increase defence spending and invest more in capabilities, both at the Union and national levels.
- (3) The Commission and the High Representative presented a Joint Communication on "The Defence Investment Gaps Analysis and Way Forward" on 18 May 2022 highlighting the existence, within the Union, of defence financial, industrial and capability gaps. In July 2022 the Commission presented the European Defence Industrial Reinforcement through common Procurement Act (EDIRPA), aimed at supporting collaboration between Member States in the procurement phase to fill the most urgent and critical gaps, especially those created by the response to the current Russia's aggression, in a collaborative way. EDIRPA will contribute to reinforce common defence procurement and, through the associated Union financing, to strengthen Union defence industrial capacities and the adaptation of Union's defence industry to structural market changes resulting from increased demand due to new challenges, such as the return of high intensity conflict.
- (4) In light of the situation in Ukraine and of its pressing defence needs in particular for ammunition, the Council of 20 March 2023 agreed on a three-track approach, aiming at providing one million rounds of artillery ammunition for Ukraine in a joint effort within the next twelve months. It agreed to urgently deliver ground-to-ground and artillery ammunition to Ukraine and, if requested, missiles from existing stocks or the reprioritisation of existing orders. It further called on Member States to jointly procure ammunition and if requested missiles from the European defence industry (and Norway) in the context of an existing European Defence Agency (EDA) project or through complementary Member States-led acquisition projects, in order to refill their stocks while

enabling the continuation of support to Ukraine. To support these efforts, the Council agreed to mobilise appropriate funding including through the European Peace Facility (EPF). The Council also tasked the Commission to present concrete proposals to urgently support the ramp-up of manufacturing capacities of the European defence industry, secure supply chains, facilitate efficient procurement procedures, address shortfalls in production capacities and promote investments, including, where appropriate, mobilising the Union budget. The latter is essential in order to ensure that the Union own security needs are adequately met at all times and the Union defence industry and internal market are up to the current changes. The three interlinked tracks need to be pursued in parallel and in a coordinated way. Regular meetings at the level of National Armament Directors with the Defence Joint Procurement Task Force (Commission, EEAS, EDA) will also be organised to assess the needs and industrial capabilities as well as ensure the necessary close coordination, to ensure an adequate implementation of the three tracks.

- (5) On 13 April 2023, the Council adopted an assistance measure under the EPF worth EUR 1 billion to support the Ukrainian Armed Forces, allowing for the reimbursement to Member States of ground-to-ground and artillery ammunition, and possibly missiles, donated to Ukraine from existing stocks or from the reprioritisation of existing orders during the period 9 February to 31 May 2023. On joint procurement, thus far 24 Member States plus Norway signed the EDA's Project Arrangement for the collaborative procurement of ammunition.
- (6) Joint efforts to enable Member States to replenish their depleted stocks and to support Ukraine can only be effective if the Union supply side can deliver on time the required defence products. But, with stocks rapidly dwindling, European production almost at maximum capacity from Member States or third countries' orders, and prices already spiralling, additional Union industrial policy measures are necessary to ensure a rapid ramp-up of manufacturing capabilities.
- (7) As highlighted by the work of the Defence Joint Procurement Task Force (Commission, EEAS, EDA) ~~on coordinating very short term defence procurement needs and engaging with Member States and Union defence manufacturers to support common procurement to replenish stocks, notably in light of the support provided to Ukraine,~~ the Union industry has manufacturing capacities in the area of ground to ground and artillery ammunition, as well as missiles. However, production capacities within the Union's defence industry

sector have been tailored for times different from the current challenges posed to the Union. Supply flows have been adapted according to a more modest demand, with minimal level of stocks and diversified suppliers globally to reduce costs, exposing the Union's defence industry sector to dependencies. As a consequence, in this context, the current manufacturing capacity and the existing supply and value chains do not allow for a secure and timely delivery of defence products to meet the Member States' needs for their security requirement and for continuing supporting Ukrainian needs, creating tensions on the market of ground-to-ground and artillery ammunition as well as missiles, and a risk of crowding-out effect. An additional intervention at Union level is therefore necessary.

- (8) In accordance with Article 173(3) TFEU, the Union industrial policy pursues the objective of speeding up the adjustment of industry to structural changes. Therefore, it appears appropriate to support Union industry to increase its volume of production, reduce its delivery lead-time and address potential bottlenecks and/or factors that could delay or impede the supply and production of— ground-to-ground and artillery ammunition as well as missiles which are considered as relevant defence products for the purpose of this Regulation.
- (9) The measures taken at Union level should aim at reinforcing the competitiveness and resilience of the European Defence Technological and Industrial Base (EDTIB) in the field of ammunition and missiles, to allow its urgent adaptation to **the structural change revealed or exacerbated by the response to the Russian aggression against Ukraine.**
- (10) To that end, an instrument for financially supporting the industry reinforcement throughout the supply and value chains related to the production of these relevant defence products in the Union (the 'Instrument') should be established.
- (11) The Instrument will be coherent with existing collaborative EU defence-related initiatives such as in the European Defence Fund, the proposed European defence industry Reinforcement through common Procurement Act, as well as the EPF and generates synergies with other Union programmes. The Instrument is fully coherent with the ambition of the Strategic Compass.
- (12) Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council should apply to this Instrument, unless otherwise specified.

- (13) In accordance with Article 193(2) of Regulation (EU, Euratom) 2018/1046, a grant may be awarded for an action which has already begun, provided that the applicant can demonstrate the need for starting the action prior to signature of the grant agreement. However, a financial contribution should not cover a period prior to the date of submission of the grant application, except in duly justified exceptional cases. In order to address the call of the Council on 20 March 2023 to speed up the delivery of relevant defence products, it should be possible to provide in the financing decision for financial contributions to actions that cover a period from this date.
- (14) This Regulation lays down a financial envelope for the Instrument, which is to constitute the prime reference amount, within the meaning of point 18 of the Inter-institutional Agreement of 16 December 2020 between the European Parliament, the Council and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources² (Interinstitutional Agreement of 16 December 2020), for the European Parliament and for the Council during the annual budgetary procedure.
- (15) Member States may request transfers of resources allocated to them under shared management to the Instrument, subject to the conditions set out in the relevant provisions of the Regulation (EU) 2021/1060 of the European Parliament and of the Council. This could in particular be the case where the production of relevant defence products faces specific market failures or suboptimal investment situations in the Member States' territories, notably in vulnerable and remote areas, and such resources contribute to the achievement of the objectives of the programme from which they are transferred. The possibilities laid out in Article 73(4) of Regulation (EU) 2021/1060 may be applied provided that the project complies with the rules set out in that Regulation and the scope of the ERDF and ESF+ as set out in the fund-specific regulations. In line with Article 24 of Regulation (EU) 2021/1060, the Commission should assess the modified national programmes submitted by the Member State and make observations within two months. Given the urgency of the situation, the Commission should strive to conclude the assessment of the modified national programmes without undue delay.

² OJ L 433I, 22.12.2020, p. 28.

- (16) When proposing amended or new Recovery and Resilience Plans, in accordance with Article 21 of Regulation (EU) 2021/241 of the European Parliament and of the Council³, Member States ~~should be able to propose~~ **may consider proposing** measures which also contribute to the objectives of this instrument, **in line with the purposes and requirements set by Council Decision 2020/2053, Regulation (EU) 2020/2094 and Regulation (EU) 2021/241**. To this end, measures linked to proposals submitted to a call for proposals under the Instrument, which were awarded a Seal of Excellence in accordance with the Instrument, should particularly be considered by Member States.
- (17) In accordance with Regulation (EU, Euratom) 2018/1046, Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council⁴ and Council Regulations (EC, Euratom) No 2988/95⁵, (Euratom, EC) No 2185/96⁶ and (EU) 2017/1939⁷, the financial interests of the Union are to be protected by means of proportionate measures, including measures relating to the prevention, detection, correction and investigation of irregularities, including fraud, to the recovery of funds lost, wrongly paid or incorrectly used, and, where appropriate, to the imposition of administrative penalties. In particular, in accordance with Regulations (Euratom, EC) No 2185/96 and (EU, Euratom) No 883/2013, the European Anti-Fraud Office (OLAF) has the power to carry out– administrative investigations, including on-the-spot checks and inspections, with a view to establishing whether there has been fraud, corruption or any other illegal activity affecting the financial interests of the Union. The European Public Prosecutor’s Office (EPPO) is empowered, in accordance with Regulation (EU) 2017/1939, to investigate and prosecute criminal offences affecting the financial interests of the Union as provided for in Directive (EU) 2017/1371 of the European Parliament and of the Council⁸. In accordance with Regulation (EU, Euratom) 2018/1046, any person or entity receiving Union funds is to fully cooperate in the protection of the financial interests of the Union, grant the necessary rights and access to

³ Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility (OJ L 57, 18.2.2021, p. 17–75).-

⁴ Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ L 248, 18.9.2013, p. 1).

⁵ Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ L 312, 23.12.1995, p. 1).

⁶ Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities’ financial interests against fraud and other irregularities (OJ L 292, 15.11.1996, p. 2).

⁷ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’) (OJ L 283, 31.10.2017, p. 1).

⁸ Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union’s financial interests by means of criminal law (OJ L 198, 28.7.2017, p. 29).

the Commission, OLAF, the Court of Auditors and, in respect of those Member States participating in enhanced cooperation pursuant to Regulation (EU) 2017/1939, the EPPO, and ensure that any third parties involved in the implementation of Union funds grant equivalent rights.

- (18) Members of the European Free Trade Association which are members of the European Economic Area (EEA) may participate in this Instrument as associated countries in the framework of the cooperation established under the Agreement on the European Economic Area, which provides for the implementation of their participation to Union programmes on the basis of a decision adopted under that Agreement. A specific provision should be introduced in this Regulation requiring those third countries to grant the necessary rights and access required for the authorising officer responsible, OLAF and the Court of Auditors to comprehensively exercise their respective competences.
- (19) Given the specificities of the defence industry, where demand comes almost exclusively from ~~Member States and associated countries~~ **governments**, which also control all acquisition of defence-related products and technologies, including exports, the functioning of the defence industry sector does not follow the conventional rules and business models that govern more traditional markets. Industry therefore does not engage in substantial self-funded industrial investments but only does so as a consequence of firm orders. While firm orders from ~~Member States~~ **governments** are a precondition for any investment, the Commission can intervene by de-risking industrial investments ~~via grants and loans~~ allowing a faster adaptation to ongoing structural market change. In the current emergency context, Union support should cover up to 60% of direct eligible costs in order to enable beneficiaries to implement actions as soon as possible, de-risk their investment and therefore speed up the availability of relevant defence products.
- (20) ~~Stakeholders in the defence industry sector face specific indirect costs, such as with regard to security. Therefore, it is appropriate to allow a flat rate of 7 % of the total direct eligible costs of the action.~~
- (21) The Instrument should provide financial support, via means defined by Regulation (EU, Euratom) 2018/1046, to actions contributing to the timely availability and supply of relevant defence products such as industrial coordination and networking activities, access to finance for undertakings involved in the manufacturing of relevant defence products, reservation of capacities, industrial process of reconditioning of expired products,

expansion, optimisation, modernisation, upgrading or repurposing of existing, or the establishment of new, production capacities in this field as well as training of personnel.

- (22) As the Instrument aims to enhance the competitiveness and efficiency of the Union's defence industry, only legal entities, whether public or privately owned, which are established and have their executive management structures in the Union or in associated countries **should** be eligible for support. **They should not be subject to control by a non-associated third country or by a non-associated third country entity or, alternatively, should have been subject to screening within the meaning of Regulation (EU) 2019/452 and, where necessary, mitigation measures, taking into account the objectives referred to in Article 4. A legal entity which is established in a non-associated third country or a legal entity which is established in the Union or in an associated country, but which has its executive management structures in a non-associated third country should not be eligible to be a recipient involved in an action.**
- (23) Legal entities established in the Union or in an associated country that are controlled by a non-associated third country or a non-associated third-country entity **and that have not been subject to a screening within the meaning of Regulation (EU) 2019/452 and, where necessary, mitigation measures,** should only be eligible to be recipients provided that strict conditions relating to the security and defence interests of the Union and its Member States, as established in the framework of the Common Foreign and Security Policy pursuant to Title V of the Treaty on European Union (TEU), including in terms of strengthening the EDTIB, are fulfilled. The participation of such legal entities should not contravene the objectives of the Instrument. In that context, control should be understood to be the ability to exercise a decisive influence on a legal entity directly, or indirectly through one or more intermediate legal entities. Applicants should provide all relevant information about the infrastructure, facilities, assets, and resources to be used in the action. Member States' concerns regarding security of supply should also be taken into account in that respect. In view of the urgency of the situation stemming from the existing ammunition supply crisis, the Instrument should take into account existing supply chains.
- (24) Infrastructure, facilities, assets, and resources of the recipients involved in an action supported by the Instrument should be located on the territory of a Member State or of an associated country for the entire duration of the action, ~~and the recipients involved in an~~

~~action should have their executive management structures in the Union or in an associated country. Accordingly, a legal entity which is established in a non-associated third country or a legal entity which is established in the Union or in an associated country, but which has its executive management structures in a non-associated third country should not be eligible to be a recipient involved in an action~~

(24a) The Instrument should not financially support the ramp-up of production capacities for relevant defence products that are subject to a restriction by a non-associated third country or a non-associated third country entity that limits Member States' ability to use it.

- (25) Pursuant to Article 94 of Council Decision 2013/755/EU⁹, persons and entities established in overseas countries and territories (OCTs) are eligible for funding subject to the rules and objectives of the Instrument and possible arrangements applicable to the Member State to which the relevant overseas country or territory is linked.
- (26) When assessing proposals, the Commission should pay particular attention to their contribution to the objectives of the Instrument. The proposal should notably be assessed against their contribution to the increase, ramp-up, reservation, modernisation of manufacturing capacities, as well as the reskilling and upskilling of the related workforce. They should also be assessed against their contribution to the reduction of the delivery lead-time of relevant defence products, including through order reprioritization mechanisms, to the identification and elimination of bottlenecks along their supply chains as well as to the development of the resilience of these supply chains through the development and the operationalisation of cross-border cooperation of undertakings, in particular, to a significant extent, SMEs and mid-caps operating in the concerned supply chains.
- (27) When designing, awarding and implementing EU financial support, the Commission should pay particular attention that such measures do not adversely affect the conditions of competition in the Internal Market.
- ~~(28) Furthermore, the current crisis has not only demonstrated deficiencies in the EU defence industrial sector, but also posed challenges to the functioning of the internal market of~~

⁹ Council Decision 2013/755/EU of 25 November 2013 on the association of the overseas countries and territories with the European Union (Overseas Association Decision) (OJ L 344, 19.12.2013, p. 1).

~~defence products. Indeed, the current geopolitical context entails a significant increase of the demand that affects the functioning of internal market of production and sale of ground-to-ground and artillery ammunition and missiles and of their components in the Union. While certain Member States have taken or are likely to take measures to preserve their own stocks as a matter of national security, others are faced with difficulties of access to the goods needed to manufacture or acquire ground to ground and artillery ammunition and missiles. Sometimes, the difficulty to have access to one single raw material or to a specific component hampers the whole productions chains. To ensure the functioning of the internal market, it is necessary to adopt certain measures which will ensure, in a coordinated way, harmonised rules for facilitating the security of supply of defence products. These rules should include the mapping of the needs in goods and services in that internal market, the possibility to establish priority rated orders at the level of the Union when at least three Member States decide or intend of decide to procure commonly defence related products, where necessary to pursue an objective of general interest of security of the Union and of its Member States, and an acceleration of grant permitting procedures or facilitation of procurement procedures. These measures should be based on Article 114 TFEU.~~

- ~~(29) In order to take the necessary and appropriate measures under this Regulation, the Commission should, on the basis of the cooperative work with the EEAS and the EDA in the context of the Defence Joint Procurement Task Force, set up and maintain a mapping of the undertakings established in the Union that operate along the supply chains of relevant defence products. The mapping should notably include the type and specifications of their products, their related production capacity, and their position in the supply chain of the relevant defence products. The Commission should regularly monitor the production capacity and the supply chains of the undertakings identified in the mapping, in close cooperation with them. The results of the mapping and the monitoring should be presented and discussed by the Programme Committee.~~
- ~~(30) On this basis, the Commission should draw up a list, identifying the relevant defence products, raw materials or components thereof, that are affected by disruptions or potential disruptions of the functioning of the Single Market and its supply chains leading to significant shortages. The Commission should regularly update this list of supply critical defence products, to focus only on possible disruptions or bottlenecks affecting the security of supply of relevant defence products, as well as raw materials and components thereof.~~

- ~~(31) The Commission should be able to request to receive necessary information to ensure the timely availability of supply critical defence products from economic operators, dealing with these products, raw materials or components thereof, in agreement with the Member State in which they are established. Such information should inform the Commission's decision on appropriate measures under this regulation to address possible disruptions or bottlenecks affecting the security of supply of relevant defence products as well as relevant raw materials and components.~~
- ~~(32) Such an identification, mapping and continuous monitoring mechanism should allow a near real time analysis of the production capacity in the Union, critical factors impacting security of supply of relevant defence products, stockpiles' status. It should also enable Commission to design emergency response measures to actual or anticipated shortages.~~
- ~~(33) Avoiding shortages of relevant defence products is essential to preserve the objective of general interest of security of the Union and its Member States and justifies, where necessary, proportionate interferences with fundamental rights of the undertakings providing supply critical defence products, such as the freedom to conduct a business in accordance with Article 16 of the Charter and the right to property in accordance with Article 17 of the Charter, in the respect of Article 52 of the Charter. Such interferences may be justified in particular where several Member States have undertaken specific efforts to consolidate demand through joint procurement, hence contributing to the further integration and smooth functioning of the Internal Market for relevant defence products. At the request of at least three Member States cooperating for the procurement of relevant defence products or at least one Member State procuring for the purpose of transferring the acquired relevant defence products to Ukraine, which face severe difficulties either in placing or in the execution of a contract, the Commission may, with the agreement of the Member State establishment, require from undertakings to accept and prioritise orders of supply critical relevant products. To preserve the fundamental rights of undertaking, these requests should be made only for products which have been identified by the Commission in an Implementing Decision. In addition, a step by step procedure should be established in order to give the undertakings the possibility to express their concerns as regards the contemplated action. In particular, the Commission should, in agreement with the Member State in which it is established, inform the undertakings concerned of its intention to ask it to accept and rank first a priority rated order and provide it all the elements needed to allow it to take an informed decision on whether it can accept that request. Where the~~

~~undertaking refuses, the Commission can, in agreement with the Member State concerned, and having due regard to the nature of the objections raised by the undertaking, consider that security reasons justify imposing, by an Implementing Decision, a priority rated order. Such a decision should be taken in accordance with all applicable Union legal obligations, having regard to the circumstances of the case. The priority rated order should be placed at a fair and reasonable price. The priority rated order should take precedence over any performance obligation under private or public law while it should have regard for the legitimate aims of the undertakings and the cost and effort required for any change in production sequence. Undertakings may be subject to penalties if they fail to comply with the obligation for priority rated orders.~~

- (34) ~~To preserve the fundamental rights of the undertakings, they should be given the right to ask to be released from their obligations in situations where the priority rated order is not possible to execute, even if prioritised, be it due to insufficient production capability or production capacity, or because this would place an unreasonable economic burden and entail particular hardship on the undertaking.~~
- (35) ~~Under the exceptional circumstance that an undertaking operating along the supply chain of relevant defence products in the Union receives a priority rated order request from a third country, it should inform the Commission of this request.~~
- (36) ~~In light of the importance to ensure the security of supply to specific defence sectors that perform vital functions for the security of Union citizens, compliance with the obligation to perform a priority rated order should not entail liability for damages towards third parties for any breach of contractual obligations that may result from the necessary temporary changes of the operational processes of the concerned manufacturer, limited to the extent the violation of contractual obligations was necessary for compliance with the mandated prioritisation. Undertakings potentially within scope of a priority rated order should anticipate this possibility in the conditions of their commercial contracts. Without prejudice to the applicability of other provisions, the liability for defective products, as provided for by Council Directive 85/374/EEC, should not be affected by this liability exemption.~~
- (37) ~~The obligation to prioritise the production of certain products should not disproportionately affect the freedom to conduct a business and the freedom of contract laid down in Article 16 of the Charter of Fundamental Rights of the European Union ('the Charter') and the~~

~~right to property laid down in Article 17 of the Charter. Any limitation of those rights should, in accordance with Article 52(1) of the Charter, be provided for by law, respect the essence of those rights and freedoms, and comply with the principle of proportionality.~~

- (38) In light of the importance to ensure the security of supply of relevant defence products, Member States should ensure that administrative applications related to the planning, construction and operation of production facilities, ~~intra-EU transfer of inputs~~ as well as qualification and certification of relevant end products are processed in an efficient and timely manner.
- (39) To pursue the general public policy objective of security, it is necessary that production facilities related to the production of relevant defence products are set-up as quickly as possible, while keeping the administrative burden to a minimum. For that reason, Member States should treat applications related to the planning, construction and operation of plants and installations for the production of relevant defence products in the most rapid manner possible. They should be given priority when balancing legal interests in the individual case.
- (40) In view of the objective of this Regulation, and of the emergency situation and exceptional context of its adoption, Member States should consider using defence related exemptions under national and applicable Union law, on a case-by-case basis, if they deem that such application would have an adverse effect on those purposes. This may in particular apply to Union law concerning environmental, health and safety issues¹⁰, which is indispensable to improve the protection of human health and environment, as well as achieve a sustainable and safe development. However, their implementation may also produce regulatory barriers hampering the Union defence industry's potential to ramp up the production and deliveries of relevant defence products. It is a collective responsibility for the European Union and its Member States to urgently look into any action it may take to mitigate possible obstacles. Any such actions, whether at Union, regional, or national level, should not compromise environmental, health and safety concerns.
- (41) In order to optimize the use of existing supply chains, hence ensuring the continuity of production of relevant defence products, Member States should consider the possibility to recourse or to encourage concerned companies to recourse to derogations provided for by

¹⁰ For instance, the REACH, CLP regulation, the Seveso Directive, RoHS Directive, POPs Regulation, BPR, Ozone regulation and the F-gas regulation.

Directive 2003/88/EC of the European Parliament and of the Council¹¹. Where a prior authorization from national authorities is required to use such derogations, applications should be processed in an efficient and timely manner.

- (42) Directive 2009/81/EC of the European Parliament and of the Council¹² aims at harmonising procurement procedures for the award of public contracts in the field of defence and security which enables to meet the security requirements of Member States and the obligations arising from the Treaty. That Directive notably provides for specific provisions ruling situations of urgency resulting from a crisis, notably shortened periods for the receipt of tenders and the possibility to use the negotiated procedure without prior publication of a contract notice. However, the extreme urgency caused by the current ammunition supply crisis may be incompatible even with those provisions in cases where ~~more than two~~ **two or more** Member States intend to engage in a common procurement. In some cases, the only solution to ensure the security interests of those Member States is to open an existing framework agreement to contracting authorities/entities of Member States that were not originally party to it, even though that possibility had not been provided for in the initial framework agreement.
- (43) In accordance with the case-law of the Court of Justice of the European Union, modifications to a contract shall be strictly limited to what is absolutely necessary in the circumstances, while complying to the maximum extent possible with the principles of non-discrimination, transparency and proportionality. In this regard, it should be possible to derogate from Directive 2009/81/EC by increasing the quantities provided for in the Framework Agreement while opening it to contracting authorities/entities of other Member States. These contracting authorities/entities should enjoy the same conditions as the original contracting authority that concluded the original framework agreement for those additional quantities. In such cases, the contracting authority should also allow any economic operator who fulfils the **contracting authority's** conditions ~~of the original~~ **initially laid down in the procurement procedure for the** framework agreement, **including requirements for qualitative selections as referred to in articles 39 to 46 of Directive 2009/81/EC** ~~to become a contractor under that framework agreement~~. In

¹¹ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ L 299, 18.11.2003, p. 9).

¹² 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 (OJ L 216, 20.8.2009, p. 76–136).

addition, appropriate transparency measures should be taken to ensure that all potentially interested parties may be informed. In order to limit the effects of these modifications on the smooth functioning of the internal market and to prevent disproportionate distortions of competition, modifications of framework agreements should only be concluded until 30 June 2025.

- (44) ~~Directive 2009/43/EC of the European Parliament and the Council aims at simplifying the terms and conditions of intra-EU transfers of defence-related products, notably through General Transfer Licences which rely on ex post verification, cover a pre-determined range of products to specified recipients or for a specific purpose, and for which no prior request is needed. However, none of the mandatory General Transfer Licences provided for by Article 4 (1) of Directive 2009/43/EC or Commission recommendations on the harmonisation of the scope of and conditions for these licences are sufficient to ensure that transfers necessary for the production of relevant defence products.~~
- (45) ~~In the current context which imposes to speed up the delivery lead times throughout the concerned supply and value chains, it appears necessary to exempt the transfer of relevant defence products from the obligation of prior authorisation within the Union. This exemption should not affect the discretion of Member States as regards policy on the export of defence-related products.~~
- (46) In order to be competitive, innovative and resilient, as well as to be able to ramp up its production capacities, the EDTIB needs to access both public and private financing. As provided in the "Commission contribution to European defence" of 15 February 2022, Union initiatives on sustainable finance are consistent with the Union efforts to facilitate the European defence industry's sufficient access to finance and investment. In that context, the EU sustainable finance framework does not prevent investment in defence-related activities. The Union defence industry is a crucial contributor to the resilience, security of the Union, and therefore to peace and social sustainability. Within Union initiatives on sustainable finance policies, ~~controversial~~ weapons subject to international conventions prohibiting their development, production, stockpiling, use, transfer, and delivery, and signed by Union all Member States, are deemed incompatible with social sustainability. The sector is subject to close regulatory scrutiny implemented by Member States for the transfer and export of military and dual-use items. In this perspective, a commitment of national and European financial actors —~~such as National Promotional~~

~~Banks and Institutions~~—to support the European defence industry, would send a strong signal to the private sector. While pursuing in full its other economic development and public policy financing missions, including the twin transition and in line with article 309 TFEU as well as its statute, the European Investment Bank (EIB) should enhance its support to the European defence industry ~~and joint procurement beyond its ongoing support to dual use, where such investments would clearly serve to implement the Strategic Compass priorities.~~

- (47) Undertakings in the value chain of relevant defence products should have access to debt financing, to speed-up investments needed to increase manufacturing capacities. The Instrument should facilitate access to finance for Union’s companies in the ammunition and missile field. The Regulation should notably ensure that those legal entities are granted the same conditions offered to other legal entities, taking charge of any additional cost arising specifically for the defence sector.
- (48) The Commission may set-up a dedicated facility as part of the investment facilitation activities described collectively as the ‘Ramp-up fund’. The Ramp-up Fund ~~may~~**should** be implemented in ~~direct or~~ indirect management. The Commission should explore in that regard the most appropriate way to leverage EU budget to unlock public and private investment in support of the rapid ramp up sought, for instance through the possibility of a blending facility, including under InvestEU Fund established by Regulation (EU) 2021/523 of the European Parliament and Council¹³, in close cooperation with its implementing partners. The ‘Ramp-up Fund’ activities should support the increase of manufacturing capacities in the ammunition and missiles area by providing opportunities for increased availability of funds to companies across the value chain.
- (49) In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission as regards the adoption of the Work Programme and ~~of the list of supply-critical defence products, for issuing obligations for undertakings concerned by a request for a priority rated order to accept or perform that order at a fair and reasonable price and for laying down the practical and operational arrangements for the functioning of priority rated orders~~ **the award of funding to selected actions**. Those powers should be exercised in accordance with Regulation (EU)

¹³ Regulation (EU) 2021/523 of the European Parliament and of the Council of 24 March 2021 establishing the InvestEU Programme and amending Regulation (EU) 2015/1017 (OJ L 107, 26.3.2021, p. 30–89).

No 182/2011 of the European Parliament and of the Council¹⁴. ~~The Commission should adopt immediately applicable implementing acts where, in duly justified cases relating to the adoption of the list of supply critical defence products, for issuing obligations for undertakings concerned by a request for a priority rated order to accept or perform that order at a fair and reasonable price and for laying down the practical and operational arrangements for the functioning of priority rated orders, where imperative grounds of urgency so require.~~

- (50) Since the objective of this Regulation namely, to respond to the impact of security crisis, cannot be sufficiently achieved by the Member States but can rather, by reason of the scale and effects of the proposed action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union ("TEU"). In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary to achieve that objective.
- (51) This Regulation should apply without prejudice to Union competition rules, in particular Articles 101 to 109 TFEU and their implementing regulations.
- (52) It is to be recalled that according to Article 41(2) TEU, operating expenditure arising from Chapter 2 of Title V shall be charged to the Union budget, except for such expenditure arising from operations having military or defence implications.
- (53) In view of the urgency to address the security crisis it is appropriate to provide for an exception to the eight-week period referred to in Article 4 of Protocol No 1 on the role of national Parliaments in the European Union, annexed to the TEU, to the Treaty on the Functioning of the European Union and to the Treaty establishing the European Atomic Energy Community. Considering the imminent danger for the security of supply brought about by Russia's war of aggression against Ukraine, this Regulation should enter into force the day after its publication in the Official Journal.
- (54) Pursuant to paragraphs 22 and 23 of the Interinstitutional Agreement of 13 April 2016 on Better Law-Making¹⁵, the Regulation should be evaluated on the basis of information

¹⁴ Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

¹⁵ OJ L 123, 12.5.2016, p. 1–14.

collected in accordance with specific monitoring requirements, while avoiding an administrative burden, in particular on Member States, and overregulation. Those requirements, where appropriate, should include measurable indicators as a basis for evaluating the effects of the Regulation on the ground. The Commission should carry out an evaluation no later than 30 June 2024, including with a view to submitting proposals for any appropriate amendments to this Regulation.

(54a) This Regulation should apply without prejudice to the specific character of the security and defence policy of certain Member States.

HAVE ADOPTED THIS REGULATION:

CHAPTER I GENERAL PROVISIONS

Article 1

Subject matter

This Regulation establishes a set of measures and lays down a budget aimed at urgently strengthening the responsiveness and ability of the European Defence Technological and Industrial Base (EDTIB) to ensure the timely availability and supply of ground-to-ground and artillery ammunition as well as missiles ('relevant defence products'), in particular through the following:

- (a) an instrument financially supporting industrial reinforcement for the production of the relevant defence products in the Union, including through the supply of their components **and the corresponding inputs** ('the 'Instrument');
- (b) ~~the identification, mapping and continuous monitoring of the availability of the relevant defence products, their components and the corresponding inputs (raw materials);~~
- (c) the establishment of mechanisms, principles, and temporary rules to secure the timely and lasting availability of the relevant defence products to their acquirers in the Union.

Based on an evaluation, pursuant to Article ~~28~~29 below, of the results achieved by the implementation of this Regulation by mid-2024, notably in regard of the evolution of the security context, the opportunity of the extension of the applicability of the set of measures and of the allocation of the corresponding additional budget ~~will~~may be considered.

Article 2

Definitions

For the purposes of this Regulation, the following definitions apply:

- (1) ‘raw materials’ means the **basic** materials required to produce relevant defence products;
- (2) ‘bottleneck’ means a point of congestion in a production **process or** system that stops or severely slows the production;
- (3) ‘recipient’ means an entity with which a funding or financing agreement has been signed, or to which a funding or financing decision has been notified;
- (4) ‘applicant’ means ~~a natural person or an entity~~ **that** ~~with or without legal personality who has submitted~~ **an application in a grant award procedure for a support from the Instrument after a call for proposals or in accordance with Article 195 of the Financial Regulation.**
- (5) ‘control’ means the ability to exercise a decisive influence on a legal entity directly, or indirectly through one or more intermediate legal entities;
- (6) ‘executive management structure’ means a body of a legal entity, appointed in accordance with national law, and, where applicable, reporting to the chief executive officer, which is empowered to establish the legal entity’s strategy, objectives and overall direction, and which oversees and monitors management decision-making;
- (7) ‘entity’ means a legal person created and recognised as such under Union, national or international law, which has legal personality and the capacity to act in its own name, exercise rights and be subject to obligations, or an entity which does not have legal personality as referred to in point (c) of Article 197(2) of Regulation (EU, Euratom) 2018/1046;

- (8) ‘classified information’ means information or material, in any form, the unauthorised disclosure of which could cause varying degrees of prejudice to the interests of the Union, or of one or more of the Member States, and which bears an EU classification marking or a corresponding classification marking, as established in the Agreement between the Member States of the European Union, meeting within the Council, regarding the protection of classified information exchanged in the interests of the European Union;
- (9) ‘sensitive information’ means information and data that is to be protected from unauthorised access or disclosure because of obligations laid down in Union or national law or in order to safeguard the privacy or security of a natural or legal person;
- (10) ‘non-associated third-country entity’ means a legal entity that is established in a non-associated third country or, where it is established in the Union or in an associated country, that has its executive management structures in a non-associated third country;
- (11) ‘lead production time’ means the period of time between a purchase order being placed and the manufacturer completing the order;
- (12) ‘relevant defence products’ means ground-to-ground and artillery ammunition as well as missiles.
- ~~(13) ‘supply critical defence products’ means relevant defence products or key components or raw materials thereof that have been identified as being seriously affected by disruption or potential disruption of the functioning of the Single Market and its supply chains resulting in actual or potential significant shortages.~~
- (14) ‘blending operation’ means an action supported by the Union budget, including within a blending facility or platform as defined in point (6) of Article 2 of the Financial Regulation, that combines non-repayable forms of support or financial instruments from the Union budget with repayable forms of support from development or other public finance institutions as well as from commercial finance institutions and investors;
- (15) ‘Seal of Excellence’ means a quality label which shows that a proposal submitted to a call for proposals under the Instrument has passed all of the evaluation thresholds set out in the work programme, but could not be funded due to a lack of budget available for that call for proposals in the work programme, and might receive support from other Union or national sources of funding;

Article 3

~~Third countries~~ **Associated to the Instrument** ~~countries~~

The Instrument shall be open to the participation of members of the European Free Trade Association which are members of the European Economic Area (associated countries), in accordance with the conditions laid down in the Agreement on the European Economic Area.

CHAPTER II

THE INSTRUMENT

Article 4

Objectives of the Instrument

1. The objective of the Instrument is to foster the efficiency and competitiveness of the European Defence Technological and Industrial Base (EDTIB) to support the ramp up of the production capacity and timely delivery of relevant defence products through industrial reinforcement.
2. The industrial reinforcement shall in particular consist of initiating and speeding up the adjustment of industry to the rapid structural changes **revealed or exacerbated by the response to the Russian aggression against Ukraine and** imposed by the **related** supply crisis affecting the relevant defence products. This should include the improvement and acceleration of the capacity of adaptation of supply chains for relevant defence products, the creation of **new** manufacturing capacities or ~~their ramp-up~~ **the ramp-up of existing ones**, and a reduction of their lead production time for the relevant defence products throughout the Union notably thanks to the intensification and widening of cross-border cooperation between the relevant legal entities.

Article 5

Budget

1. The financial envelope for the implementation of the Instrument for the period from its entry into force until 30 June 2025 shall be set a EUR 500 Million in current prices.
2. Within the financial envelope defined in paragraph 1 of this article, up to EUR 50 Million may be used as a blending operation in the frame of the ‘Ramp-up Fund’ defined in article 21.
3. Resources allocated to Member States under shared management may, at their request, be transferred to the Instrument subject to the conditions set out in the relevant provisions of the Regulation (EU) 2021/1060 of the European Parliament and the Council¹⁶. The Commission shall implement those resources directly in accordance with point (a) of the first subparagraph of Article 62(1) of Regulation (EU, Euratom) 2018/1046 of the European Parliament and the Council¹⁷. Those resources shall be used for the benefit of the Member State concerned.

Where the Commission has not entered into a legal commitment under direct management for resources transferred in accordance with this paragraph, the corresponding uncommitted resources may be transferred back to the Fund from which they have been initially transferred and allocated to one or more programmes in accordance with the conditions set out in the relevant provisions of Regulation (EU) 2021/1060.

4. The amount referred to in paragraph 1 may also be used for technical and administrative assistance for the implementation of the Instrument, such as preparatory, monitoring, control, audit and evaluation activities including corporate information technology systems.

¹⁶ Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy (OJ L 231, 30.6.2021, p. 159-706).

¹⁷ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193, 30.7.2018, p. 1–222).

5. Budgetary commitments for activities extending over more than one financial year may be broken down over several years into annual instalments.
6. The budget of the instrument can be reinforced, where the situation requires it or in case the Regulation is extended, in accordance with Article 1, last paragraph.

Article 6

Cumulative and alternative funding

1. The Instrument shall be implemented in synergy with other Union programmes. An action that has received a contribution from another Union programme may also receive a contribution under the Instrument, provided that the contributions do not cover the same costs. The rules of the relevant Union programme shall apply to the corresponding contribution to the action. The cumulative financing shall not exceed the total eligible costs of the action. The support from the different Union programmes may be calculated on a pro-rata basis in accordance with the documents setting out the conditions for support.
2. In order to be awarded a Seal of Excellence under the Instrument, actions shall comply with all of the following conditions:
 - (a) they have been assessed in a call for proposals under the Instrument;
 - (b) they comply with the minimum quality requirements of that call for proposals;
 - (c) they are not financed under that call for proposals due to budgetary constraints.
3. When proposing amended or new Recovery and Resilience Plans, in accordance with Regulation (EU) 2021/241 of the European Parliament and the Council, Member States ~~shall be able to~~ **may** include measures which also contribute to the objectives of this instrument, notably measures linked to proposals submitted to a call for proposals under the Instrument which were awarded a Seal of Excellence.
4. Article 8(5) shall apply by analogy to actions funded in accordance with this Article.

Article 7

Forms of Union funding

1. The Instrument shall be implemented under direct management and as concerns the management of the Ramp-up Fund of Article 21 in indirect management with bodies referred to in Article 62(1)(c) Regulation (EU, Euratom) 2018/1046. The Instrument may provide funding in any of the forms laid down in the Financial Regulation, including financing in the form of financial instruments within blending operations. Blending operations shall be carried out in accordance with Title X of Regulation (EU, Euratom) 2018/1046, Regulation (EU) 2021/523 and Article 21 of this Regulation.
2. By way of derogation from Article 193(2) from Regulation (EU, Euratom) 2018/1046, financial contributions may, where relevant and necessary for the implementation of an action, cover actions started prior to the date of the submission of the proposal for those actions, provided that those actions did not start before 20 March 2023 **and have not been completed before the signature of the grant agreement.**

Article 8

Eligible actions

1. Only actions implementing the objectives set out in Article 4 shall be eligible for funding.
2. The Instrument shall provide financial support for actions addressing ~~identified~~ bottlenecks in production capacities and supply chains, **to be identified in the work programme,** with a view to secure and accelerate production **and** to ensure the effective supply and timely availability of the relevant defence products.
3. Eligible actions shall relate to one or more of the following activities and be exclusively related to the production capacities of relevant-defence products, including their components and raw materials insofar as they are intended or used wholly for the production of relevant defence products:
 - (a) the optimisation, expansion, modernisation, upgrading or repurposing of existing, or the establishment of new, production capacities, in relation to the relevant defence

products or their raw materials and components, insofar as the latter are used as direct input for the production of relevant defence products, notably with a view to increasing production capacity or reducing lead production times, including on the basis of the procurement or acquisition of the requisite machine tools and any other necessary input;

- (b) the establishment of cross-borders industrial partnerships, including through public private partnerships or other forms of industrial cooperation, in a joint industrial effort, including activities that aim at the coordination of the sourcing or reservation of raw materials and components insofar the latter are used as direct input for the production of relevant defence products, as well as production capacities and at the coordination of production plans;
- (c) the building-up and making available of reserved surge manufacturing capacities of relevant-defence products, raw materials and components thereof, insofar the latter are used as direct input for the production of relevant defence products, in accordance with ordered or planned production volumes;
- (d) the testing, **including the necessary infrastructure**, and, as appropriate, reconditioning certification, ~~as appropriate~~, of relevant defence products with a view to addressing their obsolescence and making them useable by end users;
- (e) the training, reskilling or upskilling of personnel in relation to the activities referred to in points (a) to (d) of this article;
- (f) ~~the improvement of the access to finance by relevant economic operators active in the production of or making available the relevant defence products, by means of the offset of any additional cost arising specifically from the defence industry sector, for investments related to activities described in points (a) to (e) of this article.~~

4. The following actions shall not be eligible for funding under the Instrument:

- (a) actions related to the production of goods or delivery of services which are prohibited by applicable international law;
- (b) actions related to the production of lethal autonomous weapons without the possibility for meaningful human control over selection and engagement decisions when carrying out strikes against humans;

- (c) actions or parts thereof, that are already fully financed from other public or private sources;
 - (d) ~~actions entailing expenditures arising from operations having military or defence implications.~~
5. The Commission shall ensure in concluding agreements with individual recipients that the instrument only finances activities which exclusively benefit production capacities of relevant defence products, or of their components and raw materials insofar as they are intended or used wholly for the production of relevant defence products.

Article 9

Financing rate

1. The Instrument shall finance up to 40% of the eligible costs of an eligible action.
2. By way of derogation from paragraph 1, an action shall be eligible for an increased funding rate of 10 additional percentage points for each of the following criteria:
 - (a) where applicants demonstrate ~~a contribution to~~ the creation of new cross-border cooperation between legal entities established in Member States or associated countries, as described in article 10(4);
 - (b) where applicants commit that they will prioritize for the duration of the action orders stemming from the common procurement of relevant defence products by at least three Member States or associated countries or from the procurement of relevant defence products from at least one Member State of relevant defence products which procure for the purpose of transferring acquired relevant defence products to Ukraine. This commitment shall apply to any procurement of any product directly or indirectly benefitting from support under this Instrument.

~~By way of derogation, support from the instrument may cover up to 100 % of the eligible costs of an activity referred to article 8(3), point (f).~~

3. The recipients shall demonstrate that the costs of an action that are not covered by Union support are to be covered by other means of financing.

Eligible entities

1. Recipients involved in an action shall be legal entities, whether public or privately owned, **which are established and have their executive management structures** in the Union or in an associated country. **They shall not be subject to control by a non-associated third country or by a non-associated third country entity or, alternatively, shall have been subject to screening within the meaning of Regulation (EU) 2019/452 and, where necessary, mitigation measures, taking into account the objectives referred to in Article 4.**
2. ~~The infrastructure, facilities, assets, and resources of the recipients involved in an action which are used for the purposes of an action supported by the Instrument shall be located on the territory of a Member State or of an associated country for the entire duration of an action, and their executive management structures shall be established in the Union or in an associated country.~~
3. An undertaking established in the Union or in an associated country ~~and~~**that** is controlled by a non-associated third country or a non-associated third-country entity **and that has not been subject to a screening within the meaning of Regulation (EU) 2019/452 and, where necessary, mitigation measures,** shall only be eligible to be a recipient involved in an action supported by the Instrument if guarantees approved by the Member State or the associated country in which the undertaking is established ~~make~~**are made** available to the Commission in accordance with its national procedures. **The guarantees shall** ensure ~~ing~~ that the involvement in an action of such a undertaking would not contravene the security and defence interests of the Union and its Member States as established in the framework of the CFSP pursuant to Title V of the TEU, or the objectives set out in Article 4 of this Regulation. The guarantees shall in particular substantiate that, for the purposes of an action, measures are in place to ensure that:
 - (a) the recipient is able to carry out the action and to deliver results without any restrictions concerning its infrastructure, facilities, assets, resources, intellectual property or knowhow needed for the purposes of the action, or that undermines its capabilities and standards necessary to carry out the action;

~~(b) — the products being produced by undertakings having benefitted from the Instrument financial support are not subject to a restriction by a non-associated third country or a non-associated third country entity; and~~

(c) access by a non-associated third country or by a non-associated third-country entity to sensitive or classified information relating to the action is prevented and the employees or other persons involved in the action have national security clearance issued by a Member State or an associated country, where appropriate.

4. If considered to be appropriate by the Member State or the associated country in which the undertaking is established, additional guarantees may be provided.

5. Member States shall provide to the Commission a notification on the mitigation measures applied within the meaning of Regulation (EU) 2019/452 referred to in paragraph 1 or the guarantees referred to in paragraph 3. Further information on the mitigation measures applied or the guarantees shall be made available to the Commission upon request. The Commission shall inform the committee referred to in Article 22 of any ~~undertaking considered to be~~ **eligible notification provided** in accordance with **this** paragraph 3.

5a. The infrastructure, facilities, assets, and resources of the recipients involved in an action which are used for the purposes of an action supported by the Instrument shall be located on the territory of a Member State or of an associated country for the entire duration of an action.

5b. The Instrument shall not financially support the ramp-up of production capacities for relevant defence products that are subject to a restriction by a non-associated third country or a non-associated third country entity that limits Member States' ability to use it.

Article 11

Award criteria

Each proposal shall be assessed on the basis of one or more of the following criteria measuring the contribution of the relevant actions to the industrial reinforcement sought to foster the efficiency

and overall competitiveness of the EDTIB **throughout the Union**, in respect to the relevant defence products:

- (1) Increase in production capacity in the Union: the contribution of the action, ~~in relation to the relevant defence products, to the increase, ramp-up, or reservation of the~~ **creation of new** manufacturing capacities ~~their~~ **or the increase, ramp-up,** modernisation **or reservation of existing ones** or the reskilling and upskilling of the related workforce;
- (2) Reduction of delivery lead time: the contribution of the action to the timely satisfaction of the demand expressed through procurement in terms of reduced delivery lead times, including via order reprioritization mechanisms;
- (3) Elimination of sourcing and production bottlenecks: the contribution of the action to the swift identification and rapid and lasting elimination of any sourcing (raw material and any other input) or production (manufacturing ability) bottlenecks;
- (4) Resilience through cross-border cooperation: the contribution of the action to the development and operationalisation of cross-border cooperation between undertakings established in different Member States or associated countries, involving in particular, to a significant extent, SMEs or mid-caps as recipients, subcontractors or as other undertakings in the supply chain;
- (5) The demonstration by the applicants of the link between the action and newly placed orders stemming from the joint procurement of relevant defence products by at least three Member States or associated countries especially if done in a EU framework;
- (6) The quality of the implementation plan of the action, including in terms of its processes and monitoring.

The Commission shall, by means of implementing acts, award the funding under this regulation. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 22(3).

Article 12

Work Programme

1. The Instrument shall be implemented through a single work programme as referred to in Article 110 of Regulation (EU, Euratom) 2018/1046. ~~The w~~Work programmes shall set out, where applicable, the overall amount reserved for blending operations.
2. The Commission shall, by means of an implementing act, adopt the work programme referred to in paragraph 1. The implementing act shall be adopted in accordance with the examination procedure referred to in Article 22(3).
3. The work programme shall set out the funding priorities ~~in line with the mapping referred to in Article 13(1) and, taking into account~~note of the work of the Defence Joint Procurement Task Force.

Chapter III

Identification and Mapping

Article 13

~~Identification of needs, mapping and monitoring of capacities~~

- ~~1. The Commission, based on the cooperative work with the EEAS and the EDA in the context of the Defence Joint Procurement Task Force, shall set up and maintain a mapping of relevant undertakings established in the Union that operate along the supply chains of the relevant defence products, including for instance, the type and specifications of the relevant defence products produced, their related production capacity and their position in the supply chain.~~

~~Based on this mapping, the Commission shall, in close cooperation with the identified undertakings, continuously monitor their production capacity and their supply chains and assess their overall ability to respond to the expected evolution of the market demand.~~

- ~~2. The Commission shall present to, and regularly discuss with, the Committee as referred to in Article 22, the results of the mapping or its update, of the monitoring of the supply chains, and its assessment of the overall ability of the identified undertakings to respond to the expected evolution of the market demand. In doing so, the Commission will take into account the work carried out in the context of the regular meetings of the National Armaments Directors with the Defence Joint Procurement Task Force.~~
- ~~3. Based on information gathered pursuant to paragraph 1 and taking due account of the discussion held under paragraph 2, the Commission shall by means of implementing acts, draw up and regularly update a list of supply-critical defence products. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 22(3). On duly justified imperative grounds of urgency in relation with the supply crisis, the Commission shall adopt immediately applicable implementing acts in accordance with the procedure referred to in Article 22(4).~~
- ~~4. In agreement with the Member State where they are established, the Commission may request from the undertakings that provide supply-critical defence products and in relation to those, to receive, within five working days, detailed information on:
 - ~~(a) the total production capacity in the relevant supply-critical defence products;~~
 - ~~(b) the existing and expected variations in stocks of such products;~~
 - ~~(c) any existing schedule of the expected production output for the following three months for each production facility located in the union or elsewhere;~~
 - ~~(d) any additional information relevant to ensure the timely availability of supply-critical defence products.~~~~
- ~~5. Without prejudice to national security interests, Member States shall, where appropriate, provide the Commission with additional information needed to achieve the objectives of this Regulation.~~
- ~~6. Without prejudice to national security interests and the protection of commercially confidential information resulting from agreements entered into by Member States, where a Member State intends to adopt at national level measures for the procurement, purchase or manufacturing of supply-critical defence products from the list referred in paragraph 3, it shall inform the Commission in a timely manner.~~

Chapter IV

~~Security of Supply~~ SECURITY OF SUPPLY

Article 14

Priority Rated Orders

- ~~1. Where at least three Member States, which have entered or are considering entering into an agreement to commonly procure relevant defence products or where a Member State which has procured or is considering to procure for the purpose of transferring acquired relevant defence products to Ukraine, face severe difficulties either in the placing of the order or in the execution of the contract due to shortages or serious risks of shortages of supply-critical defence products and these difficulties may undermine the security of the Union and of its Member States, those may ask the Commission to require an undertaking to accept, or to prioritise an order of supply critical defence products ('priority rated order'), as defined in paragraph 3 of Article 13.~~
- ~~2. Upon such request, the Commission may, after the consultation of the Member State of establishment of the concerned undertaking and with its agreement, notify the latter of its intent to impose a priority rated order.~~

~~The notification of the intent shall include information about its legal basis, specify the product, specifications and quantities concerned and the schedule and time limit within which the order would have to be performed, and state the reasons justifying the use of the priority rated order.~~

~~From the notification of the intent, the undertaking shall reply to the Commission, within five working days and state whether it can accept or not the request. Where the urgency of the situation requires it, the Commission may, based on a justification of such urgency, reduce the deadline for the undertaking to reply.~~

~~Where the undertaking declines the request, it shall provide the Commission with a detailed explanation to the justification invoked to decline the intended request.~~

~~Where the undertaking accepts the request, the order shall be deemed accepted under the conditions described in the Commission's request in accordance with the meaning of paragraph 1 and the undertaking shall be legally bound.~~

~~3. Where the notified undertaking declines the request, the order shall be deemed refused. Having due regard to the justifications invoked by the undertaking, the Commission may, in agreement with the Member State of establishment of that undertaking:~~

~~(a) abstain from pursuing the request;~~

~~(b) adopt an Implementing Act obliging the concerned undertakings to accept or perform the priority rated order, at a fair and reasonable price.~~

~~4. The Commission shall take into account the objections raised by the undertaking under paragraph 2 and state the reasons why, in line with the proportionality principle and the fundamental rights of the undertaking under the Charter of Fundamental rights of the Union, it was necessary to adopt it in light of the circumstances described in paragraph 1.~~

~~The Commission shall state in the Implementing Act the legal basis of the priority rated order, fix the time limit within which the order is to be performed, and set out the product, specifications, volume, and any other parameter to be complied. The Commission shall also state the penalties provided for in Article 15 for non-compliance with the obligation.~~

~~5. Where the undertaking has accepted the request of the Commission under paragraph 2 or where the Commission has adopted an Implementing Act under paragraph 3, the priority rated order shall:~~

~~(a) be placed at a fair and reasonable price;~~

~~(b) take precedence over any performance obligation under private or public law;~~

~~6. Where the undertaking has agreed to the request of the Commission under paragraph 2 or where the Commission has adopted an Implementing Act under paragraph 3, the undertaking may request the Commission to review the priority rated order where it considers it to be duly justified based on one of the following grounds:~~

- ~~(a) if the undertaking is unable to perform the priority rated order on account of insufficient production capability or production capacity, even under preferential treatment of the order;~~
- ~~(b) if acceptance of the order would place an unreasonable economic burden and entail particular hardship for the undertaking.~~

~~The undertaking shall provide all relevant and substantiated information to allow the Commission to assess the merits of the objections raised.~~

~~Based on the examination of the reasons and evidence provided by the undertaking, the Commission may, after consulting the Member State concerned, amend its implementing Act to release, partially or in totality the undertaking concerned from its obligations under paragraph 2.~~

- ~~7. For the purpose of this Regulation, transfers of supply critical defence products subject to the priority rated order may not be considered as sensitive in the meaning of Article 4 (8) of Directive 2009/43/EC.~~
- ~~8. When an undertaking established in the Union is subject to a measure of a third country which entails a priority rated order, it shall notify the Commission thereof. The Commission shall then inform the Committee of the existence of such measures.~~
- ~~9. Where an undertaking accepts or is obliged to accept and prioritise a priority rated order in accordance with paragraphs 2 or 3 it shall be shielded from any contractual or extra-contractual liability in relation to comply with the priority rated orders. The liability shall be excluded only to the extent the violation of contractual obligations was necessary for compliance with the mandated prioritisation.~~
- ~~10. The Commission shall adopt an implementing act laying down the practical and operational arrangements for the functioning of priority rated orders.~~
- ~~11. The implementing acts referred to in paragraphs 3 and 10 shall be adopted in accordance with the examination procedure referred to in Article 22 (3). On duly justified imperative grounds of urgency in relation with the supply crisis, the Commission shall adopt immediately applicable implementing acts in accordance with the procedure referred to in Article 22 (4)~~

Article 15

Penalties

1. ~~Where an undertaking, intentionally or through gross negligence, does not comply with an obligation to prioritise priority rated orders pursuant to Article 14, the Commission may, by decision, where deemed necessary and proportionate, impose periodic penalty payments.~~
2. ~~Periodic penalty payments shall not exceed 1.5 % of the average daily turnover in the preceding business year for each working day of non-compliance with the obligation calculated from the date established in the decision.~~
3. ~~In fixing the amount of the periodic penalty payment, regard shall be had to the nature, gravity and duration of the infringement, taking due account of the principles of proportionality and appropriateness.~~
4. ~~Where the undertaking has satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the definitive amount of the periodic penalty payment at a figure lower than that which would arise under the original decision.~~
5. ~~The Court of Justice of the European Union shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or a periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.~~
6. ~~Time shall begin to run on the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases. Any action taken by the Commission or the competent authorities of the Member States for the purposes of ensuring compliance with the provisions of this Regulation shall interrupt the limitation period. Each interruption shall start the time running afresh. However, the limitation period shall expire at the latest on the day in which a period equal to twice the limitation period has elapsed without the Commission having imposed a periodic penalty payment. That period shall be extended by the time during which the limitation period is suspended because the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Union.~~

- ~~7. The power of the Commission to enforce decisions taken pursuant to this Article shall be subject to a limitation period of three years. Time shall begin to run on the day on which the decision becomes final. The limitation period for the enforcement of periodic penalties payments shall be interrupted: (a) by notification of a decision varying the original amount periodic penalty payment or refusing an application for variation; (b) by any action of the Commission or of a Member State, acting at the request of the Commission, designed to enforce payment of the fine or periodic penalty payment. Each interruption shall start time running afresh. The limitation period for the enforcement of periodic penalty payments shall be suspended for so long as: (a) time to pay is allowed; (b) enforcement of payment is suspended pursuant to a decision of the Court of Justice.~~

~~Article 16~~

~~Right to be heard for the imposition of fines or periodic penalty payments~~

- ~~1. Before adopting a decision pursuant to Article 15, the Commission shall give the undertaking concerned the opportunity of being heard on: (a) preliminary findings of the Commission, including any matter to which the Commission has taken objections; (b) measures that the Commission may intend to take in view of the preliminary findings pursuant to point (a) of this paragraph.~~
- ~~2. Undertakings concerned may submit their observations to the Commission's preliminary findings within a time limit which shall be fixed by the Commission in its preliminary findings and which may not be less than 14 working days.~~
- ~~3. The Commission shall base its decisions only on objections on which undertakings concerned have been able to comment.~~
- ~~4. The rights of defence of the undertaking concerned shall be fully respected in any proceedings. The undertaking shall be entitled to have access to the Commission's file under the terms of a negotiated disclosure, subject to the legitimate interest of undertakings in the protection of their business secrets. The right of access to the file shall not extend to confidential information and internal documents of the Commission or the authorities of the Member States. In particular, the right of access shall not extend to correspondence between the Commission and the authorities of the Member States. Nothing in this~~

~~paragraph shall prevent the Commission from disclosing and using information necessary to prove an infringement.~~

Article 17

Acceleration of the permit-granting process for the timely availability and supply of relevant defence products

1. Member States shall ensure that administrative applications related to the planning, construction and operation of production facilities, intra-EU transfer of inputs as well as qualification and certification of end products are processed in an efficient and timely manner. To that end, all national authorities concerned shall ensure that the most rapid treatment legally possible is given to these applications.
2. Member States shall **strive to** ensure that in the planning and permit-granting process, the construction and operation of plants and installations for the production of relevant defence products are given priority when balancing legal interests in the individual case.

Article 18

Continuity of production of relevant defence products

1. Member States may decide to use or to encourage companies working in the field of relevant defence products to use derogations provided for in Article 17(3) of Directive 2003/88/EC in order to allow expansion of working shifts hence facilitating continuity of production in the field of relevant defence products, if they deem it necessary to achieve the objectives of this regulation.
2. To that end and where prior authorisation is required, all national authorities concerned shall ensure that the most rapid treatment legally possible is given to applications from companies working in the field of relevant defence products to use such derogations.

Facilitation of common procurement during the current ammunition supply crisis

1. Where at least ~~three~~**two** Member States enter into an agreement to commonly procure relevant defence products and where the extreme urgency deriving from the current crisis resulting from the Russian aggression of Ukraine prevents to use any of the procedures provided for by Directive 2009/81/EC for the award of a framework agreement, the following rules may be applied.
2. By way of derogation from Article 29(2) second subparagraph of Directive 2009/81/EC, a contracting authority may modify an existing framework agreement which has been awarded through one of the procedures provided for by Article 24~~5~~ of Directive 2009/81/EC so that its provisions may apply to contracting authorities/entities which are not originally party to the framework agreement.
3. By way of derogation from Article 29(2) third sub-paragraph of Directive 2009/81/EC, a contracting authority may make substantial amendments to the quantities laid down in an existing framework agreement insofar as it is strictly necessary for the application of paragraph 2. Where quantities laid down in an existing framework agreement are substantially modified pursuant to this paragraph, **any economic operator that meets the contracting authority's conditions initially laid down in the public procurement procedure for the framework agreement, including requirements for qualitative selection as referred to in articles 39 to 46 of Directive 2009/81/EC, shall be given the opportunity to join that framework agreement.** ~~The~~ contracting authority shall open **that** the possibility by means of an ad hoc notice published in the Official Journal of the European Union, ~~to any economic operator that meets the conditions initially laid down in the framework agreement, to join that framework agreement.~~
4. The principle of non-discrimination shall apply to framework agreements referred to in paragraph 2 and 3 with regard to the additional quantities, and notably between contracting authorities of Member States referred to in paragraph 1.

5. Contracting authorities having modified a contract in the cases set out under paragraphs 2 and 3 of this article shall publish a notice to that effect in the Official Journal of the European Union. Such notice shall be published in accordance with Article 32 of Directive 2009/81/EC.
6. Contracting authorities/entities may not use this Article improperly or in such a way as to prevent, restrict or distort competition.
7. Modifications introduced in the framework agreements referred to in this article shall not be concluded after 30 June 2025.

~~Article 20~~

~~Facilitation of intra-EU transfers of defence-related products~~

- ~~1. By way of derogation from Article 4(1) of Directive 2009/43/EC, the transfer of the following defence-related products between Member States shall not be subject to prior authorisation:
 - (a) ~~ammunition and fuze setting devices, and specially designed components therefor, as listed in the third category of the Annex of the Directive 2009/43/EC (third category of the EU Military List — ML3);~~
 - (b) ~~missiles and related equipment and accessories, and specially designed components therefor, as listed in the fourth category of the Annex of the Directive 2009/43/EC (fourth category of the EU Military List — ML4).~~~~
- ~~2. Any transfer in accordance with the derogation set out in paragraph 1 shall be notified, for information, to the Member State of origin.~~
- ~~3. This article does not affect the discretion of Member States as regards policy on the export of the defence-related products covered by paragraph 1.~~

Chapter V

~~Specific Provisions Applicable to Access to Finance~~ SPECIFIC PROVISIONS APPLICABLE TO ACCESS TO FINANCE

Article 21

Ramp-up Fund

1. A blending facility may be established, to be described as the ‘Ramp-up Fund’ proposing debt solutions, to leverage, de-risk and speed-up investments needed to increase manufacturing capacities.
2. The specific objectives pursued by the Ramp-up Fund are set out as follows:
 - (a) improving the leverage effect of the Union budget spending and achieving a higher multiplier effect in terms of attracting private-sector financing;
 - (b) providing support to companies facing difficulties in accessing finance, and addressing the need to underpin the resilience of the Union’s defence industry;
 - (c) accelerating investment in the field of manufacturing relevant defence products and to leveraging funding from both the public and the private sectors, while increasing the security of supply for the whole Union’s defence industry value chain;
 - (d) enhancing access to finance for investments related to activities described in points (a) to (e) of article 8(3).

Chapter VI

~~Final Provisions~~ FINAL PROVISIONS

Article 22

Committee Procedure

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
2. The European Defence Agency shall be invited to provide its views and expertise to the committee as an observer. The European External Action Service shall also be invited to assist in the committee.
3. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

Where the committee delivers no opinion, the Commission shall not adopt the draft implementing act and the third subparagraph of Article 5(4) of Regulation (EU) No 182/2011 shall apply.

4. Where reference is made to this paragraph, Article 8 of Regulation (EU) No 182/2011, in conjunction with Article 5 thereof, shall apply.

Article 23

Security of Information

1. The Commission shall protect classified information received in relation to the implementation of this regulation in accordance with the security rules set out in Commission Decision (EU, Euratom) 2015/444¹⁸.

¹⁸ Commission Decision (EU, Euratom) 2015/444 of 13 March 2015 on the security rules for protecting EU classified information (OJ L 72, 17.3.2015, p. 53–88).

2. The Commission shall make use of existing or set up secured exchange systems in order to facilitate the exchange of sensitive and classified information between the Commission, the High Representative, the European Defence Agency, and the Member States and, where appropriate, with the legal entities subject to measures set out in this Regulation. That system shall take into account the Member States' national security regulations.

Article 24

Confidentiality and processing of the information

1. Information received as a result of the application of this Regulation shall be used only for the purpose for which it was requested.
2. Member States and the Commission shall ensure the protection of trade and business secrets and other sensitive and classified information acquired and generated in application of this Regulation, including recommendations and measures to be taken, in accordance with Union and the respective national law.
3. Member States and the Commission shall ensure that classified information provided or exchanged under this Regulation is not downgraded or declassified without the prior written consent of the originator.
4. The Commission shall not share any information in a way that can lead to the identification of an individual operator when the sharing of the information results in potential commercial or reputational damage to this operator or in divulging any trade secrets.

Article 25

Personal data protection

1. This Regulation shall be without prejudice to the obligations of Member States relating to their processing of personal data under Regulation (EU) 2016/679 of the European Parliament and of the Council¹⁹ and Directive 2002/58/EC of the European Parliament and

¹⁹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1–88).

of the Council²⁰, or the obligations of the Commission and, where appropriate, other Union institutions and bodies, relating to their processing of personal data under Regulation (EU) 2018/1725 of the European Parliament and of the Council²¹, when fulfilling their responsibilities.

2. Personal data shall not be processed or communicated except in cases where this is strictly necessary to the purposes of this Regulation. In such cases, the conditions of Regulation (EU) 2016/679 and Regulation (EU) 2018/1725 shall apply as appropriate.
3. Where processing of personal data is not strictly necessary to the fulfilment of the mechanisms established in this Regulation, personal data shall be rendered anonymous in such a manner that the data subject is not identifiable.

Article 26

Audits

Audits on the use of the Union contribution carried out by persons or entities, including by other than those mandated by the Union institutions, bodies, offices or agencies, shall form the basis of the overall assurance pursuant to Article 127 of the Financial Regulation. The Court of Auditors shall examine the accounts of all revenue and expenditure of the Union in accordance with Article 287 TFEU.

Article 27

Protection of the financial interests of the Union

Where an associated country participates in the Instrument by means of a decision adopted pursuant to the Agreement on the European Economic Area, the associated country shall grant the necessary rights and access required for the authorising officer responsible, OLAF and the Court of Auditors to comprehensively exercise their respective competences. In the case of OLAF, such rights shall

²⁰ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37–47).

²¹ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39–98).

include the right to carry out investigations, including on-the-spot checks and inspections, as provided for in Regulation (EU, Euratom) No 883/2013.

Article 28

Information, communication and publicity

1. The recipients of Union funding shall acknowledge the origin of those funds and ensure the visibility of the Union funding, in particular when promoting the actions and their results, by providing coherent, effective and proportionate targeted information to multiple audiences, including the media and the public.
2. The Commission shall implement information and communication actions relating to the Instrument, to actions taken pursuant to the Instrument and to the results obtained.
3. Financial resources allocated to the Fund shall also contribute to the corporate communication of the political priorities of the Union, insofar as those priorities are related to the objectives referred to in Article 4.
4. Financial resources allocated to the Fund may also contribute to the organisation of dissemination activities, match-making events and awareness-raising activities, in particular aiming at opening up supply chains to foster the cross-border participation of SMEs.

Article 29

Evaluation

1. No later than 30 June 2024, the Commission shall draw up a report evaluating the implementation of the measures set out in this Regulation and their results, ~~as well as the opportunity to extend their applicability and provide for their funding, notably in regard of the evolution of the security context.~~ The evaluation report shall build on consultations of the Member States and key stakeholders and be communicated to the European Parliament and to the Council.

2. Taking into account the evaluation report, the Commission may submit proposals for any appropriate amendments to this Regulation, notably in view to continue addressing any persisting risks in relation to the supply of the relevant defence products.

Article 30

Entry into force and application

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall apply until 30 June 2025. This shall not affect the continuation or modification of actions initiated pursuant to this Regulation, all actions necessary to protect the financial interests of the European Union and the powers conferred on the Commission to impose penalties in accordance with Article 15.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President