Council of the European Union
General Secretariat

Brussels, 02 September 2022

WK 11365/2022 INIT

LIMITE

INDEF
COPS
POLMIL
IND
MAP

DOCUMENT PARTIALLY ACCESSIBLE TO THE PUBLIC (11.02.2025)

This is a paper intended for a specific community of recipients. Handling and further distribution are under the sole responsibility of community members.

INFORMATION

From:	Presidency
To:	Ad hoc working party on defence industry
Subject:	Proposal for a Regulation on establishing the European defence industry reinforcement through common procurement act - Preliminary comments by Member States

With a view to the meeting of the Ad hoc working party on defence industry on Tuesday, 6 September, delegations will find enclosed the preliminary comments received from Member States, including also a summary by the Presidency.

Summary of MS comments on the EDIRPA Regulation proposal

Dear colleagues,

Please find bellow a summary of comments by MS on the Proposal for a Regulation of the European Parliament and of the Council on establishing the European defence industry Reinforcement through common Procurement Act.

The purpose of this document is to point out the main comments and concerns which were mentioned by a larger number of MS. The summary is rather general because of the ranging opinions on specific topics by MS.

The summary is divided into four main categories:

1) Legal issues / general concerns
2) Funding and budget
3) Eligible criteria
4) Award criteria and call conditions
5) Procurement agents and procedures
6) Other

1) Legal issues / general concerns

- Further clarifications of legal base, objectives and mechanisms of the Instrument.
- A need for coherence with the EDF Regulation and other EU documents (e.g. Strategic Compass, Versailles Declaration) and with defence-related initiatives, such as PESCO.
- Clarification of the relationship between the EDIRPA Regulation proposal and other EU documents, especially Directive 2009/81/EC and the Financial Regulation.

2) Funding and budget

- A need for detailed information about the source of funding.
- A broader description of what may be financed by the Instrument, including examples.
- The foreseen appropriation of EDIRPA funds in the coming years.

3) Eligibility criteria

- Clarification of the procedures (e.g. how the eligible actions will be selected and funded).
- The number of states forming a consortium (ranging from two to at least five).
- Time constraints for the eligibility of joint procurement actions (start and end date)
- Possible additional eligibility criteria.

4) Award criteria and call conditions

- Definition of award criteria (e.g. what will be considered as "most urgent and critical").
- Inclusion of possible additional award criteria, such as transparency, consistency with existing EU defence initiatives (e.g. CDP, CARD), cross-border cooperation, the geographic balance, security of supply considerations, and the promotion of SMEs and mid-caps.
- Methodology behind the selection of eligible joint procurement actions and the determination of Union funding.

5) Procurement agents and procedures

- Involvement of companies which are (partially) controlled by (entities from) non-associated countries.
- Mentioning explicitly not only the OCCAR as a procurement agent, but also other possibilities, such as the EDA or NSPA (NATO),
- Clarification of responsibilities of the procurement agent (e.g. responsibilities towards the EC, MS). A possible role of the procurement agent as coordinator of the consortium and recipient of the EU funds.
- Commission oversight and control of the eligible actions receiving Union funding.
- Procurement procedures.

6) Other

- Inclusion of provisions on the sharing and dissemination of classified information in the context of joint procurements.
- Possible exports of defence equipment procured jointly.

BE COMMENTS

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

Already characterised by an unstable situation in Europe's neighbouring regions for many years and a complex and challenging environment, the Union's geopolitical context has changed dramatically in light of the Russia's military aggression against Ukraine. The return of territorial conflict and high-intensity warfare on European soil requires Member States to rethink their defence plans and capacities.

EU Heads of State or Government, meeting in Versailles on 11 March 2022, committed to "bolster European defence capabilities" in light of the Russia's military aggression against Ukraine. The Versailles declaration notably states that Member States should increase defence expenditures; step up cooperation through joint projects; close shortfalls and meet capability objectives; boost innovation including through civil/military synergies; and strengthen and develop the EU defence industry, including SMEs. Moreover, the Council invited "the Commission, in coordination with the European Defence Agency, to put forward an analysis of the defence investment gaps by mid-May and to propose any further initiative necessary to strengthen the European defence industrial and technological base."

In response to this invitation, the European Commission and the High Representative presented a Joint Communication on the Defence Investment Gaps Analysis and Way Forward (the "Joint Communication") on 18 May 2022. It provided insights on three main types of gaps: a financial gap, an industrial one, and a capability gap. The Joint Communication notes that Member States' recent budgetary increases come after years of substantial cuts and severe underinvestment. Such underinvestment in defence expenditure led to industrial and capability gaps in the EU and to the current low levels of defence equipment stocks. The transfers of defence equipment to Ukraine, combined with a level of stocks tailored to peacetime, has resulted into the emergence of urgent and critical gaps in terms of military equipment.

The Joint Communication recalls that Member States need to restore defence combat readiness as a matter of urgency in light of the security situation and of transfers already made to Ukraine. In particular, a replenishment of stocks of material would also enable them to provide further assistance to Ukraine.

The Joint Communication indicates that as Member States will proceed to replenish their stockpiles and increase the quantity of their defence equipment, they should seize the opportunity to do so in a collaborative way. This would provide greater value for money, enhance interoperability and avoid that the most exposed EU Member States face an impossibility to obtain what they need, because of conflicting demands on the defence industry, which cannot respond to such a demand surge in the short term.

Without coordination and cooperation, increased Member State investments into defence risk to deepen the fragmentation of the European defence sector, to limit the potential for cooperation throughout the life cycle of the equipment, to intensify external dependencies and to hamper interoperability. Choices made as regards of short-term acquisitions will have a longer-term impact on the market strength of European Defence Technological and Industrial Base (EDTIB) and opportunities for the next decades.

Given the need to support in a timely and targeted manner the Member States for reinforcing their defence capacities in this emergency situation, the European Commission proposed to incentivise common procurement via the EU budget through a dedicated Short Term Instrument establishing the European Defence industry Reinforcement through Common Procurement Act (the 'Instrument').

The EU financial support brought through the Instrument should stimulate cooperative defence procurement process from Member States and benefit the EDTIB while ensuring EU Member States' armed forces' ability to act, security of supply and increased interoperability.

Such an Instrument should be established to incentivise those Member States who are willing to pursue common procurement to fill these gaps. The Instrument should be a dedicated tool designed to tackle the adverse effects and consequences of the Ukraine war in the Union.

The Instrument will follow the establishment of a Defence Joint Procurement Task Force supporting the coordination of their very short-term procurement needs to face the new security situation. Following the creation of the Instrument, the Commission will propose a European Defence Investment Programme (EDIP) regulation. The EDIP Regulation could serve as the anchor for future joint development and procurement projects of high common interest to the security of the Member States and the Union, and by extension of the logic of the short-term instrument, for possible associated Union financial intervention for the reinforcement of the European defence industrial base, in particular for projects which no single Member State could develop or procure alone.

Commented [HB1]: Isn't this a little vague ? Does it mean « will follow in time » or does it point to a functional link ? Recital 14 says « will build on and take into account the work of ». Is this what is meant ?

- **Consistency with existing policy provisions in the policy area**

The Instrument is consistent with the European Defence Fund. It complements the latter and relies on the same legal basis. While the EDF incentivises cooperation of legal entities on defence Research and Development projects, the Instrument will support cooperation on common defence procurement. The Instrument also takes up the European Defence Fund's approach when it comes to forbidding support for goods or services, which are prohibited by applicable international law, or lethal autonomous weapons without the possibility for meaningful human control over selection and engagement decisions when carrying out strikes against humans.

- **Consistency with other Union policies**

The Instrument will complement existing collaborative EU defence initiatives such as the Permanent Structured Cooperation (PESCO), and generate synergies with the implementation of the Strategic Compass for Security and Defence, and other EU programmes, such as the European Defence Fund.

The Instrument will also be implemented in full consistency with the EU capability development plan (CDP) identifying the defence capability priorities at EU level, as well as with the EU coordinated annual review on defence (CARD), which inter alia identifies new opportunities for defence cooperation. In this context, account may also be taken of relevant activities carried out by the North Atlantic Treaty Organisation (NATO) and other partners where they serve the Union's security and defence interests and do not exclude any Member State from participating.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

Aimed at fostering the competitiveness of the EDTIB by supporting cooperation between Member States in the field of defence common procurement, the proposal is based on Article 173 TFEU (support to competitiveness of the European Industry).

- **Subsidiarity (for non-exclusive competence)**

While cooperation presents several obvious advantages (increased interoperability, reduced unit and maintenance costs) EU Member States continue to procure defence systems in a mostly national manner.

This can be explained by several factors:

– Increased complexity and administrative burden of cooperation;

– different national requirements;

– different procurement calendars and lack of budgetary synchronisation;

– security of Information considerations;

– national defence industrial policy considerations;

– lack of national expertise in procurement agencies.

According to EDA Defence Data for 2020, EU Member States invested only €4.1bn in collaborative defence equipment procurement (11% of their total spending), a 13% decrease compared to 2019.

This is far below the 35% benchmark to which Member States committed. Fragmentation of the demand side of the defence market results into a series of problems and inefficiencies, including on the supply side, while increasing maintenance costs of a plethora of different systems.

If this current trend is not addressed, it will continue to significantly undermine the competitiveness of the EDTIB and risks affecting its market prospects in the next decade.

At the same time, the current defence market context, marked by an increased security threat and the realistic prospect of a high intensity conflict, sees Member States rapidly increasing their defence budgets and aiming at similar equipment purchases. This results in an amount of demand which exceeds EDTIB manufacturing capacities, currently tailored for peacetime.

Consequently, strong price inflation can be anticipated, as well as longer delays in delivery time, potentially harming the security of EU citizens. Defence industries need to secure the production capacity necessary to process orders, as well as critical raw materials and sub-components. In this context, defence manufacturers might privilege major orders, potentially

leaving exposed the most vulnerable countries, lacking the critical size and financial means to ensure large orders.

Fragmented orders placed individually by Member States would result in more limited market prospects for defence companies, and necessarily translate into an increased fragmentation of the offer, thus significantly harming the economic efficiency of the sector and worsening the EDTIB competitiveness.

Incentivising joint procurement is therefore a necessity, and would present the advantage of ensuring that, while the defence industry can more rapidly adapt to current market structural changes, national Armed Forces would obtain better conditions and delivery timelines by cooperating in the acquisition phase. On top of this, cooperation in the field of acquisition would result in diminished costs in terms of exploitation, maintenance and withdrawal of the systems (costs estimated at 55% of the total cost of an equipment).

Consequently, the current situation requires a policy intervention at EU level to improve the level of cooperation by incentivising financial cooperation between Member States in the defence procurement process. Such intervention is beneficial for the security of EU citizens as well as for the EDTIB.

- **Proportionality**

The proposed policy approach is proportionate to the scale and gravity of the problems that have been identified, i.e. need to speed up the adjustment of industry to structural changes and encourage an environment favourable to cooperation between undertakings within a system of open and competitive markets by incentivising cooperation and coordination between Member States. It respects the limits of possible Union intervention under the Treaties.

The initiative is limited to goals that Member States cannot achieve satisfactorily on their own and where the Union can be expected to do better.

- **Choice of the instrument**

The Commission proposes a Regulation of the European Parliament and of the Council in order to set up the Instrument. This is the most suitable legal instrument as only a Regulation, with its directly applicable legal provisions, can provide the necessary degree of uniformity needed for the establishment and operation of a Union Instrument aiming at promoting the reinforcement of an industrial sector across Europe.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

There is no prior existing legislation covering or pertaining to this specific action. To date, there was no other Union legislative initiatives in the area of defence with the objective of enhancing the competitiveness of the EDTIB in particular by speeding up, in a collaborative manner, the adjustment of industry to structural changes, including ramp-up of its manufacturing capacities. There was also no other Union legislative initiatives in the area of defence with the objective of fostering cooperation in the defence procurement process between participating Member States. Therefore, there is no previous ex-post evaluation or fitness check of existing legislation that took place for this legislative initiative.

- **Impact assessment**

European Council conclusions of 30-31 May 2022 invited the Council to examine as a matter of urgency, the short-term instrument. Therefore, Commission tables the proposal for a regulation establishing the instrument without including an impact assessment, in order to allow the co-legislators to receive it as early as possible.

- **Regulatory fitness and simplification**

The Instrument is not expected to increase the administrative burden.

The proposed performance-based approach, relying on the conditionality between the disbursement of payments and the achievement of milestones and targets by the consortium, is also an element of simplification in the implementation of the instrument.

- **Fundamental rights**

Enhancing the security of EU citizens can contribute to safeguarding their fundamental rights.

In addition, actions for defence common procurement of goods or services, which are prohibited by applicable international law, shall not be eligible for support from the Instrument.

Moreover, actions with a view to the common procurement of lethal autonomous weapons without the possibility for meaningful human control over selection and engagement decisions when carrying out strikes against humans shall not be eligible for support from the Instrument.

4. BUDGETARY IMPLICATIONS

The financial envelope for the implementation of the Instrument for the period from period XX 2022 to 31 December 2024 shall be EUR 500 million in current prices.

The impact on the multi-annual financial framework period in terms of required budget and human resources is detailed in the legislative financial statement annexed to the proposal.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The Commission should regularly monitor its actions, review progress made towards delivering the expected results as well as examine synergies with other complementary Union programmes. The Commission should draw up an evaluation report for the Instrument and communicate it to the European Parliament and to the Council. This report will notably assess the progress made towards the achievement of the objectives set in the proposal.

2022/0219 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on establishing the European defence industry Reinforcement through common 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,

Commented [HB2]: What is the position of the COM concerning Article 41(2) TEU. Do you consider that the applicability of this article is limited to military operations (in the sense of employment of troops and material to respond to a security situation) ? This is at least the interpretation of BE. Also, shouldn't we also add a reference here to art. 6 TFUE (Union's competence in the area of industry) ?

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[1],

Acting in accordance with the ordinary legislative procedure,

Whereas:

(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.

(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 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.

(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.

[1] OJ C , , p. .

(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 should therefore be at the core of those efforts. Indeed difficulties and gaps still exist and the European defence industrial base remains highly fragmented, lacking sufficient collaborative action and inter-operability of products.

(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 European Defence Technological and Industrial Base manufacturing capacities, currently tailored for peace time.

Commented [HB3]: I would suggest « could exceed », as I don't think we have actual evidence that the demand actually does exceed the EDTIB's capacity (even though this is likely)

(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. Indeed, without coordination and cooperation, the increased national investments are likely to 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, enhance its competitiveness and efficiency, and thereby contribute to strengthening and reforming Member States' defence industrial capabilities. Addressing industrial shortfalls should include promptly tackling the most urgent gaps.

Commented [HB4]: I would suggest using « European Defence Technological and Industrial Base » or « EDTIB » in the whole document, unless where a different meaning is sought

(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 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 while allowing economies of scale in the actions undertaken by Member States to reinforce and modernise the European Technological and Industrial Base, 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.

Commented [HB5]: I would suggest « collaborative actions », as « joint action » has another legal meaning

Commented [HB6]: As mentioned above, suggest to replace by « EDTIB » overall

Commented [HB7]: I would suggest to replace « maintenance » with « support », which has a broader meaning

(14) This Instrument will build on and take into account 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 with existing collaborative EU defence-related initiatives such as in the European Defence Fund 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.

(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 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 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. 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 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 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 restriction by a non-associated third country or a non-associated third country entity.

(19) Grants under the Instrument may 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 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

Commented [HB8]: « Instrument » should be with a capital letter (twice)

Commented [HB9]: This should read « associated third countries ». Suggest to check the whole document to ensure coherent use of these terms

Commented [HB10]: Suggest « or » rather than « and »

Commented [HB11]: This should be clarified, and probably included inthe body of the document as well expected from the common procurement and (d) the maximum Union contribution available.

(21) To generate the incentive effect, the level of Union contribution may 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) 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 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).

(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 that cover a period from the 24 February 2022, even if they have started before the grant application was submitted.

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, 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[2] (Interinstitutional Agreement of 16 December 2020), for the European Parliament and for the Council during the annual budgetary procedure.

(26) In accordance with the Financial Regulation, Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council[3], Council Regulation (Euratom, EC)

Commented [HB12]: Should this more detailed description not be included in the body of the Regulation ?

Commented [HB13]: This seems to mean that the award criteria will also be used to determine the amount of EU fundting. If this is correct, it could be made clearar in the body of the document.

Commented [HB14]: The concept of « participating Member States » is not necessarily clear. Would suggest to replace overall with « Member States or associated third countries participating in the common procurement »

Commented [HB15]: Associated third countries

Commented [HB16]: Associated third countries

Commented [HB17]: Suggest to use « shall » (or at least another word than « should »), as appointing a procurement agent is an obligation in the body of the Regulation

Commented [HB18]: Do EU bodies and international organisations such as OCCAR qualify as contracting authorities within the meaning of the EU prourement directives ? Directive 2009/81/EC, when referring to European public bodies, seem to say no.
So I would suggest in the sentence to delete the word « including ».
I would also suggest to add « such as the European Defence Agency » after « Union bodies ».
As discussed during the first meeting of the AHWP, the procurementa agent could also be a NATO organisation. In order to make this clear, I would suggest adding this at the end of the sentence. Maybe NSPA should be contacted to ascertain if they would be willing to take this role.

Commented [HB19]: What is the impact on the procurement rules to be applied by the procurement agent for the common procurement ? Will article 205(1) of the Financial Regulations apply and the procurement be based on the usual purchasing practices of the procurement agent (e.g. in the case of a MS, its domestic law transposing Directive 2009/81/EC) or will special rules be imposed on the procurement agent on the basis of article 205(2) of the Financial Regumations ?

2 OJ L 433I, 22.12.2020, p. 28.

3 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.

No 2988/95[4], Council Regulation (Euratom, EC) No 2185/96[5] and Council Regulation (EU) 2017/1939[6], 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[7]. 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[8], 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.

Commented [HB20]: As the funds under the instrument are disbursed to the MS, I do not see to which entities this refers to. Does it refer to contractors and subcontractors ?

(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 the European Defence Industry Reinforcement through common Procurement Act (the 'Instrument').

[4] 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).

[5] 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).

[6] 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).

[7] 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).

[8] 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).

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**' means the ability to exercise a decisive influence on a legal entity 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 established in a Member State or an associated country designated by at least three Member States to conduct a common procurement on their behalf, including Union bodies or international organisations;

(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) for a more resilient Union, in particular by speeding up, in a collaborative manner, the adjustment of industry to structural changes, including ramp-up of its manufacturing capacities;

(b) to foster cooperation in defence procurement process between participating Member States contributing to solidarity, interoperability, prevention of crowding-out effects, avoiding fragmentation and increasing the effectiveness of public spending.

2. The objectives shall be pursued with an emphasis on strengthening and developing the Union defence industrial base to allow it to address in particular the most urgent and critical defence products needs, especially those revealed or exacerbated by the response to the Russian aggression against Ukraine, taking into account the work of the Defence Joint Procurement Task Force.

Commented [HB21]: This means that cooperative procurement within the scope of a bilateral cooperation (e.g. Belgium-Netherlands or Belgium-France) would not be eligible. This might be detrimental to the efficiency of the Instrument. As the number of participating MS is an award criteria, I would suggest to delete this minimum requirement (or replace it by « two »)

Commented [HB22]: Associated third country

Commented [HB23]: Associated third country

Commented [HB24]: Do EU bodies and international organisations such as OCCAR qualify as contracting authorities within the meaning of the EU prourement directives ? Directive 2009/81/EC, when referring to European public bodies, seem to say no.
So I would suggest to rephrase the definition as « a contracting authority established in a Member State or in an associated country, a Union body or an international organisation designated by at least three Member States to conduct a common procurement on their behalf »

Commented [HB25]: Could be useful to include a definiton of « associated third country » (it is currently only found in article 5)

Commented [HB26]: We would suggest that there should be a reference to SME in the Regulation, considering their importance for the EU economy, and that possible participation of SME should be taken into account in the award. Therefore, we suggest making reference to SMEs to justify an award criteria in article 10 (2) by adding « including SMEs » or « in particular SMEs » after « (EDTIB) »

Commented [HB27]: Are there « non participating » MS in terms of the Instrument ? I would suggest to replace here by « Member States and associated third countries » as the sattement here is generic, and when referring to participants in an action use the terms « Member States or associated third countries participating in the common procurement »

Commented [HB28]: Suggest to add what this is, as the detals are only provided in the preamble

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 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. Where necessary for the implementation of an action, financial contributions may cover a period prior to the date of the request for financial contributions for that action, provided that the action has not started prior to the 24 February 2022.

4. Grants implemented under direct management shall be awarded and managed in accordance with Title VIII of the Financial Regulation.

Commented [HB29]: Could the COM clarify in more details the sources of this budget ? Would there be a budgetary impact for the MS ?

Commented [HB30]: On the basis of the discussions held at the first meeting of the AHWP, I understand this paragraph to refer only to the costs incurred by COM to implement the Instrument. Correct ?

Commented [HB31]: Change title by « eligible countries » ?

Commented [HB32]: Would suggest « associated third countries ».
It may be useful to include « associated third country » as a definition, as it is found in many places in the document.

Commented [HB33]: Should this article not mention financing not linked to cost that is mentioned in the recitals ? If yes, this article could explain how this concept will be eimplemented in practice

Commented [HB34]: It is not entirealy clear what is meant by this sentence… This could possibly be clarified through examples at the next meeting of the AHWP (and then the text clarified on this basis). See next comment on what will be funded.

Article 7

Eligible actions

Commented [HB35]: This section is relatively clear as a generic statement, but the devil is in the details. What will actually be funded by the instrument ?
-Part or all of the cost of the defence products themselves ?
-The administrative costs of the procurement agent ?
-The administrative costs of the pMS ?
-An incentive ? And if yes, based on what ?
As suggested during the first meeting of the AHWP, examples would be welcome

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

Commented [HB36]: Suggest to replace by « Union funding under the Instrument »

(a) the actions shall involve cooperation for common procurement of the most urgent and critical defence products between eligible entities implementing the objectives referred to in Article 3;

Commented [HB37]: The word « involve » is somewhat vague : it seems to imply that the action may include other things than common procurement. Suggest to rephrase.

Commented [HB38]: Suggest to delete : the concept of cooperation is already in the definition of common procurement

Commented [HB39]: Shouldn't « defence products » be defined ? Is it synionymous with « defence equipment » in Directive 2009/81/EC ?
Shouldn't eligible actions also include services ? Or maybe only services ancillary to the defence products ?

Commented [HB40]: For the sake of internal clarity, maybe the text should read « common procurement of the most urgent and critical defence products, as evaluated by the Commission on the basis of Article 10, between eligible entities referred to in Article 9, implementing… »

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

Commented [HB41]: This means that new actions within the scope of an existing cooperation are not covered. I would suggest that this may be overly limitative, as using the framework of an existing cooperation would facilitate the procurement. This requirement actually penalises the Member States who are currently already collaborating a lot…
Moreover, if the instrument is supposed to be the blueprint of a future long-term instrument, it is not realistic to require every time the creation of a new cooperation (we cannot create indefinitely new cooperation frameworks)

Commented [HB42]: Associated third countries

(c) the actions shall be carried out by a consortium of at least three Member States;

Commented [HB43]: As (a) refers to « common procurement », this condition is redundant with the definition Moreover, we find that the use of the word « consortium » in this concext is not clear (this is the only place in the proposed Instrument that the ter mis used). Whilst it is clerar in the EDF, it is not really appropriate for cooperation among States. If this paragraph is maintained, suggest to delete « a consortium of »
And I recall our comment on the definitions that we would advise replacing « three » by « two »

(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 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 with contractors on behalf of the participating 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.

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.

4. Contractors and subcontractors involved in the common procurement shall be established and have their executive management structures in the Union. They shall not be subject to control by a non-associated third country or by a non-associated third country entity.

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 by the Member State or associated third country in which the contractor is established.

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 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;

Commented [HB44]: I suppose that the relationship between the pMS and the procurement agent is exempted from compliance with Directive 2009/81/EC on the basis of :
-Its article 12(c) if the procurement agent is an international organisation or a Union body, or
-Its article 13(f) if the procurement agent is an MS.
Can you confirm this interpretation ?

Commented [HB45]: See comment above on the procurement procedures to be applies by the procurement agent : Will article 205(1) of the Financial Regulations apply and the procurement be based on the usual purchasing practices of the procurement agent (e.g. in the case of a MS, its domestic law transposing Directive 2009/81/EC) or will special rules be imposed on the procurement agent on the basis of article 205(2) of the Financial Regumations ?

Commented [HB46]: Would « contracts » be clearer ?

Commented [HB47]: As suggested, propose to replace overall with « Member States or associated third countries participating in the common procurement »

Commented [HB48]: The legal set-up and basis of collaborative procurement can be widely different. I would suggest to keep this sentence more generic : « based on one or more agreements between the Member States and associated third countries participating in the common procurement and the procurement agent ».
Moreover, maybe it would be useful to specify that the agreements in question must be compliant with EU law (e.g. not including clauses that discriminate on the basis of the nationality of economic operators from the EU) ?

Commented [HB49]: Suggest to replace by « or »

Commented [HB50]: Porpose to replace by « Member States participating in the common procurement » (no mention of associated third countries, because I think this obligation is more for the MS)

Commented [HB51]: This sentence seems contradictory with the previous one. Or does the first one mean that only a notification is mandatory, but that the detailed quarantees are only provided on request ?

Commented [HB52]: Would suggest to move this sentence to paragraph 5, so that paragraph 5 deals with the gnarantees and paragraph 6 with the notification to the COM

Commented [HB53]: Suggest to merge this paragraph with paragraph 5, for the same reason

(b) access by a non-associated third country or by a non-associated third-country entity to sensitive information is prevented and the employees or other persons involved in the common procurement have national security clearance issued by a Member State.

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 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.

10. For the purposes of this Article, 'subcontractors involved in the common procurement' means all of the following:

(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.

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:

(a) public contracting authorities or contracting entities as defined in Directives 2014/24/EU[9] and 2014/25/EU[10] of the European Parliament and of the Council;

(b) public authorities of associated third countries.

Commented [HB54]: This is not entirely in line with EDF Regulation, and we should strive to ensure that the two are coherent :
1) only access to sensisitve information **relating to the common procurement** should be protected → sensisitive information that has nothing to do with the common procurement or other EU projects should still be accessible to the 3rd country entity
2) Employees or other involved persons should have a security clearance **if required** (i.e. when something is officialy classified) → no level-playing-field if foreign controlled entities are required to have a security clearance for unclassified information
Therefore, suggest to add « relating to the common procurement » after « sensitive information » on the second line, and « where appropriate » at the end of the paragraph.

Commented [HB55]: To avoid confusion, would suggest to use the same terminology as set forth in para 6 above

Commented [HB56]: This means that all ITAR- or EAR-controlled items are excluded

Commented [HB57]: Shouldn't we include this in the definitions (together, maybe, with « contractor ») ?

Commented [HB58]: See my comment during the first meeting of the AHWP : in many MS, when the State receives income, these income are accounted for globally, and not to cover a specific expense. Therefore, the payments of COM would be « lost » in the State's revenues (in Belgium, this can be countered through a law). But we should pay close attention to whom the payments are made. I would suggest that the payments would better be made to the procurement agent, or the method of payment defined case by case in the grant agreement.

Commented [HB59]: I suppose that the defence ministries of the MS will have to comply with the rules of the Financial Regulations related to grant application (article 196 of the Fiancnail Regulations), grant implementation (articles 202-205 of the Financial Regulations), etc. Maybe it would be useful to receive a presentation from the Commission on these rules, as I do not believe that the MOD of the MS are familiar with then.

Commented [HB60]: Is this word meant to limit the concept of contracting authority ? If not I would suggest to delete it.

Commented [HB61]: Would suggest referring to Directive 2009/81/EC as well.

Commented [HB62]: But as associated third countries mean the EEA members, the EU procurement directives are applicable to them, so I think that actually referring to contracting authorities within the meaning of the directives also covers those of the associated third countries

9 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).

10 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).

Article 10
Award criteria

The Commission shall evaluate the proposals submitted on the basis of the following award criteria:

1. The contribution of the action to strengthening and developing the Union defence industrial base 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;

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. the contribution of the action to strengthening cooperation among Member States or associated countries and interoperability of products;

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;

7. quality and efficiency of the plans for carrying out of the action.

Commented [HB63]: Who needs to submit proposals ? The pMS ? The procurement agent ?
Must there be a written agreement (e.g. MOU) amongst the pMS before submission ? Let's keep in mind that negotiating and signing an MOU takes one year if everything goes very smoothly, and two to three years in most cases…
As mentioned above, it might be useful that the Commission gives a presnetation on submission to the MS

Commented [HB64]: From what I understood, the amount of EU funding is not linked to actual costs. So how will the amount of EU funding be determined ? Strictly speaking, award criteria only define which action will be eligible for the grant. Will these criteria also define the level of funding ? If yes, this should be clarified I think.

Commented [HB65]: Replace by EDTIB ?

Commented [HB66]: SMEs play a key role in the EDTIB, but are often overlooked. To avoid this happening in EDPIRA, it would be better to include the participation of SMEs in the award criteria. Therefore, we suggest to add at the end of the paragraph « with special attention to the involvement of SMEs ».

Commented [HB67]: Associated third countries

Commented [HB68]: Although cross border cooperation is one of the main goals of the EDF, it is not reflected in the award criteria for EDIPRA. Making cross border cooperation a strict eligibility criteria might be a bit too restrictive, but cross border cooperation in the defence sector should be encouraged by means of the award criteria. Therefore, we would suggest to add at the end of the paragraph « including cross border cooperation between contractors and subcontractors » or to create a new criteria whereby the proposal would receive higher marks if it concerns products that are the result of cross border cooperation between contractors and subcontractors.

Commented [HB69]: Associated third countries

Commented [HB70]: Replace by « Member States and associated third countries participating in the common procurement »

Commented [HB71]: Maybe useful to clarify what is meant by « jointly » in this context ? For instance, if the pMS each own their defence products but they participate to operations/missions together, is it joint use ?

Commented [HB72]: The Instrument should clarify who is or can be the owner of the defense products jointly procured under this instrument. I would guess it would in any case not be the EU… ;-) Maybe a sentence could be added somewhere such as « the defence products procured through the common procurement shall be owned by the Member States and associated third countries participating in the common procurement, individually, jointly, or as they otherwise determine amongst themselves »

Article 11
Work programme

1. The Instrument shall be implemented through a 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.

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 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 13
Information, communication and publicity

1. 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.

Commented [HB73]: Based on the discussions held at the first meeting of the AHWP, it seems that the Commission wishes to have a fairly generic Regulation, and to include the details in the work programme. This is acceptable, but then the MS must be given sufficient say in the management principles that will be included in the work programme.
The work programme must take into account the capability gaps and priorities defined in the SC
Would common actions tu support UKR through the EPF also be covered ?

Commented [HB74]: Maybe replace by « each » ?

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.

Commented [HB75]: If the approach is chosen to have a fairly generic Regulation and to include details in the work programme, the committee must have sufficient say in the principles developped in the work programme.
It might be useful to keep the AHWGDI alive as a Council forum to agree on prioritied and future evolutions of the instrument.

Commented [HB76]: This text seems to denote a difference of status between the EDA and the EEAS. Does this mean that the EEAS is not invited to provide its views and expertise, but only to be a « silent » observer ?

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

CZ COMMENTS

The Czech Republic would like to provide a comment on paragraph 22. We believe that not only the role of the OCCAR as a procurement agent should be explicitly stated in the draft of the EDIRPA regulation, but also (possible) involvement of the European Defence Agency (EDA) or NATO Support and Procurement Agency (NSPA). The wording of the paragraph would be as follows:

(22) Member States should appoint a procurement agent to conduct a common procurement on their behalf. The procurement agent should be a contracting authority 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), ***the European Defence Agency (EDA) or NATO Support and Procurement Agency (NSPA).***

DE COMMENTS

Attachment to the DEU first comments of the EDIRPA regulation draft.

Please find the proposed text changes in the left column with track changes. Parts of the text, which are commented, are highlighted in green.

DRAFT Text of Recitals and Articles	**Comments and Questions**
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[11], Acting in accordance with the ordinary legislative procedure,	

[11] OJC, pp.

Whereas:	
(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.	
(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 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.	Should it turn out during the iteration of the regulation draft that EDIRPA will address activities, which are not primarily in context with replenishment of stocks, the link to the “transfer of defence products to Ukraine” should be dropped in this recital. In this case it would also become necessary to differentiate stronger between the activities of the Task Force and the EDIRPA instrument.
(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.	
(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 Russian unlawful military aggression, in a collaborative way.	In line with previous EU statements, we suggest to use the term “the current Russian unlawful military aggression”

(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 should therefore be at the core of those efforts. Indeed difficulties and gaps still exist and the European defence industrial base remains highly fragmented, lacking sufficient collaborative action and inter-operability of products.	
(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 European Defence Technological and Industrial Base manufacturing capacities, currently tailored for peace time.	
(8) As a result, strong price inflation may be anticipated, as well as longer delays in delivery time, potentially leading to adverse effects on 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.	We suggest to use “leading to adverse effects on the security of the Union and its Member States” rather than “harming”.
(9) Furthermore, efforts should be made so that the increased spending results in a much stronger European Defence Technological and Industrial Base. Indeed, increased coordination and cooperation are necessary, to avoid that	We seek to underline the positive effects that could follow a strengthened EDTIB, thus, we suggest the formulation “Indeed, increased coordination and cooperation are necessary, to avoid that the increased national investments deepen the

national investments are deepen the fragmentation of the European defence industry.	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, enhance its competitiveness and efficiency, and thereby 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 European industrial base takes 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.	When it turns out that the "Short-Term" instrument could not be implemented rapidly (which at the moment seems very likely) we should rather refer to it as the "instrument".
(13) The Short-Term Instrument should offset the complexity and risks associated with such joint actions while allowing economies of scale in the actions undertaken by Member States to reinforce and modernise the European Technological and Industrial Base, 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	The effect of common procurement on efficiency and innovation in European defense and security industry might be even stronger if markets are competitive throughout the European Union.

withdrawal of the systems. The Instrument shall be accompanied by efforts strengthening the Common Market for defence and security products, services and systems with a level-playing-field for suppliers from all EU member states. Joint procurement on a Common Market for the defence and security industry allows for economies of scale and assures innovation and efficiency in production and technology.	
(14) This Instrument will build on and take into account 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 fully coherent with existing collaborative EU defence-related initiatives such as in the European Defence Fund 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.	The instrument shall be fully coherent with the existing EU defence-related initiatives to avoid duplication.
(16) 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. The instrument might also enhance the competitiveness and efficiency of the Union's defence industry.	This refers rather to national or European security interests than to efficiency and innovations. Limiting number and origin of suppliers might reduce competitive pressure on national or European security and defence industry. The overall effect of lessening competition and generating economies of scope by common procurement is not unique. Therefore change of order of arguments.

To benefit from the instrument, common procurement contracts will need to be placed with legal entities 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 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.	
(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 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 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.	Need to specify "circumstances" and "conditions".
(18) Furthermore, the common procurement procedures and contracts shall also include a requirement for the defence product to not be subject to control or restriction by a non-associated third country or a non-associated third country entity.	
(19) Grants under the Instrument may take the form of financing not linked to cost based on the achievement of results by	Needs to be revisited in light of discussion on Art. 4 (2), 6 and 7.

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 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.	Needs to be revisited in light of discussion on Art. 4 (2), 6 and 7.
(21) To generate the incentive effect, the level of Union contribution may 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) the number of participating Member States or associated countries or the inclusion of additional Member States or associated countries to existing cooperations.	See comments in para 10; From our point of view the dependency of the size of the Union contribution on the various factors (a)- (c) is not incorporated in the relevant art. 10: According to art. 10 COM shall evaluate the proposals submitted on the basis of specific award criteria, what we understand as a “whether or whether not” – check., Needs to be revisited in light of discussion on Art. 4 (2).
(22) Member States should appoint a procurement agent to conduct a common procurement on their behalf. The procurement agent should be a contracting authority 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).	
(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 that cover a period from the 24 February 2022, even if they have started before the grant application was submitted.	See comments on art. 6 para 3
(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, 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[12] (Interinstitutional Agreement of 16 December 2020), for the European Parliament and for the Council during the annual budgetary procedure.	

[12] 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[13], Council Regulation (Euratom, EC) No 2988/95[14], Council Regulation (Euratom, EC) No 2185/96[15] and Council Regulation (EU) 2017/1939[16], 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[17]. In accordance with the Financial Regulation, any person or entity receiving Union funds is to fully cooperate in the protection of the Union's	

[13] 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.

[14] 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).

[15] 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).

[16] 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).

[17] 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).

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[18], 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.	
(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	In line with the other programmes of the multiannual financial framework and considering the justification of this short term instrument we would very much welcome the inclusion of

[18] 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).

This Regulation establishes the European Defence Industry Reinforcement through common Procurement Act (the ‘Instrument’) for the period from entry into force to 31 December 2024.	a sunset clause limiting the duration of this regulation to a maximum of 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’ means the ability to exercise a decisive influence on a legal entity 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 established in a Member State or an associated country designated by at least three Member States to conduct a common procurement on their behalf, including Union bodies or international organisations; (6) 'third country' means a country that is not a member of the Union; (7) 'non-associated third country' means a country that is neither a member of the Union, nor an 'associated third country' as defined in Article 5.	
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) for a more resilient Union, in particular by speeding up, in a collaborative manner, the adjustment of industry to structural changes, including ramp-up of its manufacturing capacities, and strengthening the Common Market for defence and security products, services and systems with a level-playing-field for suppliers from all member states; (b) to foster cooperation in defence procurement process between participating Member States contributing to solidarity, interoperability, prevention of crowding-out effects, avoiding fragmentation and increasing the effectiveness of public spending. 2. The objectives shall be pursued with an emphasis on	see recital 13

strengthening and developing the Union defence industrial base to allow it to address in particular the most urgent and critical defence products needs, especially those revealed or exacerbated by the response to the Russian aggression against Ukraine, taking into account the work of the Defence Joint Procurement Task Force.	
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 exclusively for administrative assistance for the implementation of the Instrument, such as preparatory, monitoring, control, audit and evaluation activities including corporate information technology systems. The amount awarded must not exceed these administrative costs. 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.	Changes according to our reading with a view to art. 41 para 1 and 2 of the treaty on the European Union, see general question above.

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 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 third countries), in accordance with the conditions laid down in the Agreement on the European Economic Area.	Sent. 1: Clarification as mostly use in the Act as 'associated third country'
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. Where necessary for the implementation of an action, financial contributions may cover a period prior to the date of the request for financial contributions for that action, provided that the action has not started prior to the 24 February 2022.	With a view to the objectives mentioned in art. 3: Does para 3 really creates incentives for new cooperations? Have cooperations that would meet the criteria of this regulations been set up after February 24th?

4. Grants implemented under direct management shall be awarded and managed in accordance with Title VIII of the Financial Regulation.	
Article 7 Eligible actions 1. Only actions fulfilling all of the following criteria shall be eligible for funding: a) the action shall strengthen and develop the European defence industrial base to allow it to address in particular the most urgent and critical defence products as referred to in Article 3, including with respect to delivery lead times, replenishment of stocks, availability and supply; b) the action shall foster the 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; (c) the actions shall involve cooperation for common procurement of the most urgent and critical defence products between eligible entities implementing the objectives referred to in Article 3; (d) the actions shall involve new cooperation or an extension of existing cooperation to new Member States or associated countries; (e) the actions shall be carried out by a consortium of at least two Member States;	No. 1(c): Cf. comment to Article 2(1). No. 1(d) new, see recital 13 No. 1(d) changed to 1(e) new. Additional paras moved from art. 10 (see comments in art. 10: With reference to the legal basis in art. 173 of the Treaty on the Functioning of the European Union the criteria mentioned in para 1 and 2 of art. 10 are - from our point of view - absolutely mandatory requirements that must be met in every case. We therefore propose to shift para 1 and 2 of art. 10 to art. 7).

(f) the action shall assure non-discriminatory participation of suppliers from member states and associated countries in tender procedures for defence products, (e) 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 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 with contractors on behalf of the participating 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.	Para. 2: The nature of the agreement between the different procurement agents of cooperating countries is not really clear. Shall this issue be regulated by the member states? Is it possible for privately owned companies to participate in such agreements, if necessary? Para. 3: Requirements and conditions in para 4 to 10 seem acceptable, regulating possible involvement of third countries.

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. 4. Contractors and subcontractors involved in the common procurement shall be established and have their executive management structures in the Union.]. They shall not be subject to control by a non-associated third country or by a non-associated third country entity. 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 by the Member State or associated third country in which the contractor is established. 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	Para. 9: Does this regulation include (third country's) export restrictions?

3. 7. 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 information is prevented and the employees or other persons involved in the common procurement have national security clearance issued by a Member State. 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 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. 10. For the purposes of this Article, 'subcontractors involved in the common procurement' means all of the following: (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.	
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: (a) public contracting authorities or contracting entities as defined in Directives 2014/24/EU and 2014/25/EU[10] of the European Parliament and of the Council; (b) public authorities of associated third countries.	
Article 10 Award criteria	

	See recital 21:
The Commission shall evaluate the proposals submitted in accordance with the work programme referred to in art. 11 and while taking into account art. 4 para 2 decide on the level of the Union contribution on the basis of the following award criteria:	We understand art 10 as a “whether or whether not decision”. We therefore have doubts as to, whether the dependency of the level of Union contribution on the various factors (see recital 21) has really been incorporated. We therefore suggest to slightly redraft art. 10 in order to align the wording with recital 21.
1. The size and importance of the contribution of the action to strengthening and developing the 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 delivery lead times, replenishment of stocks, availability and supply; 2. the size and importance of 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. the contribution of the action to strengthening cooperation among Member States or associated countries and interoperability of products;	With reference to the legal basis in art. 173 of the Treaty on the Functioning of the European Union the criteria mentioned in para 1 and 2 are - from our point of view - absolutely mandatory requirements that must be met in every case. while the other criteria may be used to decide on the level of the Union contribution based on the work programme. We therefore propose to move para 1 and 2 to art. 7. However, for the size of contribution the relevance of the criteria in paras 1 and 2 may be taken into account.
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;	Which body evaluates the proposals according to the criteria? To what extent is sufficient knowledge of the industry and technologies ensured? Does the Committee referred to in Article 14 participate in this? The Legislative Financial Statement refers to “experts” under point 1.5.1. Are they included?
6. catalytic effect of Union financial support through demonstration of how the Union contribution can overcome	No. 1: It is unclear, what “including with respect to procurement procedure” or “including with respect to procurement procedure

obstacles to common procurement; 7. quality and efficiency of the plans for carrying out of the action. The participating Member States shall provide the Commission with the necessary documentation to evaluate the award criteria as well as the administrative expenses according to article 4.2. The Commission shall inform the Council about its decisions.	… times" is meant? Shall faster procedures be prioritized or certain procedures (e.g. negotiated)? If so: why? If there are good reasons, the criterion should be formulated clearer. See above re. Art. 3: Need to align wording with the Joint Communication of 18 May 2022; "product needs" is misleading. The draft should also refer to the EU 11 Capability Development Priorities defined by the EDA in its 2018 CDP Review.
Article 11 Work programme 1. The Instrument shall be implemented through a 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. 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 2025 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.	Para. 2: It remains unclear which stakeholders are meant here. Representatives of the industry? National security authorities? Since the financial envelope mentioned in art. 4 para 1 is available until December 2024, it is questionable, whether an evaluation by the end of December 2024 makes sense.
Article 13 Information, communication and publicity 1. 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	acceptable (is this a standard regulation or does it differ significantly from other funding PR-rules)?

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.	Since the EU MS are the main stakeholders in defence and products to be procured there should be a positive vote (including a necessary qualified majority) for actions funded on the basis of the EDIRPA regulation.
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.	

EE comments

Dear Presidency,

Many thanks for the opportunity to provide written comments to the draft Regulation on establishing the European defence industry Reinforcement through common procurement act (doc 11531/22).

Since our national positions vis-à-vis the draft regulation are yet to be approved by the cabinet of ministers, Estonia would like to enter a general security reservation to the whole text. Thereby we would like to reserve the right to come back with written comments to all articles of the draft regulation. Kindly asking you to acknowledge that you have noted our scrutiny reservation. Many thanks in advance!

All that said, based on the initial assessment of different ministries and in line with our remarks at the first meeting, our comments/written proposals will inter alia touch upon the following key aspects of the draft:

- Article 3 (objectives)
- Eligible actions (art 7)
- Additional funding conditions (art 8)
- Award criteria (art 10)
- Work programme (art 11)

Our general direction will be supportive. We will be delighted to work with the Presidency, the fellow Member States as well as with the Commission.

EL COMMENTS

[redacted]

PUBLIC

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

ES COMMENTS

LOCATION (PAGE AND PARAGRAPH)	PROPOSAL OF CHANGE	RATIONALE
Page 8. **Paragraph (19)**	Add at the end of the paragraph: *Among the results that must be assessed in order to obtain grants, other aspects related to the contracting procedure carried out will be taken into account. Aspects such as the transparency of the tender, broadening competition and promotion of Small and Medium Enterprises (SME). Those are also relevant for achieving the objectives of the Instrument relating to the reinforcement of the European Defence Industry.*	Undoubtedly, some other aspects such as facilitating competition or expanding the possibilities for the participation of companies (open contracts) -including SMEs- will, in turn, have secondary effects, like the definition and impulse of gathering companies with a common interest in tendering, and will also help reducing the current fragmentation and thus also reinforcing the European Defence Industrial Base.
Page 13. **Article 8**	Consider the insertion of a paragraph that clarifies the responsibilities of the procurement agent towards the Commission (e.g. communication, monitoring, advisor…).	Completeness. Clarity of the procedures.
Page 13. **Article 8.1**	Why is a procurement agent mandatory?	Need for explanation.
Page 13.	Add at the end of paragraph 8.2:	If the financing of the Instrument is an European one, then the procurement procedures used on its behalf, should be based on

LOCATION (PAGE AND PARAGRAPH)	PROPOSAL OF CHANGE	RATIONALE
Article 8.2.	*The procurement procedures will be based on the regulations for public procurement in the fields of defence and security, currently in force in the European Union.*	European regulations. Specifically on: - Directive 2009/81/EC 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 - Communication of the European Commission 2019/C157/01 regarding guidelines on cooperative contracting in the fields of defence and security.
Page 14. **Article 8.9**	The kinds of restrictions should be referred.	Need to be defined.
Page 15. **Article 10**	Insert the highlighted text to read: *The Commission* ***in conjunction with EDA*** *shall evaluate the proposals submitted on the basis of the following award criteria:*	EDA guarantees the coherence with other initiatives like CARD, CDP…
Page 15. **Article 10**	Each criteria need more definition, including subcriteria. If this definition is expected to be detailed in the work program or in the call for proposals, it should be stated somewhere in the regulation of the instrument.	Completeness. For the sake of transparency, the way in which criteria are to be

LOCATION (PAGE AND PARAGRAPH)	PROPOSAL OF CHANGE	RATIONALE
	The criteria, are they listed in order of priority / importance? The answer to this question should be clearly reflected in this article.	applied to award the grants, must be explained previously to the presentation of the proposals.
Page 15. **Article 10.1.**	Where it says: *…including with respect to procurement procedure and delivery lead times,…* Change to: *…including with respect to procurement procedure* ***-especially in relation to transparency and competition-*** *and delivery lead times…*	Same rationale as in paragraph (19) on page 8

LOCATION (PAGE AND PARAGRAPH)	PROPOSAL OF CHANGE	RATIONALE
Page **Article 10.2**	<u>Add at the end of paragraph 10.2</u>: *…; and the promotion of Small and Medium Enterprises.*	Same rationale as in paragraph (19) on page 8
Page 15. **Article 10.4**	<u>Insert the highlighted text to read</u>: *the number of Member States or associated countries participating* ***at a proper rate*** *in the common procurement;*	It is important that the acquisition be fairly distributed among the participating countries.
Page 16. **Article 11**	The procedure to produce the work programme must be defined, preferably the same of the one for the EDF.	Completeness.
Page 16. **Article 11.4**	<u>Consider to add at the end of the paragraph</u>: *The work programme shall set out the funding priorities in line with the needs referred to in Article 3 paragraph 2,* ***and the procedure to evaluate the proposals and award the grants, in line with the criteria referred to in Article 10****.*	Same rationale as in Article 10 on page 15.

FI COMMENTS

In relation to the Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on establishing the European defence industry Reinforcement through common Procurement Act, Finland would like to highlight the following points

- We see it important that the goals and mechanisms of the instrument are further clarified. At present it is not clear in the regulation whether the increased funding provided by the instrument is to be used to partially cover the price of the defence materiel procurement or the price of the procurement process.

- The possibility to increase the production lines and thus increase the defence materiel capacity of the European industry are mentioned in the goals of the regulation. We regard this in a positive light. However, according to the regulation, funding is to be given only to member states and joint procurement, not to the industry. We would like to see this clarified.

- In terms of the legal base of the instrument, TFEU 173 does not make it possible to give concrete support of defence materiel procurement to the member states. Instead, supporting the cooperation between member states could be possible, if it can also be seen as supporting the goals in relation to the competitiveness of the industry and prerequisites of the companies involved. We would like to see this clarified.

- We would like to see further analysis on the impact this instrument might have the market. In the current market situation where demand of defence materiel is far greater than what the market can provide, giving more money to the already overheated market could prove counterproductive.

- Joint procurement could increase the volume of the procurement contracts to such an extent that only the most sizeable companies can respond to their demand. We would like to see further analysis on the instruments impact on SME's and their possibilities to partake to such procurement.

- The possibilities of this instrument are limited to those countries that have already started their national procurement processes and we would like to see further assessment on this.

- We would like to have more detailed information on how the instrument is funded.

FR COMMENTS

Objet : Commentaires généraux de la France sur la proposition de règlement relatif à la mise en place d'un instrument visant à renforcer l'industrie européenne de défense au moyen d'acquisitions conjointes publiée le 19 juillet 2022

Voici de premiers commentaires généraux sur le texte. La France, poursuivant son analyse du texte, ne manquera pas de compléter ses propos dans le cadre des négociations.

- La France soutient la création de cet instrument de court terme d'acquisition conjointe (EDIRPA), qui répond à la commande politique du Conseil européen extraordinaire des 30 et 31 mai.

- La France est favorable à l'adoption rapide de ce texte pour que l'instrument entre en vigueur au plus tôt, idéalement avant la fin 2022. Il en va de notre crédibilité collective.

- Sur le fond, nous serons particulièrement vigilants à deux éléments majeurs :
    - La France est attachée aux critères d'éligibilité fixés par la Commission, alignés sur ceux du FEDEF. Notre priorité est que les fonds disponibles dans le cadre de cet instrument bénéficient aux industries de défense européenne.
    - La France est attachée à ce que la gouvernance proposée pour cet outil préserve les choix stratégiques et souverains des États membres.

- En outre, la France a identifié quelques premiers points d'attention qui mériteront d'être précisés s'agissant :
    - des modalités de financement proposées (par ex : nature de la subvention allouée et modalités associées, nature et intégralité des coûts éligibles, modalité de détermination de l'effet incitatif, somme ou pourcentage de crédits alloués par projet) ;
    - de la trajectoire des paiements prévus jusqu'en 2027 ;
    - des modalités de détermination de la liste des matériels de défense pouvant être financée et du programme de travail.

- Enfin le texte est silencieux sur certains points qu'il conviendra d'aborder ensemble :
    - le cadre de garanties à apporter et les moyens de contrôles associés;
    - le respect des prérogatives des États membres en matière d'exportations ;
    - le respect des intérêts des États dans la divulgation d'informations et le respect des règles de classification, de besoin d'en connaitre et d'autorisation préalable en matière de sécurité des informations.

HR COMMENTS

Introductory remarks: *at this stage, HR is providing exclusively generic comments on the text proposal. Croatia welcomes the Proposal for a Regulation and envisaged establishment of a Short Term Instrument. We consider it as an important element, which might incentivise and contribute to stronger common and collective investments, deepening interoperability and more robust defence procurement in line with the MS priorities in the domain of defence capabilities. Equally, we consider the aforementioned Regulation as a contribution to further reinforcement of European defence industry manufacturing capacities, which will be stronger and more capable of responding to the needs of building the defence capabilities of the member states.*

Comment #1

We welcome that the Proposal for Regulation in the preamble highlights the need for coherence of synergy with existing collaborative EU defence-related initiatives such (EDF and PESCO) and with ambition of the Strategic Compass. However, the link with the mentioned EU initiatives and instruments should be stated more strongly in the text of the Regulation itself (e.g. in Article 3). Likewise, we consider it necessary to mention references to CDP and CARD, because these frameworks provides collective, consolidated and unified priorities in the domain of defence capabilities as well.

Comment #2

Acknowledging the fact that the text of the Regulation intends to be sufficiently general and to establish general criteria, we believe that the text of the Regulation should still give some indications as to which generic capabilities and critical defence products need to be replenished or reinforced urgently.

Comment #3

*We welcome the reference "*to address...most urgent and critical defence products needs, especially those revealed or exacerbated by the response to the Russian aggression against Ukraine, taking into account the work of the Defence Joint Procurement Task Force*". In addition, we also suggest more specific reference to the requirement to address and support the ongoing phasing out of existing Soviet era legacy systems still in use within the European Armed Forces (e.g. in Article 3 and 10). In support of this, we emphasize that the EU MS donated these systems to a very significant extent to the UA armed forces, which further strengthened the need to restore defence combat readiness in these areas as a matter of urgency.*

Comment #4

It is not evident in what way and with what means will this Instrument ''speed up the adjustment of industry to structural changes, including ramp-up of its manufacturing capacities". We suggest additional elaboration what is the proposed action on Union or MS level that would enable "ramping up" manufacturing capacities in the short-term.

Comment #5

We acknowledge the importance and necessity that "the common procurement procedures and contracts shall also include a requirement for the defence product not to be subject to control or restriction by a non-associated third country or a non-associated third country entity". *Nevertheless, we also suggest that certain degree of flexibility needs to be envisaged, especially for those defence product or capability for which we have no alternative in the European context.*

Comment #6

In addition to the Union bodies, the regulation preamble currently specifically lists only one procurement agent (OCCAR), which creates a wrong perception and unnecessarily narrows the options of member states. In this context, we also suggest specific mentioning the EDA, since Agency has a legal basis for undertaking joint procurements in the field of defence. Likewise, we suggest that the possibility of appointing national authorities and NSPA as procurement agents should also be mentioned. More specifically, we propose more precise text in Article 2 to reflect the possibility to appoint national authorities or entity as procurement agent.

Comment #7

In relation to Award criteria (Article 10), the declaration to jointly use, stockpile, own or maintain the procured defence products as an award criteria could be reconsidered since this Short Term Instrument seeks for urgency. The afore mentioned award criteria could be more convenient for the envisaged European Defence Investment Programme (EDIP), which will set up a medium to long-term instrument that will incentivize the mentioned joint use, ownership and maintenance.

IT COMMENTS

Italy thanks the European Commission for the Proposal for a Regulation of the European Parliament and of the Council on establishing the *European defence industry Reinforcement through common Procurement Act* (henceforth referred to as EDIRPA).

Italy welcomes the Proposal for a Regulation, as it is fully consistent with the Joint Communication on *Defence Investment Gaps Analysis and Way Forward*, noted by Heads of State and Government on the occasion of the Extraordinary meeting of the European Council on May 31st. Italy is looking forward to a common procurement act that matches the level of ambition for a more resilient and secure Union.

To this end, Italy offers the following comments:

- We agree that focus should be put on replenishing the stocks, especially in light of the assistance given by the European Union to the Ukrainian Armed Forces. Negotiations on the EDIRPA Regulation must remain separated from reflections pertaining to mid- and long-term initiatives, that will require further strategic discussions;

- The requirement for an immediate replenishing of the stocks should clearly take into account the possibility to resort, especially if timing warrants, to *off the shelf / off the catalogue* solutions on the market, including by non Member States. Such a solution would: ensure that the highest standards in the Union's military capabilities are maintained; the level of ambition defined by the Strategic Compass is matched; an open concept of strategic autonomy is preserved;

- The requirements for establishing a consortium should be reinforced, by raising the minimum number of Member States forming a consortium (e.g. to at least five), and/or by introducing further conditions for the eligibility of a consortium;

- We suggest revising the criteria aimed at safeguarding the security and defence interests of the Union when the assets, infrastructures and facilities of contractors and subcontractors involved in the common procurement are located or held outside the territory of the Member States or of associated third Countries. The goal remains to preserve the Union's access to the best available technologies;

- We suggest envisaging a reinforced role for EU specialized institutions – by fostering a bigger involvement of EEAS, EDA, and especially EUMC and EUMS – ensuring in particular that actions pertaining to the defence industry fully benefit from Member States' and specialized institutions' expertise and advice.

LT COMMENTS

Recitals:

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 **cross-border** SMEs**.**

(21) To generate the incentive effect, the level of Union contribution may 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) the number of participating Member States or associated countries or the inclusion of additional Member States or associated countries to existing cooperations, d**) urgency of adressed capability needs and impact on MS critical capability shortfalls.**

(22) Member States should appoint a procurement agent to conduct a common procurement on their behalf. The procurement agent should be a contracting authority established in a Member State or an associated third country, including Union bodies or international organisations **and agencies of international organisations**, such as the Organisation Conjointe de Coopération en matière d'ARmement (OCCAR) **and/or NATO Support and Procurement Organisation (NSPO) and NATO Support and Procurement Agency (NSPA).**

Article 2, (5)

'procurement agent' means a contracting authority established in a Member State or an associated country designated by at least three Member States to conduct a common procurement on their behalf, including Union bodies or international organisations **and agencies or bodies of international organisations;**

Article 10 (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 **and creation of new cross border cooperation including with SMEs.**

LV COMMENTS

1. **General Comments**

a) Considering the current security situation in Europe and the world, Latvia definitely agrees, that strengthening of defence capabilities has to be defined as one of the priority fields in which European Union member states should cooperate, because the threats to security are global and affects all of the member states, especially the Europe's Eastern flank countries, which are more endangered and in which it is of great importance to increase defence capabilities.

b) Latvia highly values European Commission's initiative of short-term financial instrument; however, Latvia would like to point out that at the moment from the context of the Regulation of The European Parliament and of The Council on establishing the European defence industry Reinforcement through common Procurement Act (hereinafter – Regulation) it is not surely understandable how will this financial instrument be implemented in practice.

2. Specific Comments on Text

1. In the section Context of the Proposal it is mentioned that "*The Joint Communication recalls that member States need to restore defence combat readiness as matter of urgency in light of the security situation and of transfer already made to Ukraine. In particular, a replenishment of stock of material would also enable them to provide further assistance to Ukraine*" and *"Member States will proceed to replenish their stockpiles and increase the quantity of their defence equipment" (Page 1).*

a) Latvia believes that it should be specified in the Regulation that this short-term financial instrument would be used to strengthen the military industry capabilities and cooperation in the field of defence sector between "the most vulnerable countries" (As it is mentioned in Point 8 of Regulation; Page 7) aka European Eastern flank countries.

b) Latvia believes that because of the Russian full-scale invasion of Ukraine, European Eastern flank countries are the ones that are more endangered and vulnerable than other EU member states.

2. *Article 4 Budget 1 "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"*

a) According to the current version of Regulation it is understood that this financial instrument will be used for technical and administrative costs.

b) Accordingly, a more precise description of what is included in "technical and administrative assistance" is needed.

c) Latvia believes, that if this short-term financial instrument is used only to cover the cost of administrative process, it contradicts the objective of the Regulation to strengthen military industry.

d) Latvia objects, that this short – term financial instrument is used only to cover the cost of administrative process and believes that this short –term financial instrument needs to be used to strengthen the military industry capabilities.

3. Article 7 1. (b) "the action shall involve new cooperation or an extension of existing cooperation to new Member States or associated countries"

a) A more detailed description is needed, **does the Regulation determines that contracts already in place cannot be used for procurements?**

b) Latvia believes that to reach the goal "to replenish their stockpiles" which is specified in the Regulation, **it would be significant that contracts that are already in place would also qualify for the financial support.**

4. Article 7 (c) "the actions shall be carried out by a consortium of at least three Member States"

a) Latvia believes that the count of three member states which participate in common procurement and qualifies for the EU financial support is optimal and **it does not need to be increased,** because if more member states participate in a procurement, this process becomes more difficult and time consuming.

b) We think that this process should be as simple as possible to minimize the bureaucratic process - **a lead nation of the common procurement should qualify as the procurement agent mentioned in Point 22 of the Regulation (Page 8).**

3. Technical comments

1. *Article 2 (4) "non-associated third-country entity"*

a) **It is needed to consolidate definitions in the whole Regulate which are given in Article 2 paragraph 4.** At the moment in the text of Regulation there are three different variations - "Third countries associated to the Instrument", "associated third countries", "associated countries".

2. *Article 4 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"*

a) **More precise explanation of the end date of this regulation would be needed**. Does the 31 December 2024 is the due date until which the contract should be signed and the deliveries and payment can follow after this date?

3. *Article 7 1. (a) "the actions involve cooperation for common procurement of the most urgent and critical defence products between eligible entities implementing the objectives referred to in Article 3"*

a) A more precise explanation is need for that after which criteria the critical needs will be defined.

NL COMMENTS

The NL recognizes the need for more and closer EU defence cooperation. By working together we can fill the most urgent and critical gaps in an efficient manner, achieve economies of scale, prevent crowding-out effects and increase our interoperability. The NL therefore supports the initiative of the EC to create a financial incentive that can foster cooperation between the Member States on joint procurement, and will in turn increase the competitiveness and efficiency of our European Defence Technological and Industrial Base (EDTIB). In order to achieve concrete results as soon as possible, the NL underlines the importance of keeping the procedure for the implementation of the instrument as pragmatic and simple as possible.

More specifically on the details of the proposed regulation, the NL has a few comments and suggestions:

1. The proposed regulation lacks clarity on the way eligible actions will be selected and funded.
    a) The proposed regulation does not include an article on the selection and award procedure. In the regulation it should be described what kind of procedure will be used to determine what actions will be funded, e.g. a competitive call for proposals or another method. The NL suggests to include such an article, in order to provide a stable and transparent basis for the implementation of the instrument. An article on the selection and award procedure is also included in the EDF regulation (art. 11).
    b) In the EC presentation on 20 July 2022 it was stated that funding will take place on the basis of the completion of milestones. The use of the completion of milestones as a condition for financing should be better reflected in the regulation. This could possibly be included in the proposed new article on the selection and award procedure. The milestones that will be used for the award procedure should also be defined and included in the regulation.
    c) The proposed regulation does not mention the use of independent experts to evaluate the proposals. Does the EC have the expertise to do so (taking into account that independent experts *are* needed to evaluate EPF proposals).
    d) Will the procurement procedure used by the consortium be part of the assessment of the Commission (ref. slide 9 of the presentation given on 20 July)?
2. The proposed regulation states that only actions that involve cooperation for common procurement of the most urgent and critical defence products shall be eligible for funding (art. 7). In what way will be defined what can be considered ‘most urgent and critical’? If this will be defined in the work programme, this should be mentioned in art. 11. Priorities of the work program should be based on identified needs of the member states for short and medium term.
3. The instrument should benefit all Member States, and involve both large and smaller

industries. To strengthen the EDTIB, the Union needs a more level playing field and open up the supply chain.

4. The regulation needs provisions for the dissemination of information and the sharing and protection of classified and/or restricted information.
5. Currently, article 4(2) is written in such a way that it seems to suggest that EU funding can only be used to cover overhead costs. Funding for "joint procurement actions", as mentioned in articles 10 and 11, seems missing.
6. The role and responsibility of the Committee in article 14 should be further defined in the regulation.
7. In the presentation made on 20 July and In art. 8 (2) it is stated that 'Procurement procedures shall be based on an agreement to be signed by participating Member States with procurement agent under conditions set out in work programme' (slide 7). What sort of condition will be discussed in the work programme? Will exclusion from the procurement Directive (2009/82/EC art 13(c)) be applicable for joint procurement cases governed by EDIRPA?
8. The EC proposes to finance the instrument from the margins and 'special instruments of the MFF'. It is not specified which special instruments the commission proposes to use. Can the Commission clarify this and indicate when the financial aspects of the proposal will be discussed in the Budget Committee?

PL COMMENTS

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

Already characterised by an unstable situation in Europe's neighbouring regions for many years and a complex and challenging environment, the Union's geopolitical context has changed dramatically in light of the Russia's military aggression against Ukraine. The return of territorial conflict and high-intensity warfare on European soil requires Member States to rethink their defence plans and capacities.

EU Heads of State or Government, meeting in Versailles on 11 March 2022, committed to "bolster European defence capabilities" in light of the Russia's military aggression against Ukraine. The Versailles declaration notably states that Member States should increase defence expenditures; step up cooperation through joint projects; close shortfalls and meet capability objectives; boost innovation including through civil/military synergies; and strengthen and develop the EU defence industry, including SMEs. Moreover, the Council invited "the Commission, in coordination with the European Defence Agency, to put forward an analysis of the defence investment gaps by mid-May and to propose any further initiative necessary to strengthen the European defence industrial and technological base."

In response to this invitation, the European Commission and the High Representative presented a Joint Communication on the Defence Investment Gaps Analysis and Way Forward (the "Joint Communication") on 18 May 2022. It provided insights on three main types of gaps: a financial gap, an industrial one, and a capability gap. The Joint Communication notes that Member States' recent budgetary increases come after years of substantial cuts and severe underinvestment. Such underinvestment in defence expenditure led to industrial and capability gaps in the EU and to the current low levels of defence equipment stocks. The transfers of defence equipment to Ukraine, combined with a level of stocks tailored to peacetime, has resulted into the emergence of urgent and critical gaps in terms of military equipment.

The Joint Communication recalls that Member States need to restore defence combat readiness as a matter of urgency in light of the security situation and of transfers already made to Ukraine. In particular, a replenishment of stocks of material would also enable them to provide further assistance to Ukraine.

The Joint Communication indicates that as Member States will proceed to replenish their stockpiles and increase the quantity of their defence equipment, they should seize the opportunity to do so in a collaborative way. This would provide greater value for money, enhance interoperability and avoid that the most exposed EU Member States face an impossibility to obtain what they need, because of conflicting demands on the defence industry, which cannot respond to such a demand surge in the short term.

Without coordination and cooperation, increased Member State investments into defence risk to deepen the fragmentation of the European defence sector, to limit the potential for cooperation throughout the life cycle of the equipment, to intensify external dependencies and to hamper interoperability. Choices made as regards of short-term acquisitions will have a longer-term impact on the market strength of European Defence Technological and Industrial Base (EDTIB) and opportunities for the next decades.

Given the need to support in a timely and targeted manner the Member States for reinforcing their defence capacities in this emergency situation, the European Commission proposed to incentivise common procurement via the EU budget through a dedicated Short Term Instrument establishing the European Defence industry Reinforcement through Common Procurement Act (the 'Instrument').

The EU financial support brought through the Instrument should stimulate cooperative defence procurement process from Member States and benefit the EDTIB while ensuring EU Member States' armed forces' ability to act, security of supply and increased interoperability.

Such an Instrument should be established to incentivise those Member States who are willing to pursue common procurement to fill these gaps. The Instrument should be a dedicated tool designed to tackle the adverse effects and consequences of the Ukraine war in the Union.

The Instrument will follow the establishment of a Defence Joint Procurement Task Force supporting the coordination of their very short-term procurement needs to face the new security situation. Following the creation of the Instrument, the Commission will propose a European Defence Investment Programme (EDIP) regulation. The EDIP Regulation could serve as the anchor for future joint development and procurement projects of high common interest to the security of the Member States and the Union, and by extension of the logic of the short-term instrument, for possible associated Union financial intervention for the reinforcement of the European defence industrial base, in particular for projects which no single Member State could develop or procure alone.

- **Consistency with existing policy provisions in the policy area**

The Instrument is consistent with the European Defence Fund. It complements the latter and relies on the same legal basis. While the EDF incentivises cooperation of legal entities on defence Research and Development projects, the Instrument will support cooperation on common defence procurement. The Instrument also takes up the European Defence Fund's approach when it comes to forbidding support for goods or services, which are prohibited by applicable international law, or lethal autonomous weapons without the possibility for meaningful human control over selection and engagement decisions when carrying out strikes against humans.

- **Consistency with other Union policies**

The Instrument will complement existing collaborative EU defence initiatives such as the Permanent Structured Cooperation (PESCO), and generate synergies with the implementation of the Strategic Compass for Security and Defence, and other EU programmes, such as the European Defence Fund.

The Instrument will also be implemented in full consistency with the EU capability development plan (CDP) identifying the defence capability priorities at EU level, as well as with the EU coordinated annual review on defence (CARD), which inter alia identifies new opportunities for defence cooperation. In this context, account may also be taken of relevant activities carried out by the North Atlantic Treaty Organisation (NATO) and other partners where they serve the Union's security and defence interests and do not exclude any Member State from participating.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

Aimed at fostering the competitiveness of the EDTIB by supporting cooperation between Member States in the field of defence common procurement, the proposal is based on Article 173 TFEU (support to competitiveness of the European Industry).

- **Subsidiarity (for non-exclusive competence)**

While cooperation presents several obvious advantages (increased interoperability, reduced unit and maintenance costs) EU Member States continue to procure defence systems in a mostly national manner.

This can be explained by several factors:

– Increased complexity and administrative burden of cooperation;

– different national requirements;

– different procurement calendars and lack of budgetary synchronisation;

– security of Information considerations;

– national defence industrial policy considerations;

– lack of national expertise in procurement agencies.

According to EDA Defence Data for 2020, EU Member States invested only €4.1bn in collaborative defence equipment procurement (11% of their total spending), a 13% decrease compared to 2019.

This is far below the 35% benchmark to which Member States committed. Fragmentation of the demand side of the defence market results into a series of problems and inefficiencies, including on the supply side, while increasing maintenance costs of a plethora of different systems.

If this current trend is not addressed, it will continue to significantly undermine the competitiveness of the EDTIB and risks affecting its market prospects in the next decade.

At the same time, the current defence market context, marked by an increased security threat and the realistic prospect of a high intensity conflict, sees Member States rapidly increasing their defence budgets and aiming at similar equipment purchases. This results in an amount of demand which exceeds EDTIB manufacturing capacities, currently tailored for peacetime.

Consequently, strong price inflation can be anticipated, as well as longer delays in delivery time, potentially harming the security of EU citizens. Defence industries need to secure the production capacity necessary to process orders, as well as critical raw materials and sub-components. In this context, defence manufacturers might privilege major orders, potentially

leaving exposed the most vulnerable countries, lacking the critical size and financial means to ensure large orders.

Fragmented orders placed individually by Member States would result in more limited market prospects for defence companies, and necessarily translate into an increased fragmentation of the offer, thus significantly harming the economic efficiency of the sector and worsening the EDTIB competitiveness.

Incentivising joint procurement is therefore a necessity, and would present the advantage of ensuring that, while the defence industry can more rapidly adapt to current market structural changes, national Armed Forces would obtain better conditions and delivery timelines by cooperating in the acquisition phase. On top of this, cooperation in the field of acquisition would result in diminished costs in terms of exploitation, maintenance and withdrawal of the systems (costs estimated at 55% of the total cost of an equipment).

Consequently, the current situation requires a policy intervention at EU level to improve the level of cooperation by incentivising financial cooperation between Member States in the defence procurement process. Such intervention is beneficial for the security of EU citizens as well as for the EDTIB.

- **Proportionality**

The proposed policy approach is proportionate to the scale and gravity of the problems that have been identified, i.e. need to speed up the adjustment of industry to structural changes and encourage an environment favourable to cooperation between undertakings within a system of open and competitive markets by incentivising cooperation and coordination between Member States. It respects the limits of possible Union intervention under the Treaties.

The initiative is limited to goals that Member States cannot achieve satisfactorily on their own and where the Union can be expected to do better.

- **Choice of the instrument**

The Commission proposes a Regulation of the European Parliament and of the Council in order to set up the Instrument. This is the most suitable legal instrument as only a Regulation, with its directly applicable legal provisions, can provide the necessary degree of uniformity needed for the establishment and operation of a Union Instrument aiming at promoting the reinforcement of an industrial sector across Europe.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

There is no prior existing legislation covering or pertaining to this specific action. To date, there was no other Union legislative initiatives in the area of defence with the objective of enhancing the competitiveness of the EDTIB in particular by speeding up, in a collaborative manner, the adjustment of industry to structural changes, including ramp-up of its manufacturing capacities. There was also no other Union legislative initiatives in the area of defence with the objective of fostering cooperation in the defence procurement process between participating Member States. Therefore, there is no previous ex-post evaluation or fitness check of existing legislation that took place for this legislative initiative.

- **Impact assessment**

European Council conclusions of 30-31 May 2022 invited the Council to examine as a matter of urgency, the short-term instrument. Therefore, Commission tables the proposal for a regulation establishing the instrument without including an impact assessment, in order to allow the co-legislators to receive it as early as possible.

- **Regulatory fitness and simplification**

The Instrument is not expected to increase the administrative burden.

Commented [BA98]: Which burden is meant? Member States' or the Commission's. In the light of point 1.5.1 *Grounds for the propsal – The Commission will need to be staffed with the appropprate experts in orger to monitor effectively the implementation*, this sentence is not true.

The proposed performance-based approach, relying on the conditionality between the disbursement of payments and the achievement of milestones and targets by the consortium, is also an element of simplification in the implementation of the instrument.

- **Fundamental rights**

Enhancing the security of EU citizens can contribute to safeguarding their fundamental rights.

In addition, actions for defence common procurement of goods or services, which are prohibited by applicable international law, shall not be eligible for support from the Instrument.

Moreover, actions with a view to the common procurement of lethal autonomous weapons without the possibility for meaningful human control over selection and engagement decisions when carrying out strikes against humans shall not be eligible for support from the Instrument.

4. BUDGETARY IMPLICATIONS

The financial envelope for the implementation of the Instrument for the period from period XX 2022 to 31 December 2024 shall be EUR 500 million in current prices.

The impact on the multi-annual financial framework period in terms of required budget and human resources is detailed in the legislative financial statement annexed to the proposal.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The Commission should regularly monitor its actions, review progress made towards delivering the expected results as well as examine synergies with other complementary Union programmes. The Commission should draw up an evaluation report for the Instrument and communicate it to the European Parliament and to the Council. This report will notably assess the progress made towards the achievement of the objectives set in the proposal.

2022/0219 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on establishing the European defence industry Reinforcement through common 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[29],

Acting in accordance with the ordinary legislative procedure,

Whereas:

(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.

(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 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.

(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.

[29] OJ C , , p. .

(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 should therefore be at the core of those efforts. Indeed difficulties and gaps still exist and the European defence industrial base remains highly fragmented, lacking sufficient collaborative action and inter-operability of products.~~

(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 producers' manufacturing capacities~~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 timely provision of adequate defense equipment, both in qualitative and quantitative terms. ~~a much stronger European Defence Technological and Industrial Base~~ throughout the Union. ~~Indeed, without coordination and cooperation, the increased national investments are likely to 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, enhance its competitiveness and efficiency, and thereby 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 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 while allowing economies of scale in the actions undertaken by Member States ~~to reinforce and modernise the European Technological and Industrial Base, increasing thereby the Union's capacity resilience and security of supply~~ supplyto fill critical and most urgent defense gaps. Incentivizing common procurement

Commented [BA99]: As far as it has been presented during the meeting of 20.07., the reguation is to promote joint procurement, so reinforcing EDTIB cannot be the core of these efforts.

Commented [BA100]: Agreed language; we should aim at an even development of the EDTiB across the Union

Commented [BA101]: PL sustains its position and support for balanced development of industrial base in the EU. National capabilities essential for security of supply in times of conflict and war. According to this what has been presented during the meeting of 20.07., the regulation is focused on joint procurement and not on the industry players as it is in the EDF. No attention will be given to entities important for EDTIB - SMEs, mid-caps. Nothing related to industry is mentioned in (21) where factors differentiating EU contribution are listed.

Commented [BA102]: As above.

would also result into diminished costs in terms of exploitation, maintenance and withdrawal of the systems.

(14) This Instrument will build on and take into account 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 with existing collaborative EU defence-related initiatives such as in the European Defence Fund 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.

(16) As the instrument, along with its main purpose described above, 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 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 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. 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 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 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. In exceptional circumstances, and under conditions mentioned above, it should be also possible to derogate from the principle that contractors and subcontractors involved in a common procurement supported by the Instrument are not established in the Union or in associated countries, if this is the most appropriate way to fill a critical and urgent capability gap.

(18) ~~Furthermore, the common procurement procedures and contracts shall also include a requirement for the defence product or services to not be subject to control or restriction by a non-associated third country or a non-associated third country entity.~~

(19) Grants under the Instrument may 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 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.

(21) To generate the incentive effect, the level of Union contribution may 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) 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 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 NATO Support and Procurement Organisation (NSPO).

(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 that cover a period from the 24 February 2022, even if they have started before the grant application was submitted.

(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, 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[30] (Interinstitutional Agreement of 16 December 2020), for the European Parliament and for the Council during the annual budgetary procedure.

(26) In accordance with the Financial Regulation, Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council[31], Council Regulation (Euratom, EC)

30 OJ L 433I, 22.12.2020, p. 28.

31 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

No 2988/95[32], Council Regulation (Euratom, EC) No 2185/96[33] and Council Regulation (EU) 2017/1939[34], 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[35]. 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[36], 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.

(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 the European Defence Industry Reinforcement through common Procurement Act (the 'Instrument').

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.

32 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).

33 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).

34 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).

35 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).

36 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).

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 two ~~three~~ Member States;

(2) '**control by a non-associated third country or by a non-associated third country entity**' means the ability to exercise a decisive influence on a legal entity 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 established in a Member State or an associated country designated by at least ~~three~~ two Member States to conduct a common procurement on their behalf, including Union or international organisations bodies ~~or international organisations~~;

(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 incentivise Member States, on a voluntary basis, to pursue common procurement in a collaborative way to fill the most urgent and critical capability gaps, especially those created by the response to the current Russia's aggression ~~especially those created by the transfer of defence products to~~ against Ukraine and the need to replace post-Soviet systems with new solutions;

(b) to foster cooperation in defence procurement process between participating Member States contributing to solidarity, interoperability, prevention of crowding-out effects, avoiding fragmentation and increasing the effectiveness of public spending.~~to foster the competitiveness and efficiency of the European Defence Technological and Industrial Base (EDTIB) for a more resilient Union, in particular by speeding up, in a collaborative manner, the adjustment of industry to structural changes, including ramp-up of its manufacturing capacities while contributing to the balanced development of the EDTIB throughout the Union~~;

Commented [BA103]:

(~~b~~c) to foster the competitiveness and efficiency of the European Defence Technological and Industrial Base (EDTIB) for a more resilient Union. ~~in particular by speeding up, in a collaborative manner.to foster cooperation in defence procurement process between participating Member States contributing to solidarity, interoperability, prevention of crowding out effects, avoiding fragmentation and increasing the effectiveness of public spending~~.

2. The objectives shall be pursued with an emphasis on strengthening and developing the Union defence industrial base in an inclusive and balanced way throughout the Union.~~to allow it to address in particular the most urgent and critical defence products and services needs, especially those revealed or exacerbated by the response to the Russian aggression against Ukraine, taking into account the work of the Defence Joint Procurement Task Force~~.

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, conducting, monitoring, control, product testing, 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 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. Candidate countries' participation in common procurement under the Instrument may be accepted on a case-by-case basis.

Commented [BA104]: What we would like to achieve through this amendment is strengthening candidate countries agains full-scale armed aggression and/or hybrid interference, incluging candidate countries to the EU defence before their formal accession, facilitating their participation is CSDP missions.

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. Where necessary for the implementation of an action, financial contributions may cover a period prior to the date of the request for financial contributions for that action, provided that the action has not started prior to 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 7
Eligible actions

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

   (a) the actions shall involve cooperation for common procurement of the most urgent and critical defence products and services between eligible entities implementing the objectives referred to in Article 3;

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

   (c) the actions shall be carried out by a consortium of at least ~~three~~ two 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 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 with contractors on behalf of the participating Member States.

Commented [BA105]: PL opts for changing the number of countries in the consortium from 3 to 2. On the one hand, there is an argument of the European Commission about the need to make quick purchases in order to fill the gaps caused by Ukraine's support, but on the other hand - experiences of some countries that have made "joint purchases" point out that such purchases are complicated and time consuming due to long process of harmonising specifications / hardware requirements. Reducing the number of countries for joint purchasing from 3 to 2 would make it easier to find a purchasing partner, agree common requirements and then conduct joint purchasing procedure. Additionally, taking into account that the regulation will be used to a large extent to replenish the stocks of equipment previously owned by the Armed Forces of the Member States and transferred to Ukraine, it should be noted that the higher number of countries for joint purchases will favor those manufacturers who have already dominated the defense market and sold their products to large number of countries. Our goal (as well as the declared goal of the regulation itself) is to support the development of new cooperative ties, and not to preserve those that have existed so far.

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.

Commented [BA106]: PL proposes to clarify in the text what procurement procedures are meant – procedures arising from the agreement, defence directive or Treaty?

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.

4. Contractors and subcontractors involved in the common procurement shall be established and have their executive management structures in the Union. They shall not be subject to control by a non-associated third country or by a non-associated third country entity.

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 by the Member State or associated third country in which the contractor is established.

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 is necessary and 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 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 information is prevented and the employees or other persons involved in the common procurement have national security clearance issued by a Member State.

8. By way of derogation from paragraph 4, a legal entity established in non-associated third country having an agreement with the EU on security procedures for exchanging and protecting classified information which is in force, may participate as contractor and subcontractor involved in the common procurement only if it provides guarantees confirmed by an authorised authorities of such non-associated third country.

9. 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 a non-associated third

country having an agreement with the EU on security procedures for exchanging and protecting classified information which is in force. 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 is necessary and 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.

10. 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 information is prevented and the employees or other persons involved in the common procurement have national security clearance issued by a Member State or the third country referred to in Article 8.

~~8~~11. 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 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~~12. 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.

~~10~~13. For the purposes of this Article, 'subcontractors involved in the common procurement' means all of the following:

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

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

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

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:

(a) public contracting authorities or contracting entities as defined in Directives 2014/24/EU[37] and 2014/25/EU[38] of the European Parliament and of the Council;

(b) public authorities of associated third countries.

Article 10
Award criteria

The Commission shall evaluate the proposals submitted on the basis of the following award criteria:

1. The contribution of the action to ~~strengthening and developing the Union defence industrial base to allow it to~~ addressing ~~in particular~~ the most urgent and critical defence products and services needs as referred to in Article 3, including with respect to procurement procedure provided in the arrangement between participating Member States and delivery lead times, replenishment of stocks, availability and supply;

Commented [BA107]: How "most urgent and critical" will be determined by the Commission?

2. the contribution of the action to strengthening cooperation among Member States or associated countries and interoperability of products;

~~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. the number of Member States or associated countries participating in the common procurement;

~~3~~4. 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;

5. 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;

6. Establishment of new or strengthening of recently established defense cooperation ties;

7. the contribution of the action to the balanced development of the EDTIB throughout the Union by prioritizing common procurments in countries with a small share in the European market;

3. ~~the contribution of the action to strengthening cooperation among Member States or associated countries and interoperability of products;~~

37 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).

38 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. ~~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;~~

7. quality and efficiency of the plans for carrying out of the action~~.~~;

8. diversification of acquisition sources and durability of cooperation;
9. applying resources and components available on the Union's territory;
10. proportionality of Member States contribution and participation in contract execution (production of goods and services provision by at least two member states).

Commented [BA108]: Ad. 8. It is essential that products could be acquired from different sources, so that failure in one of tchem could not prevent deliveries.
Ad. 9. This aspect is important for security of supply.

Article 11
Work programme

1. The Instrument shall be implemented through a 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.

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. The work programme shall also define what are urgent and critical defence products and services needs.

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 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 13
Information, communication and publicity

Commented [BA109]: Is this Article necessary in all corcumstances – for example sensitive defence procurement under limitations due to protection of classified information.

1. 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. This however shall not apply to sensitive defence procurement or cases when protection of classified inforation prevails.

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.

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.

RO COMMENTS

First, we would like to convey our appreciation regarding the efforts to put forward this ambitious Regulation and on the work to negotiate it in such a short time frame, it will be a challenge. The Commission proposal is a good basis to initiate the related process.

Indeed, the proposal for the EDIRPA Regulation is a historical milestone on integrating the Defence at EU level, in order to increase the security of EU citizens and to better cooperate with our allies/partners, responding to the call of EU Heads of State

To be more specific on the EDIRPA Regulation text, we would like to add a few comments. This new programme should not only encourage cross border cooperation among Member States in consortium, but also it should promote cross border cooperation among industrial entities at EU level.

- This new EU financial tool proposed by the European Commission should better reflect the Member States prerogatives on defence procurement. Also, into this Regulation we should clarify the role of the European Defence Agency, which could support the Member States in collaborative procurement.
- We need to make sure that this new MFF programme proposed to reinforce the EDTIB through joint procurement does not actually stimulate the submission of security and defence needs to industrial interests, whereby common solutions are preferred to best solutions.
- We should acknowledge that a greater convergence in defence acquisitions at EU level based will require time. Considering the complexity of collaborative procurement, including the lasting process of requirements' harmonization, we assess necessary to start with an inclusive project (one supported by most Member States, as resulting from the analysis of MSs' requests compiled by the Task Force).
- In this Regulation, a bigger weight should be attributed to the security of supply. A possible option could be an award criterion to reflect the necessity that contractors, preferably cross-border consortia, demonstrate that the security of supply is ensured on a widely EU geographically-balanced industrial capabilities, including the countries with less developed ones. In the current complex circumstances, the agility of supply chain it become an essential factor. This will build a stronger European supply chain across all levels and will be the basis to foster the European Defence Technological and Industrial Base (EDTIB) through the medium-long term Instrument.

We might come back later with further track-changes comments on the text of the Regulation.

SE COMMENTS

Sweden's initial comments on the proposal for a regulation on establishing the European Defence Industry Reinforcement through common Procurement Act (EDIRPA)

Sweden appreciates the possibility to submit its initial findings on the proposal as communicated by the Council on 20 July 2022.
Sweden welcomes initiatives to support a competitive EDTIB, based on competition and the rules on the Internal Market to support and develop this. Thus, Sweden welcomes that the proposed rules for participation/eligibility criteria are identical to those of the European Defence Fund EDF.
Sweden expects that Article 8.9 on *Procurement procedures and contracts* will be an area where thorough discussions will take place. Further to this, Article 10 on *Award Criteria* merits further discussion. For Sweden, quality and efficiency are paramount and should be properly addressed.
Defence remains a national prerogative. Therefore, member states' involvement on requirements and needs are key. A diverse and agile EDTIB supporting member states' military operational capability is crucial. Any actions limiting member states' ability to sustain its capability cannot be part of any European initiatives. Consolidation on the supply side must be based on market conditions.
Sweden is indeed concerned about the proposed financing of EDIRPA. All new initiatives should be financed through reprioritisation within the multiannual financial framework. Thus, Sweden encourages the Commission to present an in-depth proposal for such reprioritisation.
Finally, Sweden would like to stress that reporting obligations must acknowledge law and rules on protection of classified information.

SK COMMENTS

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

Already characterised by an unstable situation in Europe's neighbouring regions for many years and a complex and challenging environment, the Union's geopolitical context has changed dramatically in light of the Russia's military aggression against Ukraine. The return of territorial conflict and high-intensity warfare on European soil requires Member States to rethink their defence plans and capacities.

EU Heads of State or Government, meeting in Versailles on 11 March 2022, committed to "bolster European defence capabilities" in light of the Russia's military aggression against Ukraine. The Versailles declaration notably states that Member States should increase defence expenditures; step up cooperation through joint projects; close shortfalls and meet capability objectives; boost innovation including through civil/military synergies; and strengthen and develop the EU defence industry, including SMEs. Moreover, the Council invited "the Commission, in coordination with the European Defence Agency, to put forward an analysis of the defence investment gaps by mid-May and to propose any further initiative necessary to strengthen the European defence industrial and technological base."

In response to this invitation, the European Commission and the High Representative presented a Joint Communication on the Defence Investment Gaps Analysis and Way Forward (the "Joint Communication") on 18 May 2022. It provided insights on three main types of gaps: a financial gap, an industrial one, and a capability gap. The Joint Communication notes that Member States' recent budgetary increases come after years of substantial cuts and severe underinvestment. Such underinvestment in defence expenditure led to industrial and capability gaps in the EU and to the current low levels of defence equipment stocks. The transfers of defence equipment to Ukraine, combined with a level of stocks tailored to peacetime, has resulted into the emergence of urgent and critical gaps in terms of military equipment.

The Joint Communication recalls that Member States need to restore defence combat readiness as a matter of urgency in light of the security situation and of transfers already made to Ukraine. In particular, a replenishment of stocks of material would also enable them to provide further assistance to Ukraine.

The Joint Communication indicates that as Member States will proceed to replenish their stockpiles and increase the quantity of their defence equipment, they should seize the opportunity to do so in a collaborative way. This would provide greater value for money, enhance interoperability and avoid that the most exposed EU Member States face an impossibility to obtain what they need, because of conflicting demands on the defence industry, which cannot respond to such a demand surge in the short term.

Without coordination and cooperation, increased Member State investments into defence risk to deepen the fragmentation of the European defence sector, to limit the potential for cooperation throughout the life cycle of the equipment, to intensify external dependencies and to hamper interoperability. Choices made as regards of short-term acquisitions will have a longer-term impact on the market strength of European Defence Technological and Industrial Base (EDTIB) and opportunities for the next decades.

Given the need to support in a timely and targeted manner the Member States for reinforcing their defence capacities in this emergency situation, the European Commission proposed to incentivise common procurement via the EU budget through a dedicated Short Term Instrument establishing the European Defence industry Reinforcement through Common Procurement Act (the 'Instrument').

The EU financial support brought through the Instrument should stimulate cooperative defence procurement process from Member States and benefit the EDTIB while ensuring EU Member States' armed forces' ability to act, security of supply and increased interoperability.

Such an Instrument should be established to incentivise those Member States who are willing to pursue common procurement to fill these gaps. The Instrument should be a dedicated tool designed to tackle the adverse effects and consequences of the Ukraine war in the Union.

The Instrument will follow the establishment of a Defence Joint Procurement Task Force supporting the coordination of their very short-term procurement needs to face the new security situation. Following the creation of the Instrument, the Commission will propose a European Defence Investment Programme (EDIP) regulation. The EDIP Regulation could serve as the anchor for future joint development and procurement projects of high common interest to the security of the Member States and the Union, and by extension of the logic of the short-term instrument, for possible associated Union financial intervention for the reinforcement of the European defence industrial base, in particular for projects which no single Member State could develop or procure alone.

- **Consistency with existing policy provisions in the policy area**

Commented [A110]: SK appreciates the consistency and complemenrarity of the instrument with existing initiatives, including the interconnection with Defence Joint Procurement Task Force as well as eventual proposal for EDIP regulation.

The Instrument is consistent with the European Defence Fund. It complements the latter and relies on the same legal basis. While the EDF incentivises cooperation of legal entities on defence Research and Development projects, the Instrument will support cooperation on common defence procurement. The Instrument also takes up the European Defence Fund's approach when it comes to forbidding support for goods or services, which are prohibited by applicable international law, or lethal autonomous weapons without the possibility for meaningful human control over selection and engagement decisions when carrying out strikes against humans.

- **Consistency with other Union policies**

The Instrument will complement existing collaborative EU defence initiatives such as the Permanent Structured Cooperation (PESCO), and generate synergies with the implementation of the Strategic Compass for Security and Defence, and other EU programmes, such as the European Defence Fund.

The Instrument will also be implemented in full consistency with the EU capability development plan (CDP) identifying the defence capability priorities at EU level, as well as with the EU coordinated annual review on defence (CARD), which inter alia identifies new opportunities for defence cooperation. In this context, account may also be taken of relevant activities carried out by the North Atlantic Treaty Organisation (NATO) and other partners where they serve the Union's security and defence interests and do not exclude any Member State from participating.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

Aimed at fostering the competitiveness of the EDTIB by supporting cooperation between Member States in the field of defence common procurement, the proposal is based on Article 173 TFEU (support to competitiveness of the European Industry).

- **Subsidiarity (for non-exclusive competence)**

While cooperation presents several obvious advantages (increased interoperability, reduced unit and maintenance costs) EU Member States continue to procure defence systems in a mostly national manner.

This can be explained by several factors:

– Increased complexity and administrative burden of cooperation;

– different national requirements;

– different procurement calendars and lack of budgetary synchronisation;

– security of Information considerations;

– national defence industrial policy considerations;

– lack of national expertise in procurement agencies.

According to EDA Defence Data for 2020, EU Member States invested only €4.1bn in collaborative defence equipment procurement (11% of their total spending), a 13% decrease compared to 2019.

This is far below the 35% benchmark to which Member States committed. Fragmentation of the demand side of the defence market results into a series of problems and inefficiencies, including on the supply side, while increasing maintenance costs of a plethora of different systems.

If this current trend is not addressed, it will continue to significantly undermine the competitiveness of the EDTIB and risks affecting its market prospects in the next decade.

At the same time, the current defence market context, marked by an increased security threat and the realistic prospect of a high intensity conflict, sees Member States rapidly increasing their defence budgets and aiming at similar equipment purchases. This results in an amount of demand which exceeds EDTIB manufacturing capacities, currently tailored for peacetime.

Consequently, strong price inflation can be anticipated, as well as longer delays in delivery time, potentially harming the security of EU citizens. Defence industries need to secure the production capacity necessary to process orders, as well as critical raw materials and sub-components. In this context, defence manufacturers might privilege major orders, potentially

Commented [A111]: SK understands the short-term and immediate nature of this instrument, however these remain first and foremost the systemic obstacles to joint procurement. Financial support to facilitate the execution of jointly procured acquisitions is an incetive, but in our view not the deciding one. We therefore expect further discussions on possibilities to address the challenges listed here.

Commented [A112]: SK agrees that this is indeed current challenge within Eurpean industry. However, acquisition of advanced technologies is often aimed at providers able to develop and manufacture them in better quality and price ratio than European ones. In case of these specific technologies, the primary issue of not procuring them jointly in Europe is not the lack of manufacturing capacities, but rather lack of available European providers.

leaving exposed the most vulnerable countries, lacking the critical size and financial means to ensure large orders.

Fragmented orders placed individually by Member States would result in more limited market prospects for defence companies, and necessarily translate into an increased fragmentation of the offer, thus significantly harming the economic efficiency of the sector and worsening the EDTIB competitiveness.

Incentivising joint procurement is therefore a necessity, and would present the advantage of ensuring that, while the defence industry can more rapidly adapt to current market structural changes, national Armed Forces would obtain better conditions and delivery timelines by cooperating in the acquisition phase. On top of this, cooperation in the field of acquisition would result in diminished costs in terms of exploitation, maintenance and withdrawal of the systems (costs estimated at 55% of the total cost of an equipment).

Commented [A113]: SK : This can often be the case, but with more countries participating and more requirements, other factors influence the prices and delivery.

Consequently, the current situation requires a policy intervention at EU level to improve the level of cooperation by incentivising financial cooperation between Member States in the defence procurement process. Such intervention is beneficial for the security of EU citizens as well as for the EDTIB.

- **Proportionality**

The proposed policy approach is proportionate to the scale and gravity of the problems that have been identified, i.e. need to speed up the adjustment of industry to structural changes and encourage an environment favourable to cooperation between undertakings within a system of open and competitive markets by incentivising cooperation and coordination between Member States. It respects the limits of possible Union intervention under the Treaties.

The initiative is limited to goals that Member States cannot achieve satisfactorily on their own and where the Union can be expected to do better.

- **Choice of the instrument**

The Commission proposes a Regulation of the European Parliament and of the Council in order to set up the Instrument. This is the most suitable legal instrument as only a Regulation, with its directly applicable legal provisions, can provide the necessary degree of uniformity needed for the establishment and operation of a Union Instrument aiming at promoting the reinforcement of an industrial sector across Europe.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

There is no prior existing legislation covering or pertaining to this specific action. To date, there was no other Union legislative initiatives in the area of defence with the objective of enhancing the competitiveness of the EDTIB in particular by speeding up, in a collaborative manner, the adjustment of industry to structural changes, including ramp-up of its manufacturing capacities. There was also no other Union legislative initiatives in the area of defence with the objective of fostering cooperation in the defence procurement process between participating Member States. Therefore, there is no previous ex-post evaluation or fitness check of existing legislation that took place for this legislative initiative.

• **Impact assessment**

European Council conclusions of 30-31 May 2022 invited the Council to examine as a matter of urgency, the short-term instrument. Therefore, Commission tables the proposal for a regulation establishing the instrument without including an impact assessment, in order to allow the co-legislators to receive it as early as possible.

Commented [A114]: SK considers it to be problematic that such instrument with its expected effects on the defence market is not accompanied by appropriate impact assessment as is the standard procedure for legislative proposal. This complicates the ability to make an informed decision about the content of this proposal. We therefore propose that the instrument is thoroughly evaluated upon its expiration and ideally on a rolling basis during its implementation. This is especially crucial in view of the planned discussions about the EDIP proposal.

• **Regulatory fitness and simplification**

The Instrument is not expected to increase the administrative burden.

The proposed performance-based approach, relying on the conditionality between the disbursement of payments and the achievement of milestones and targets by the consortium, is also an element of simplification in the implementation of the instrument.

• **Fundamental rights**

Enhancing the security of EU citizens can contribute to safeguarding their fundamental rights.

In addition, actions for defence common procurement of goods or services, which are prohibited by applicable international law, shall not be eligible for support from the Instrument.

Moreover, actions with a view to the common procurement of lethal autonomous weapons without the possibility for meaningful human control over selection and engagement decisions when carrying out strikes against humans shall not be eligible for support from the Instrument.

4. BUDGETARY IMPLICATIONS

The financial envelope for the implementation of the Instrument for the period from period XX 2022 to 31 December 2024 shall be EUR 500 million in current prices.

Commented [A115]: SK question to the EC : Given the duration of the preparatory phases of joint projects, we consider it to unrealistic to be able to propose many projects already in 2022. Will the resources in the instrument be distributed into respective years or will this work on the first come, first served basis? This may result in quick use of all the money allocated to the instrument without giving chance to the project which are at the moment less mature.

The impact on the multi-annual financial framework period in terms of required budget and human resources is detailed in the legislative financial statement annexed to the proposal.

5. OTHER ELEMENTS

• **Implementation plans and monitoring, evaluation and reporting arrangements**

The Commission should regularly monitor its actions, review progress made towards delivering the expected results as well as examine synergies with other complementary Union programmes. The Commission should draw up an evaluation report for the Instrument and communicate it to the European Parliament and to the Council. This report will notably assess the progress made towards the achievement of the objectives set in the proposal.

2022/0219 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on establishing the European defence industry Reinforcement through common 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[39],

Acting in accordance with the ordinary legislative procedure,

Whereas:

(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.

(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 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.

(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.

---

39 OJ C , , p. .

(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 should therefore be at the core of those efforts. Indeed difficulties and gaps still exist and the European defence industrial base remains highly fragmented, lacking sufficient collaborative action and inter-operability of products.

(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 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. Indeed, without coordination and cooperation, the increased national investments are likely to 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, enhance its competitiveness and efficiency, and thereby 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 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 while allowing economies of scale in the actions undertaken by Member States to reinforce and modernise the European Technological and Industrial Base, 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.

(14) This Instrument will build on and take into account 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 with existing collaborative EU defence-related initiatives such as in the European Defence Fund 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.

(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 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 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. 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 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 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 restriction by a non-associated third country or a non-associated third country entity.

(19) Grants under the Instrument may 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 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.

(21) To generate the incentive effect, the level of Union contribution may 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) 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 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).

Commented [A116]: SK question to the EC: Has there been any consultation for example with NSPA whether this agency would also be a while option?

(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 that cover a period from the 24 February 2022, even if they have started before the grant application was submitted.

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, 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[40] (Interinstitutional Agreement of 16 December 2020), for the European Parliament and for the Council during the annual budgetary procedure.

(26) In accordance with the Financial Regulation, Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council[41], Council Regulation (Euratom, EC) No 2988/95[42], Council Regulation (Euratom, EC) No 2185/96[43] and Council

[40] OJ L 433I, 22.12.2020, p. 28.

[41] 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.

[42] 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).

Regulation (EU) 2017/1939[44], 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[45]. 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[46], 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.

(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 the European Defence Industry Reinforcement through common Procurement Act (the 'Instrument').

Article 2
Definitions

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

---

43 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).

44 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).

45 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).

46 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).

(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**’ means the ability to exercise a decisive influence on a legal entity 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 established in a Member State or an associated country designated by at least three Member States to conduct a common procurement on their behalf, including Union bodies or international organisations;

(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) for a more resilient Union, in particular by speeding up, in a collaborative manner, the adjustment of industry to structural changes, including ramp-up of its manufacturing capacities;

   (b) to foster cooperation in defence procurement process between participating Member States contributing to solidarity, interoperability, prevention of crowding-out effects, avoiding fragmentation and increasing the effectiveness of public spending.

2. The objectives shall be pursued with an emphasis on strengthening and developing the Union defence industrial base to allow it to address in particular the most urgent and critical defence products needs, especially those revealed or exacerbated by the response to the Russian aggression against Ukraine, taking into account the work of the Defence Joint Procurement Task Force.

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.

Commented [A117]: SK in principle agrees with PL proposal to also include services in this instrument. However, we would like more clarity on what is meant. Procurement of services is often not a one-time project.
Furthermore, we propose that the support can be claimed also for joint projects focused on the upgrades of the existing and previously acquired European products. Finally, the new but additional acquisitions of products within existing contracts should also be covered (for ex.: if MSs want to buy more pieces of the product they have already previously bought)

Commented [A118]: SK question to the EC: In what sense and to what extent? Will it be possible to procure under proposed instrument also products that were not selected by the Task Force?

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 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. Where necessary for the implementation of an action, financial contributions may cover a period prior to the date of the request for financial contributions for that action, provided that the action has not started prior to 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 7
Eligible actions

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

(a) the actions shall involve cooperation for common procurement of the most urgent and critical defence products between eligible entities implementing the objectives referred to in Article 3;

Commented [A119]: SK considers the possibility to cover the technical and administrative assistance to be a useful concept. Is there an intent that EC or EDA will also provide such assistance as is often the case with many other EC funds also in other policy areas?
Such assistance could contribute to building of know-how in the less experienced MSs in order to successfully handle the entire procurement process.

Commented [A120]: SK : MSs should know fairly ahead of time the amount of possible contribution they could receive for their projects. The criteria for setting up (at least indicative) amount of the contribution should be transparent and well-defined. Could they be clarified?

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

(c) the actions 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 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 with contractors on behalf of the participating 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.

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.

4. Contractors and subcontractors involved in the common procurement shall be established and have their executive management structures in the Union. They shall not be subject to control by a non-associated third country or by a non-associated third country entity.

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 by the Member State or associated third country in which the contractor is established.

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

Commented [A121]: SK apreciates the ambition of including more and new MSs into the cooperation and including it as one of the criteria

Commented [A122]: SK agrees with this mechanism but we also do not see an issue with rather opting for national agencies.

Commented [A123]: SK appreciates the mention of subcontractors established in the EU. It is a good way to encourage participation of SMEs in such contracts and possibly increase the innovative potential.

framework of the CFSP pursuant to Title V of the TEU, or the objectives set out in Article 3.

7. 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 information is prevented and the employees or other persons involved in the common procurement have national security clearance issued by a Member State.

Commented [A124]: SK question to the EC : Could the EC give an example of a situation which it is trying to avoid with this provision?

Commented [A125]: SK question to the EC : What is to be considered 'sensitive information' for the purposes of this regulation?

Commented [A126]: SK question to the EC : Is it expected that foreign nationals (employees, contractors, subcontractors) from countries outside the European Union/EFTA will be required to obtain a security clearance issued by respective MS(s) involved in the procurement?

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 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.

10. For the purposes of this Article, 'subcontractors involved in the common procurement' means all of the following:

(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.

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:

(a) public contracting authorities or contracting entities as defined in Directives 2014/24/EU[47] and 2014/25/EU[48] of the European Parliament and of the Council;

[47] 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).

(b) public authorities of associated third countries.

Article 10
Award criteria

The Commission shall evaluate the proposals submitted on the basis of the following award criteria:

1. The contribution of the action to strengthening and developing the Union defence industrial base 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;

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. the contribution of the action to strengthening cooperation among Member States or associated countries and interoperability of products;

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;

7. quality and efficiency of the plans for carrying out of the action.

Article 11
Work programme

1. The Instrument shall be implemented through a 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.

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.

[48] 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).

Commented [A127]: SK : It will be very challeging to evaluate proposals objectively. There will be competing priorities among them with proposals focused on various domains of capabilities (e.g. air defence vs. submarines). How would it be determined which one is more appropriate to receive financial contribution?

Commented [A128]: SK question to the EC : What are the measurable indicators to evaluate this ?

Commented [A129]: SK question to the EC : What are the measurable indicators to evaluate this ?

Commented [A130]: SK question to the EC : What are the measurable indicators to evaluate this ?

Commented [A131]: In order to stimulate the participation of MSs which so far have not been involved in joint procurements many times or at all, SK proposes to consider adding also a criterion regarding the composition of participating states. This could be considered to be an additional added value when evaluating the proposals.

Commented [A132]: SK question to the EC : What are the measurable indicators to evaluate this ?

Commented [A133]: SK question to the EC : What are the measurable indicators to evaluate this ?

Commented [A134]: SK question to the EC : What would be the minimum financial size of the joint procurement actions based on? How will it be set?

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 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 13
Information, communication and publicity

1. 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.

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.