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**'I/A' ITEM NOTE**

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From: General Secretariat of the Council  
To: Permanent Representatives Committee/Council

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Subject: Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on establishing the European defence industry Reinforcement through common Procurement Act  
- General approach

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1. On 19 July 2022, the Commission submitted to the European Parliament and the Council its proposal for a Regulation on establishing the European defence industry Reinforcement through common Procurement Act<sup>1</sup>.
2. With this proposal, the Commission followed-up on its commitment, set out in the Defence Investment Gaps Analysis of 18 May 2022<sup>2</sup>, to create a short-term instrument aimed at reinforcing European defence industrial capacities through common procurement by EU Member States.
3. On 20 July 2022, under the Czech Presidency, the Ad Hoc Working Party on Defence Industry began examining the proposal. At its meeting on 17 November 2022, the text set out in annex to this note received broad support from delegations.

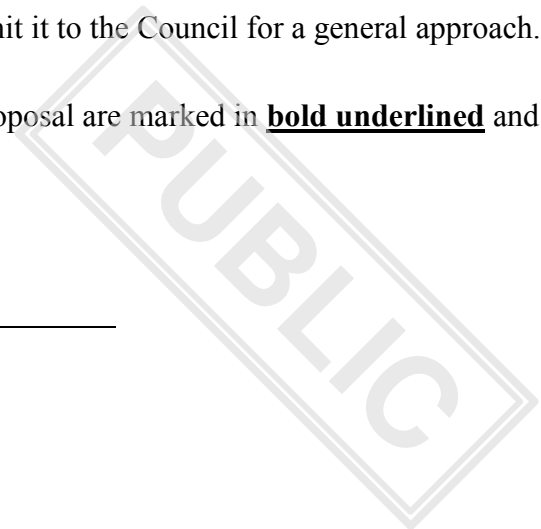
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<sup>1</sup> 11531/22.

<sup>2</sup> 9033/22 + ADD1.

4. The Presidency therefore invites the Permanent Representatives Committee to confirm agreement on the text set out in annex and to submit it to the Council for a general approach.
5. Changes compared to the original Commission proposal are marked in **bold underlined** and ~~striketrough~~.

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Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**  
**on establishing the instrument for the reinforcement of the European defence industry**  
**~~Reinforcement~~ through common ~~P~~procurement Act**

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 Article 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 Committee<sup>1</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

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<sup>1</sup> OJ C , , p .

- (1) The EU Heads of State or Government, meeting in Versailles on 11 March, committed to "bolster European defence capabilities" in light of the Russian military aggression against Ukraine. They 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 EU defence industry, **including SMEs**.
- (2) The unjustified invasion of Ukraine by the Russian Federation on 24 February 2022 and the ongoing armed conflict in Ukraine has made it clear that it is critical to act ~~now~~**without delay** to address the existing shortfalls. It has led to the return of high-intensity warfare and territorial conflict in Europe, requiring a significant increase in the capacity of Member States to fill the most urgent and critical gaps, especially those exacerbated by the transfer of defence products to Ukraine.
- (3) The Commission and the High Representative presented a Joint Communication on "The Defence Investment Gaps Analysis and Way Forward" on 18 May 2022. The Communication highlighted the existence, within the EU, of defence financial, industrial and capability gaps. **The Joint Communication notably highlighted capability gaps immediately affecting the freedom of action of European Union Member States armed forces and underlined the urgency to replenish certain stockpiles, to replace Soviet era legacy systems and to reinforce strategic capabilities.**
- (4) A dedicated short-term instrument, designed in a spirit of solidarity, was indicated as a tool to incentivise Member States, on a voluntary basis, to pursue common procurement to fill the most urgent and critical gaps, especially those created by the response to the current Russia's aggression, in a collaborative way.

- (5) Such a new instrument will contribute to reinforce common defence procurement and, through the associated Union financing, to strengthen EU defence industrial capabilities.
- (6) Reinforcing the European Defence Technological and Industrial Base (**EDTIB**) should therefore be at the core of those efforts. Indeed difficulties and gaps still exist and ~~the European defence industrial base~~ **fragmentation** remains, **causing a lack of** ~~highly fragmented, lacking~~ sufficient collaborative action and ~~inter operability~~ **interoperability** of products.
- (6a) The specific conditions and criteria laid down in this Regulation are determined by specific circumstances and the current timelines.**
- (7) In the current defence market context, marked by an increased security threat and the realistic perspective of a high intensity conflict, Member States are rapidly increasing their defence budgets and aiming at similar purchases. This results in an amount of demand which ~~exceeds~~ **could exceed** European Defence Technological and Industrial Base manufacturing capacities, currently tailored for peace time.
- (8) As a result, strong price inflation can be anticipated, as well as longer delays in delivery time, potentially harming the security of the Union and its Member States. Defence industries need to secure the production capacity necessary to process orders, as well as critical raw materials and sub-components. In this context producers might privilege major orders, potentially leaving exposed the most vulnerable countries, lacking the critical size and financial means to ensure large orders.

- (9) Furthermore, efforts should be made so that the increased spending results in a much stronger European Defence Technological and Industrial Base **throughout the Union**. Indeed, **increased national investments**, without coordination and cooperation, ~~the increased national investments are likely to~~**may** deepen the fragmentation of the European defence industry.
- (10) In the light of the above challenges and the related structural changes ~~in the EU Defence industry~~, it appears necessary to speed up the adjustment of the ~~European Defence Technological and Industrial Base~~**EDTIB**, **to** enhance its competitiveness and efficiency, and thereby **to** contribute to strengthening and reforming Member States' defence industrial capabilities. Addressing industrial shortfalls should include promptly tackling the most urgent gaps.
- (11) Common investment and defence procurement should in particular be incentivised, as such collaborative actions would ensure that the necessary changes in the ~~EU industrial base~~ ~~takes~~**EDTIB take** place in a collaborative manner, avoiding further fragmentation of the ~~industry~~.

- (12) To that end a Short Term Instrument for increasing the collaboration of the Member States in the defence procurement phase (the ‘Instrument’) should be established. It will incentivise Member States to pursue collaborative actions and in particular, when they procure in order to fill these gaps, to do so jointly, increasing the level of interoperability and strengthening and reforming their defence industrial capabilities.
- (13) The Short Term Instrument should offset the complexity and risks associated with ~~such joint actions~~ **common procurement** while allowing economies of scale in the actions undertaken by Member States to reinforce and modernise the ~~European Technological and Industrial Base~~ **EDTIB**, increasing thereby the Union’s capacity resilience and security of supply. Incentivizing common procurement would also result into diminished costs in terms of ~~exploitation, maintenance and withdrawal of the systems~~ **lifecycle** management of the systems. **The Instrument should be accompanied by efforts strengthening the European defence and security markets, services and systems with a level-playing-field for suppliers from all EU Member States. Common procurement on a common market for the EDTIB allows for economies of scale and assures innovation and efficiency in production and technology.**

- (14) This Instrument will build on and ~~take into account~~ **consider** the work of the Defence Joint Procurement Task Force established by the Commission and the High Representative/Head of Agency, in line with the Joint Communication 'Defence Investment Gaps Analysis and Way Forward', to coordinate very short-term defence procurement needs and engage with Member States and EU defence manufacturers to support joint procurement to replenish stocks, notably in light of the support provided to Ukraine.
- (15) The Instrument is ~~coherent~~ **should ensure coherence** with existing collaborative EU defence-related initiatives such as ~~in~~ **the Capability Development Plan (CDP), the Coordinated Annual Review on Defence (CARD), the European Defence Fund (EDF)** as well as the Permanent Structured Cooperation (PESCO), and generates synergies with other EU programmes. The Instrument is fully coherent with the ambition of the Strategic Compass. **Where appropriate, regional and international priorities, including those in the North Atlantic Treaty Organization context, may also be taken into account if they are in line with Union priorities and do not prevent any Member State or associated country from participating, while seeking to avoid unnecessary duplication.**



- (16) As the instrument aims to enhance the competitiveness and efficiency of the Union's defence industry, to benefit from the instrument, common procurement contracts will need to be placed with ~~legal entities~~ **contractors or subcontractors** which are established in the Union or in associated countries and are not subject to control by non-associated third countries or by non-associated third-country entities. In that context, control **of a contractor or subcontractor** should be understood to be the ability to exercise a decisive influence on a ~~legal entity~~ **contractor or subcontractor** directly, or indirectly through one or more intermediate legal entities. Additionally, in order to ensure the protection of ~~essential~~ security and defence interests of the Union and its Member States, the infrastructure, facilities, assets and resources of the contractors and subcontractors involved in the common procurement which are used for the purposes of the common procurement shall be located on the territory of a Member State or of an associated ~~third~~ country.
- (17) In certain circumstances, it should be possible to derogate from the principle that contractors and subcontractors involved in a common procurement supported by the Instrument are not subject to control by non-associated third countries or non associated third-country entities. In that context, a ~~legal entity~~ **contractor or subcontractor** established in the Union or in an associated ~~third~~ country and controlled by a non-associated third country or a non-associated third country entity may participate as contractor ~~and/or~~ **subcontractor** involved in the common procurement, **provided that** ~~if~~ 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 European Defence Technological and Industrial Base, are fulfilled.
- (18) Furthermore, the common procurement procedures and contracts shall also include a requirement for the defence product to not be subject to ~~control or a~~ restriction by a non-associated third country or a non-associated third country entity **that limits Member States' ability to use it.**

- (19) Grants under the Instrument ~~may~~**should** take the form of financing not linked to cost based on the achievement of results by reference to work packages, milestones or targets of the common procurement process, in order to create the necessary incentive effect.
- (20) ~~Where the Union grant takes the form of financing not linked to costs, the Commission~~**The Commission, assisted by the committee referred to in Article 14,** should determine ~~in the work programme the funding conditions for each action, in particular (a) a description of action involving cooperation for common procurement with a view to addressing the most urgent and critical capacity needs, (b) the milestones for the implementation of the action, (c) the rough order of magnitude expected from the common procurement and (d) the maximum Union contribution available~~**priorities and the applicable funding conditions in the work programme.**
- (21) To generate the incentive effect, the level of Union contribution ~~may~~**for each action should be able to** be differentiated based on factors such as ~~(a) the complexity of the common procurement, for which a proportion of the anticipated size of the procurement contract, based on experience gained in similar actions, may serve as an initial proxy, (b) the characteristics of the cooperation, such as joint usage, stockpiling, ownership or maintenance, which are likely to induce stronger interoperability outcomes and long-term investment signals to industry, and (c)~~ **or** the number of participating Member States or associated countries or the inclusion of additional Member States or associated countries to existing cooperations.

- (22) Member States should appoint a procurement agent to conduct a common procurement on their behalf. The procurement agent should be a contracting authority **as defined in Directives 2014/24/EU and 2014/25/EU**, established in a Member State or an associated third country, ~~including Union bodies or international organisations, such as the Organisation Conjointe de Coopération en matière d'Armement (OCCAR)~~ **or the European Defence Agency or an international organisation.**

(23) In accordance with Article 193(2) of the Financial Regulation, 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, 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 avoid any disruption in Union support which could be prejudicial to the interests of the Union, it should be possible to provide in the financing decision for financial contributions to actions, **even if they have started before the grant application was submitted. Russia's illegal, unprovoked and unjustified aggression against Ukraine dramatically changed the European security context, and led to the need to adapt armed forces' capabilities and stocks to the possibility of a high intensity conflict. Resulting new defence equipment needs provoked a structural change of the European defence equipment market, to which defence industry needs to adapt urgently. Increasing manufacturing capacities and production rate requires modification of production systems and reduction of lead times, while safeguarding cost efficiency. Thus, by derogation from Article 193(2) of the Financial Regulation, cooperations between Member States established after the date of the publication of the Commission proposal for the Instrument, that is 19 July,** ~~that cover a period from the 24 February 2022, even if they have started before the grant application was submitted~~ **but before its entry into force, and addressing the most urgent and critical defence product needs, should be retroactively eligible for funding as long as it can be demonstrated that the perspective of the EU funding has incentivised the cooperation and that they contribute to the objectives of the Regulation and comply with its requirements.**

**(23a) This Regulation is without prejudice to the rules laid down in particular by 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. However, this Regulation provides for more specific eligibility requirements in Article 8. Directive 2009/81/EC provides that Member States may include in their laws the possibility to impose, in the contract documentation, requirements related to the protection of security of supply or the protection of the security of information. Article 8 of this Regulation builds upon these provisions and creates obligations for the procurement agent regarding eligibility requirements to be included in the contract documentation. These obligations should prevail over conflicting laws of the Member State in which the procurement agent is established.**

(24) Regulation (EU, Euratom) No 2018/1046 (the ‘Financial Regulation’) applies to this Programme. It lays down rules on the implementation of the Union budget, including the rules on grants.

- (25) This Regulation lays down a financial envelope for the Fund **for the period from the entry into force of this Regulation to 31 December 2024**, 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 resources<sup>2</sup> (Interinstitutional Agreement of 16 December 2020), for the European Parliament and for the Council during the annual budgetary procedure.

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<sup>2</sup> OJ L 433I, 22.12.2020, p. 28.

- (26) In accordance with the Financial Regulation, Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council<sup>3</sup>, Council Regulation (Euratom, EC) No 2988/95<sup>4</sup>, Council Regulation (Euratom, EC) No 2185/96<sup>5</sup> and Council Regulation (EU) 2017/1939<sup>6</sup>, the financial interests of the Union are to be protected through proportionate measures, including the prevention, detection, correction and investigation of irregularities and fraud, the recovery of funds lost, wrongly paid or incorrectly used and, where appropriate, the imposition of administrative sanctions. In particular, in accordance with Regulation (EU, Euratom) No 883/2013 and Regulation (Euratom, EC) No 2185/96 the European Anti-Fraud Office (OLAF) may carry out 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. In accordance with Regulation (EU) 2017/1939, the European Public Prosecutor's Office (EPPO) may investigate and prosecute fraud and other illegal activities affecting the financial interests of the Union as provided for in Directive (EU) 2017/1371 of the European Parliament and of the Council<sup>7</sup>. In accordance with the Financial Regulation, any person or entity receiving Union funds is to fully cooperate in the protection of the Union's financial interests, to grant the necessary rights and access to the Commission, OLAF, the EPPO and the European Court of Auditors (ECA) and to ensure that any third parties involved in the implementation of Union funds grant equivalent rights.
- (27) Pursuant to Article 94 of Council Decision 2013/755/EU<sup>8</sup>, 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.

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<sup>3</sup> 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 L248, 18.9.2013, p. 1).

<sup>4</sup> Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ L 312, 23.12.95, p.1).

<sup>5</sup> 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 L292, 15.11.96, p.2).

<sup>6</sup> 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 L283, 31.10.2017, p.1).

<sup>7</sup> 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).

<sup>8</sup> 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).

**(27a) For the purposes of this Regulation, defence products should be understood as products within the scope of Article 2 of Directive 2009/81/EC, in particular as the product types included in the list of arms, munitions and war material adopted by the Council in its Decision 255/58 of 15 April 1958. This list includes only equipment which is designed, developed and produced for specifically military purposes. However, the list is generic and is to be interpreted in a broad way in the light of the evolving character of technology, procurement policies and military requirements which lead to the development of new types of equipment, for instance on the basis of the Common Military List of the Union. For the purposes of this Regulation, defence products should also cover products which, although initially designed for civilian use, are later adapted to military purposes to be used as arms, munitions or war material.**

**(27b) In accordance with Article 4(2)TEU, national security remains the sole responsibility of each Member State. Member States determine among themselves the arrangements applicable to the protection of classified information for the purposes of the common procurements, in accordance with national laws and regulations.**

**(27c) The Commission protects EU classified information in accordance with the security rules set out in Decision (EU, Euratom) 2015/444. In line with Agreement 2011/C 202/05 and Council Decision 2013/488/EU, Member States provide an equivalent degree of protection to EU classified information to that provided by the security rules of the Council set out in Council Decision 2013/488/EU.**



**(27d) This Regulation is without prejudice to Member States' discretion as regards their policy on the export of defence-related products.**

(28) Since the objectives of this Regulation cannot be sufficiently achieved by the Member States but can rather be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

HAVE ADOPTED THIS REGULATION:

*Article 1*  
*Subject matter*

This Regulation establishes **an instrument for the reinforcement of** the European defence industry ~~Reinforcement~~ through common procurement Act (the ‘Instrument’), **for the period from the entry into force of this Regulation to 31 December 2024.**

*Article 2*  
*Definitions*

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

- (1) ‘**common procurement**’ means a ~~cooperative~~ procurement jointly conducted by ~~at least three~~ Member States;
- (2) ‘**control by a non-associated third country or by a non-associated third country entity of a contractor or subcontractor**’ means the ability to exercise a decisive influence on a legal entity ~~entity~~ **contractor or subcontractor** directly, or indirectly through one or more intermediate legal entities;
- (3) ‘**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;
- (4) ‘**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;

- (5) **‘procurement agent’ means a contracting authority, as defined in Directives 2014/24/EU and 2014/25/EU, established in a Member State or an associated country, or the European Defence Agency or an international organisation, designated by at least three Member States to conduct a common procurement on their behalf, including Union bodies or international organisations;**
- (5a) ‘defence products’ means products within the scope of Article 2 of Directive 2009/81/EC.**
- (5b) ‘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.**
- (5c) ‘sensitive information’ means unclassified information and data that is to be protected from unauthorised access or disclosure because of obligations laid down in Union or national law, where applicable, or in order to safeguard the privacy or security of a natural or legal person;**
- (6) ~~‘third country’ means a country that is not member of the Union.~~

*Article 3*  
*Objectives*

1. The Instrument has the following objectives:
  - (a) to foster the competitiveness and efficiency of the European Defence Technological and Industrial Base (EDTIB), **including SMEs and mid-capitalisation companies (mid-caps),** for a more resilient Union, in particular by speeding up, in a collaborative manner, the adjustment of industry to structural changes, including **the creation and** ramp-up of its manufacturing capacities **and the opening of the supply chains throughout the Union, thereby allowing the EDTIB to provide the defence products needed by Member States;**
  - (b) to foster cooperation in defence procurement process between participating Member States **contributing in order to contribute** to solidarity, interoperability, **and the** prevention of crowding-out effects, **avoiding to avoid** fragmentation and **increasing to increase** the effectiveness of public spending.
  
2. The objectives shall be pursued with an emphasis on strengthening and developing the **EDTIB throughout the** Union ~~defence industrial base~~ to allow it to address in particular the most urgent and critical defence products needs, especially **including** those revealed or exacerbated by the response to the Russian aggression against Ukraine, ~~taking into account~~ **such as the shipment of defence products to Ukraine, considering** the work of the Defence Joint Procurement Task Force **and in line with the objectives of the Strategic Compass. This can be achieved through the replenishment of stockpiles and the replacement and reinforcement of capabilities.**

## *Article 4*

### *Budget*

1. The financial envelope for the implementation of the Instrument for the period from the entry into force of this Regulation to 31 December 2024 shall be EUR 500 million in current prices.
2. The amount referred to in paragraph 1 may 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.
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 Common Provisions Regulation for 2021-2027. The Commission shall implement those resources directly in accordance with point (a) of the first subparagraph of Article 62(1) of Regulation (EU, Euratom) No 2018/1046 (the ‘the Financial Regulation’). Those resources shall be used for the benefit of the Member State concerned.
4. Budgetary commitments for activities extending over more than one financial year may be broken down over several years into annual instalments.

*Article 5*

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

The Instrument shall be open to the participation of ~~Member States and~~ 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.

*Article 6*

*Implementation and forms of EU funding*

1. The Instrument shall be implemented in direct management in accordance with the Financial Regulation.
2. The EU funding shall incentivize the cooperation between Member States to fulfil the objectives referred to in Article 3. The financial contribution shall be set up taking into consideration the collaborative nature of the common procurement plus an appropriate amount to create the incentive effect necessary to induce cooperation.

3. **By way of derogation to Article 193 of the Financial Regulation, and** where necessary for the implementation of an action, financial contributions may cover a ~~period~~**actions started** prior to the date of the request for financial contributions for that action, provided that ~~the~~**these actions** ~~has~~**have** not started prior to **19 July 2022 and have not been completed before the signature of the grant agreement. Retroactively eligible actions must comply with all eligibility criteria provided for in Articles 7 and 8**~~the 24 February 2022.~~
4. Grants implemented under direct management shall be awarded and managed in accordance with Title VIII of the Financial Regulation.

**Article 6a**

**Use of financing not linked to costs**

1. **Grants shall take the form of financing not linked to costs referred to in Article 180(3) of the Financial Regulation.**
2. **The level of Union contribution attributed to each action may be defined based on factors such as:**
- (a) **the complexity of the common procurement, for which a proportion of the estimated value of the common procurement contract and the experience gained in similar actions may serve as an initial proxy;**
- (b) **the characteristics of the cooperation, which are likely to induce stronger interoperability outcomes and long-term investment signals to industry; or**

**(c) the number of participating Member States and associated countries or the inclusion of additional Member States and associated countries to existing cooperations.**

**3. The Union financial contribution to each action shall be capped at 15 per cent of the estimated value of the common procurement contract per consortium of Member States and associated countries.**

*Article 7*

*Eligible actions*

1. Only actions fulfilling all of the following criteria shall be eligible for **Union** funding **under the Instrument**:

(a) the actions shall involve cooperation **between eligible entities, as referred to in Article 9,** for common procurement ~~of~~**addressing** the most urgent and critical defence products ~~between eligible entities implementing the objectives~~ **needs as referred to in Article 3 paragraph 2 and implementing the objectives of the Instrument;**

(b) the actions shall involve new cooperation or an extension of existing cooperation to **at least one** new Member States or associated countries;

(c) the actions **involving new cooperation, including within an existing framework, or an extension of existing cooperation** shall be carried out by a consortium of at least three Member States;

(d) the actions shall fulfil the additional conditions as set out in Article 8.

2. The following actions shall not be eligible for funding:



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

*Article 8*

*Additional ~~funding~~eligibility conditions*

1. Member States or associated ~~third~~ countries shall appoint a procurement agent to act on their behalf for the purpose of the common procurement. The procurement agent shall carry out the procurement procedures and conclude the resulting ~~agreements~~contracts with contractors on behalf of the **Member States and associated countries participating in the common procurement. The procurement agent may participate in the action as beneficiary and act as coordinator of the consortium and therefore may be able to manage and combine funds from the Instrument and funds from the** Member States.
2. The procurement procedures referred to in paragraph 1 shall be based on an agreement to be signed by the participating Member States with the procurement agent under the conditions set out in the work programme referred to in Article 11. **The agreement shall in particular determine the practical arrangements governing the common procurement and the decision-making process with regard to the choice of the procedure, the assessment of the tenders and the award of the contract.**

3. Common procurement procedures and contracts shall include participation requirements for contractors and subcontractors involved in the common procurement as referred to in paragraphs 4 to 10~~1~~.
4. Contractors and subcontractors involved in the common procurement shall be 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 3.
5. By way of derogation from paragraph 4, a legal entity established in the Union or in an associated ~~third~~ country and controlled by a non-associated third country or a non-associated third country entity may participate as contractor and subcontractor involved in the common procurement ~~only~~ if it provides guarantees ~~approved~~ verified by the Member State or associated ~~third~~ country in which the contractor or subcontractor involved in the common procurement is established. The guarantees shall provide assurances that the involvement of the contractor or subcontractor involved in the common procurement does 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 3.

6. ~~The participating Member States shall provide to the Commission a notification from the procurement agent on the guarantees provided by a contractor or subcontractor involved in the common procurement that is established in the Union or an associated third country and controlled by a non-associated third country or a non-associated third country entity. The guarantees and related provisions in the procurement contract shall be made available to the Commission upon request. The guarantees shall provide assurances that the involvement of the contractor or subcontractor involved in the common procurement does 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 3.~~
7. **The guarantees as referred to in paragraph 5 may be based on a standardised template provided by the Commission, assisted by the Committee referred to in Article 14, and shall be part of the tender specifications, to ensure a harmonised use throughout the European Union.** The guarantees shall in particular substantiate that, for the purposes of the common procurement, measures are in place to ensure that:
- (a) control over the contractor or subcontractor involved in the common procurement is not exercised in a manner that restrains or restricts its ability to carry out the order and to deliver results and;

- (b) access by a non-associated third country or by a non-associated third-country entity to ~~sensitive~~**classified** information **relating to the common procurement** is prevented and the employees or other persons involved in the common procurement have **a national security clearance issued by a Member State, in accordance with national laws and regulations.**

**7a. The procurement agent shall provide to the Commission a notification on the mitigation measures applied within the meaning of Regulation (EU) 2019/452 referred to in paragraph 4 or the guarantees referred to in paragraph 5. 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 14 of any notification provided in accordance with this paragraph.**

8. The infrastructure, facilities, assets and resources of the contractors and subcontractors involved in the common procurement which are used for the purposes of the common procurement shall be located on the territory of a Member State or of an associated ~~third~~ country. ~~Where no competitive substitutes are readily available in the Union or in an associated third country,~~ Contractors and subcontractors involved in the common procurement may use their assets, infrastructure, facilities and resources located or held outside the territory of the Member States or of the associated third countries, **if they do not have relevant infrastructure, facilities, assets and resources in the Union or in an associated country,** provided that such use does not contravene the security and defence interests of the Union and its Member States and is consistent with the objectives set out in Article 3.

9. Common procurement procedures and contracts shall also include a requirement for the defence product to not be subject to a restriction by a non-associated third country or a non-associated third country entity **directly, or indirectly through one or more intermediary legal entities, that limits Member States' ability to use it.**

**9a. By way of derogation from paragraph 9, in light of the current situation and the urgency to procure with the support of the Instrument, the requirement referred to in paragraph 9 does not apply to urgent and critical defence products, provided all the following conditions are met:**

**(a) Member States or associated countries participating in the common procurement commit to study the feasibility of replacing the components that cause the restriction by an alternative restriction-free component of EU origin;**

**(b) the procured products were in use prior to 24 February 2022 within the armed forces of a majority of the Member States participating in the common procurement.**

10. For the purposes of this Article, 'subcontractors involved in the common procurement' means **any entity which provides critical inputs that possess unique attributes essential for the functioning of a product and is allocated at least 10 per cent** of the following: **value of the contract.**

(a) ~~subcontractors with a direct contractual relationship to a contractor;~~

(b) ~~other subcontractors to which at least 10 % of the work share is allocated;~~

- (c) ~~subcontractors which may require access to classified information in order to carry out the common procurement.~~

**10a. The cost of components originating in non-associated third countries shall not exceed 30 per cent of the value of the end product. No components shall be sourced from non-associated third countries that contravene the security and defence interests of the Union and its Member States, including respect for the principle of good neighbourly relations.**

*Article 9*

*Eligible entities*

Provided that they comply with the eligibility criteria set out in Article 197 of the Financial Regulation, ~~the following entities are eligible for funding~~ **are**:

- (a) ~~public contracting authorities or contracting entities as defined in Directives 2014/24/EU<sup>9</sup> and 2014/25/EU<sup>10</sup> of the European Parliament and of the Council~~ **of Member States**;
- (b) public authorities of associated third countries;

**(ba) procurement agents as referred to in Article 2 paragraph 5.**

*Article 10*

*Award criteria*

- 1.** The Commission shall evaluate the proposals submitted on the basis of the following **criteria for the award criteria of the grant**:

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<sup>9</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).

<sup>10</sup> Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).

- 4.~~(a)~~ the number of Member States or associated countries participating in the common procurement;
- (b) the estimated value of the common procurement;**
- 1.~~(c)~~ the ~~contribution~~**demonstration** of the action's **contribution** to strengthening and developing the Union defence industrial base **EDTIB** to allow it to address in particular the most urgent and critical defence products needs as referred to in Article 3, including with respect to ~~procurement procedure and delivery lead times, replenishment of stocks, availability and supply;~~
- (d) the demonstration of the action's contribution to the replenishment of stockpiles, including those that have been depleted as a result of the response to the unprovoked and unjustified military aggression against Ukraine, as well as the replacement and reinforcement of capabilities as referred to in Article 3;**
2. ~~the contribution of the action to competitiveness and adaptation of the EDTIB, including through the envisaged ramp-up of its manufacturing capacities, reservation of manufacturing capacities, its reskilling and upskilling, and overall modernization;~~
- 3.~~(e)~~ the ~~contribution~~**extent** of the action's **contribution** to strengthening cooperation among Member States or associated countries, **in particular the proportional sharing of technical financial risks and opportunities, based on a genuinely cooperative concept, as well as the** and interoperability of products **procured under this Regulation;**
4. ~~the number of Member States or associated countries participating in the common procurement;~~
5. ~~the estimated size of the common procurement and any declaration by the participants that they will jointly use, stockpile, own or maintain the procured defence products;~~

6. ~~catalytic effect of Union financial support through demonstration of how the Union contribution can overcome obstacles to common procurement;~~
- (f) the extent of the action's contribution to the competitiveness and adaptation of the EDTIB, including through the envisaged creation or ramp-up of manufacturing capacities, reservation of manufacturing capacities, and security of supply;**
- (g) the participation of SMEs and mid-caps as well as new cross-border cooperation between contractors and subcontractors in the supply chains throughout the Union;**
- ~~7(h).~~ quality and efficiency of the plans for carrying out of the action.

- 2. The weighting of the award criteria shall be determined by the Commission, assisted by the Committee as referred to in Article 14.**
- 3. Upon request, the Commission shall share its evaluation as well as the underlying information submitted by the applicants with the committee referred to in Article 14.**

#### *Article 11*

##### *Work programme*

1. The Instrument shall be implemented through a **multiannual** work programme as referred to in Article 110 of the Financial Regulation.
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 14 paragraph 3.



**2a. The work programme shall set out:**

- (a) the funding priorities concerned, in line with the needs referred to in paragraph 2 of Article 3, a description of actions involving cooperation for common procurement and the estimated value of the common procurement, and the procedure for the evaluation and selection of the proposals;**
- (b) the overall amount of the Union contribution for each funding priority concerned;**
- (c) the minimum value of each joint procurement action and the indicative amount of financial support for actions carried out by Member States as well as, where applicable, incentives for procurement of higher value and inclusion of additional Member States or associated countries;**
- (d) a description of the milestones, designed in such a way as to mark substantial progress in implementing the respective action or the results to be achieved, as well as the associated amounts for disbursement;**
- (e) the arrangements for verification of the milestones and of the fulfilment of conditions or achievement of results; and**
- (f) the methods for determination and adjustment of the amounts, where applicable.**

3. ~~The work programme shall set out the minimum financial size of the joint procurement actions and determine the indicative amount of financial support for actions carried out by the minimum number of Member States as referred to in point c) of Article 7 paragraph 1 as well as incentives for procurement of higher value and inclusion of additional Member States or associated countries.~~

4. ~~The work programme shall set out the funding priorities in line with the needs referred to in Article 3 paragraph 2.~~

*Article 12*

*Monitoring and reporting*

1. The Commission shall draw up an evaluation report for the Instrument not later than 31 December 2024~~5~~ and submit it to the European Parliament and to the Council. The report shall evaluate the impact and effectiveness of the actions taken under the Instrument.
2. The report shall build on consultations of Member States and key stakeholders and shall, in particular, assess the progress made towards the achievement of the objectives set out in Article 3.

*Article 12a*

*Application of the rules on classified information*

1. **Member States and associated countries participating in a common procurement shall determine among themselves the arrangements applicable to the protection of classified information for the purposes of the common procurement, in accordance with national laws and regulations.**

2. **The Commission shall protect EU classified information received in relation to the Instrument in accordance with the security rules set out in Decision (EU, Euratom) 2015/444.**
3. **The Commission shall set up a secured exchange system in order to facilitate the exchange of sensitive and classified information between the Commission and the Member States and associated countries and, where appropriate, with the applicants and the recipients. That system shall take into account the Member States' national security regulations.**

*Article 13*

*Information, communication and publicity*

1. **Without prejudice to applicable Union or national laws and regulations for the protection of sensitive and classified information,** the recipients of Union funding shall acknowledge the origin 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, and its actions and results. Financial resources allocated to the Instrument shall also contribute to the corporate communication of the political priorities of the Union, as far as they are related to the objectives referred to in Article 3.

*Article 14*  
*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.**

*Article 15*

*Entry into force*

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 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